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American Steel Construction, Inc., *and* Local 25, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (Ironworkers), AFL–CIO, Petitioner. Case 07–RC–269162

December 14, 2022

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) (*Specialty Healthcare*), the Board rearticulated and clarified the framework that applies in bargaining-unit determination cases where a labor union seeks to represent a unit that contains some, but not all, of the job classifications at a particular workplace. Drawing on longstanding precedent, *Specialty Healthcare* reaffirmed that, in order for such a unit to be appropriate, the employees in the petitioned-for unit must be readily identifiable as a group and share a "community of interest." *Specialty Healthcare* also reiterated that, if a party contends that the unit is nevertheless inappropriate because it excludes additional employees who are not sufficiently distinct from the petitioned-for employees, that party must show that the excluded employees share an "overwhelming community of interest" in order to mandate inclusion.[1] By retaining this heightened showing, the *Specialty Healthcare* framework properly protected the statutory rights being exercised by employees seeking representation, while also requiring that the petitioned-for unit have a rational basis and the requisite community of interest to engage in effective collective bargaining. It is therefore unsurprising that *Specialty Healthcare* was upheld in the face of numerous challenges in the federal courts of appeals, with every reviewing court finding that the framework was consistent with the Board's longstanding unit-determination test.

In *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) (*PCC Structurals*), the Board overruled *Specialty Healthcare* and purported to restore a "traditional" test. In doing so, *PCC Structurals* focused almost exclusively on rejection of the "overwhelming community of interest" standard, contending that it was too deferential to the petitioned-for unit.[2] As detailed below, however, *PCC Structurals*' reasoning fits poorly with the policy goals of the Act, with Supreme Court precedent, and with the "traditional" test it purported to restore. In particular, by making it easier to invalidate a petitioned-for unit based on the supposed interests of excluded employees, *PCC Structurals* discounted the rights of the employees seeking representation and obscured the core inquiry in such cases: whether the employees in the petitioned-for unit share a community of interest rendering the unit appropriate for the purposes of collective bargaining.

Accordingly, as explained in greater detail below, we have decided to overrule *PCC Structurals* and reinstate *Specialty Healthcare,* which is superior to *PCC Structurals* in multiple respects: it better reflects traditional Board precedent, better achieves consistency with Supreme Court precedent, and better promotes the policies of the Act.

I. BACKGROUND

On November 8, 2020, Local 25, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (Ironworkers), AFL–CIO (the Petitioner) filed a petition seeking to represent all journeymen and apprentice field ironworkers working for American Steel Construction, Inc. (the Employer). The Employer asserted that the petitioned-for unit was inappropriate because the smallest appropriate unit must contain additional employees: specifically, the painters, drivers, and inside fabricators who work at the Employer's shop.

On January 4, 2021, the Regional Director issued her Decision and Order. Applying the unit determination test set forth in *PCC Structurals,* as revised in *The Boeing Co.*, 368 NLRB No. 67 (2019),[3] the Regional Director determined that the petitioned-for unit was not appropriate because the evidence was insufficient to establish that the Employer's field ironworkers, who predominantly work as field installers at third-party jobsites, possess a community of interest that is "sufficiently distinct" from the Employer's remaining employees. Because the Petitioner was not willing to proceed to an election in any unit other than the petitioned-for unit, the Regional Director dismissed the petition. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a request for review of the Regional Director's Decision and Order. The Employer filed an opposition.

On December 7, 2021, the Board issued an Order Granting Review and Notice and Invitation to File Briefs. See 371 NLRB No. 41. In granting review, the Board offered

[1] 357 NLRB at 943–945.

[2] 365 NLRB No. 160, slip op. at 6.

[3] Throughout this decision, we will refer to the collective standard established by *PCC Structurals* and *Boeing* as simply the *PCC-Boeing* standard.

interested parties the opportunity to answer the following questions:

> 1. Should the Board adhere to the standard in *PCC-Boeing*?
>
> 2. If not, what standard should replace it? Should the Board return to the standard in *Specialty Healthcare*, either in its entirety or with modifications?

The Employer and Petitioner filed briefs on review, several interested parties filed briefs in response to the Board's invitation,[4] and the Employer and Petitioner filed responsive briefs.

Having carefully considered the entire record in this proceeding, including the briefs on review and the amicus briefs, the Board has decided to overrule *PCC-Boeing* and reinstate *Specialty Healthcare*, for the reasons discussed below. We will therefore remand the case to the Regional Director for action consistent with this decision and the standard articulated herein, including reopening the record and reanalyzing the appropriateness of the petitioned-for unit, if necessary.

II. DISCUSSION

A. The Statute and the Board's Traditional Unit-Determination Standard

The overarching policy of the National Labor Relations Act is, as stated in Section 1, to "encourag[e] the practice and procedure of collective bargaining," and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Section 9(a) of the Act provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining," and Section 9(b) provides that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Thus, the Act itself repeatedly defines the "appropriate unit" as one that is appropriate "for the purposes of collective bargaining."[5]

In elaborating on what renders a unit appropriate "for the purposes of collective bargaining," the Supreme Court has explained:

> [T]he Board regards as its primary concern in resolving unit issues 'to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment' . . . . Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit.[6]

Accordingly, "[a] cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining."[7] If the petitioned-for employees have a sufficient mutuality of interests, then the unit is, absent countervailing considerations, appropriate for collective bargaining.

In recognition of this key statutory principle, the Board has, since the earliest days of the Act, inquired into whether a petitioned-for unit has the requisite mutuality of interests—a "community of interest," in the Board's usual parlance.[8] This well-established test considers whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.[9]

As various configurations of employees might share a community of interest sufficient for collective bargaining, "[i]t is elementary that more than one unit may be appropriate among the employees of a particular enterprise."[10]

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[4] Specifically, the Board received and reviewed briefs from the American Federation of Labor and Congress of Industrial Organizations; the Coalition for a Democratic Workplace, Chamber of Commerce, National Federation of Independent Business, National Retail Federation, National Association of Wholesaler-Distributors, and American Bakers Association; the HR Policy Association; the International Association of Machinists and Aerospace Workers; the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL–CIO; the International Franchise Association; the International Union of Operating Engineers; Members of the House Committee on Education and Labor; the National Labor Relations Board General Counsel; Service Employees International Union; and SHRM, the Society for Human Resource Management.

[5] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941) (reiterating that the Board must comply with "the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining").

[6] *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 172–173 (1971).

[7] *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985).

[8] See, e.g., *International Broadcasting Corp.*, 67 NLRB 1227, 1229 (1946) ("These [announcer-control operators] have a community of interest, and are distinguishable from other employees of the Company. We find that they may constitute an appropriate unit.").

[9] See *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

[10] *Haag Drug Co., Inc.*, 169 NLRB 877, 877 (1968). See also *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (observing that "more than one appropriate bargaining unit logically can

This principle, recognized by the Supreme Court,[11] is rooted in the language of the Act itself, since Section 9(b) makes clear that an appropriate unit may be "the employer unit, craft unit, plant unit, or subdivision thereof." Hence, in every unit determination case, the Board's inquiry will "consider only whether the requested unit is an appropriate one even though it may not be the optimum or most appropriate unit for collective bargaining."[12] In this regard, "the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees unless such grouping constitutes the *only* appropriate unit" (emphasis in original).[13] In each case, the Board will examine the petitioned-for unit to determine whether it is appropriate, including when the employer contends that the unit is not appropriate because it excludes certain classifications of employees. In that situation, if the Board determines that the petitioned-for unit is *not* appropriate, then the Board must determine the alternative configuration encompassing the petitioned-for classifications that constitutes the smallest appropriate unit.[14]

Over the years, the Board has developed various tests to analyze the unit configurations articulated in Section 9(b). Employer-wide and plantwide units are presumptively appropriate under the Act, and will be approved unless the contesting party can rebut the presumption.[15] Similarly, if the petitioned-for unit meets the criteria to be defined as a "craft unit," it will also be approved.[16] But a petitioner is not limited to choosing one of these three unit compositions: Section 9(b) contemplates that a petitioner can also seek to represent a "subdivision" of employees that contains some, but not all, of the employee classifications[17] that would otherwise be included in a plantwide, employer-wide, or craft unit. In such cases, the Board has identified three fundamental elements that render the petitioned-for grouping of classifications appropriate: the petitioned-for unit must be (1) "homogeneous," (2) "identifiable," and (3) "separate" or "sufficiently distinct."[18] While each element is a fundamental component of the unit determination, the decisionmaker (usually the Regional Director, in the first instance) is not required to litigate or address every single element in every single case: if no party disputes a particular element, it need not be analyzed.

The first element—that the unit be "homogeneous"—simply reflects the principle, articulated above, that petitioned-for employees must share a community of interest that renders the unit suitable for collective bargaining. Thus, the Board will reject a petitioned-for unit where the petitioned-for employees represent a heterogeneous grouping of classifications with disparate interests.[19]

The second element—that the unit be "identifiable"—is met where the unit employees can "logically and reasonably be segregated from other employees for the purposes of collective bargaining."[20] Put differently, there must be

be defined in any particular factual setting") (quoting *Operating Engineers Local 627 v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979)).

[11] As the Supreme Court has explained:

> Section 9(a) of the Act provides that the representative "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" shall be the exclusive bargaining representative for all the employees in that unit.... This section, read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize "a unit" that is "appropriate"—not necessarily *the* single most appropriate unit.... Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof.

American Hospital Association v. NLRB, 499 U.S. 606, 610 (1991) (emphasis in original; citations omitted).

[12] *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964).

[13] *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964).

[14] See *Boeing Co.*, 337 NLRB 152, 153 (2001).

[15] See, e.g., *Airco, Inc.*, 273 NLRB 348, 349 (1984) (plantwide unit); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998) (employer-wide unit); *UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 254 (D.C. Cir. 2019) ("Under controlling Board precedent, a single-facility bargaining unit is 'presumptively appropriate.'"); *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844 (7th Cir. 1999) (rejecting challenge to unit determination that was based on presumptively appropriate single site unit). The dissent is therefore incorrect to suggest that imposing a heightened burden on a party seeking to invalidate a petitioned-for unit amounts to abdication of the Board's duty in each case to determine the appropriateness of the unit and turns a representation case into an "adversarial" proceeding. To the contrary, the Board regularly applies presumptions and burdens in its unit determination cases. See also *Hilander Foods*, 348 NLRB 1200, 1200 (2006) (the contesting party bears the burden to rebut a presumptively appropriate single-facility unit).

[16] See *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994).

[17] The question of whether a petitioned-for unit must contain additional classifications is substantively different than whether a petitioned-for unit must contain employees at additional locations. Because our decision today concerns the test for evaluating whether a petitioned-for unit must contain additional employee classifications, it does not alter the Board's extant law with respect to whether additional locations must be included. See *Hilander Foods*, supra, at 1200 (articulating the test for when a petitioner seeks a single-facility unit); *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1081–1082 (2004) (articulating the test for when a petitioner seeks a multi-location unit).

[18] See, e.g., *G. Fox & Co., Inc.*, 155 NLRB 1080, 1083 (1965) (finding that the petitioned-for unit was appropriate where it constituted "a homogeneous and identifiable group of employees with a sufficiently distinct and separate community of interests to constitute a separate appropriate bargaining unit"); *Hampton Roads Broadcasting Corp. (WGH)*, 100 NLRB 238, 239 (1952); *Lee Brothers Foundry, Inc.*, 106 NLRB 212, 213 (1953); *Farmers Insurance Group*, 164 NLRB 233, 233 (1967); *J.C. Penney Company, Inc.*, 196 NLRB 708, 709 (1972); *Southern Baptist Hospitals, Inc.*, 242 NLRB 1329, 1330 (1979).

[19] See, e.g., *The Grand*, 197 NLRB 1105, 1106 (1972); *Camden Clark*, 221 NLRB 944, 944 (1975); *Hayes Aircraft Corp.*, 98 NLRB 362, 365 (1952).

[20] See *Champion Machine and Forging Co.*, 51 NLRB 705, 707–708 (1943).

a "substantial, rational basis" for the unit's contours.[21] The purpose of this element is to ensure that the petitioned-for subdivision of employees does not represent a "clearly arbitrary" unit composed of random classifications and with no coherent organizing principle.[22]

The third element—that the unit be "sufficiently distinct"—recognizes that even if the petitioned-for unit exhibits a mutuality of interests and has some coherent organizing principle, it may nonetheless be inappropriate because it excludes employees who cannot rationally be separated from the petitioned-for employees on community-of-interest grounds.[23] When applying this element, the Board invalidates petitioned-for units where the petitioned-for employees have little-to-no separate identity from the excluded employees.[24] Crucially, the Board has always made clear that the presence of *some* overlapping interests between the petitioned-for and excluded employees does not invalidate the petitioned-for unit, even if those overlapping interests indicate that a larger unit would also be appropriate for collective bargaining.[25] Instead, the excluded employees must share "strong," "substantial," "overwhelming," "significant," or extremely "close" interests with the petitioned-for employees to mandate inclusion.[26] As the U.S. Court of Appeals for the District of Columbia Circuit has explained, "[i]n order successfully to challenge [a] unit, the employer must do more than show there is another appropriate unit," because multiple unit configurations may be appropriate and the petitioner is not required to seek the most appropriate one.[27] Instead, the employer must prove that the petitioned-for unit is "irrational" and that "there is no legitimate basis upon which to exclude certain employees from it."[28]

When taken together, these three elements—that a unit be homogeneous, identifiable, and sufficiently distinct—form the foundation of the Board's historical unit determination jurisprudence with respect to petitioned-for "subdivisions" of employee classifications. The central inquiry is, of course, whether the petitioned-for employees share a community of interest, which renders the unit appropriate for the purposes of collective bargaining (and therefore appropriate for the purposes of the Act). But the Board has also guarded against truly arbitrary or irrational units by invalidating petitioned-for units that constitute haphazard groupings of random classifications, or that represent arbitrary segments of broader groups with indistinguishable interests. In so doing, the Board has balanced its fundamental duty under the Act—to facilitate the creation of bargaining units that possess the requisite community of interest—with its obligation to ensure that those bargaining units have a rational basis.

B. Specialty Healthcare

In *Specialty Healthcare*, 357 NLRB 934, the Board synthesized these three fundamental elements into an overarching framework for situations where a petitioner is seeking to represent a "subdivision" of employee classifications. Consistent with the Board's traditional unit determination jurisprudence, the *Specialty Healthcare* framework considers whether the employees in the petitioned-for unit share a community of interest (i.e., whether the unit is "homogeneous");[29] whether the petitioned-for unit is "readily identifiable as a group" (i.e., "identifiable") based on "job classifications, departments, functions, work locations, skills, or similar factors;"[30] and whether the petitioned-for unit is "sufficiently distinct."

Recognizing that prior cases had been unclear with respect to the "sufficiently distinct" element, the Board undertook to more precisely define the standard that applies when a party asserts that "the smallest appropriate unit contains employees not in the petitioned-for unit."[31] When this element is disputed (and only when this element is disputed), the party contesting the petitioned-for unit bears the burden of proving that there is an "overwhelming community of interest" between the petitioned-for and excluded employees in order to add the excluded employees to the petitioned-for unit.[32]

As the Board explained in *Specialty Healthcare*, the precise formulation and wording of the "sufficiently

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[21] See *Johnson Controls, Inc.*, 322 NLRB 669, 672 (1996).

[22] See *Champion Machine*, supra, at 708. See also *Loose Wiles Biscuit Co., Inc.*, 44 NLRB 865, 868–869 (1942).

[23] See, e.g., *Brand Precision Services*, 313 NLRB 657 (1994) (concluding that "the grouping chosen by the Petitioner is an arbitrary one, and should be rejected" where the Board was unable to find that "the [petitioned-for] operators possess a separate community of interest from the Employer's other production employees").

[24] See, e.g., *Casino Aztar*, 349 NLRB 603, 607 (2007) ("In sum, we find that the beverage employees have little community of interest with each other that is not also shared with most of the catering and restaurant employees.").

[25] See *Engineered Storage Products Co.*, 334 NLRB 1063, 1063 (2001) ("[C]ontrary to the Employer's contentions, the fact that the jointly employed employees supplied by Tandem Staffing may share a community of interest with the petitioned-for employees does not mean that they must be included in the unit or that the petitioned-for unit is inappropriate.").

[26] See, e.g., id.; *Colorado National Bank of Denver*, 204 NLRB 243, 243 (1973); *United Rentals, Inc.*, 341 NLRB 540, 541 (2004); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967); *Overnite Transportation Co.*, 322 NLRB 723, 726 (1996).

[27] *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421–422 (D.C. Cir. 2008).

[28] Id. at 421.

[29] Id. at 942–943.

[30] Id. at 945.

[31] Id. at 943.

[32] Id. at 944.

distinct" element has varied from case to case,[33] and, accordingly, the Board did not necessarily apply a consistent approach to assessing this element in every single case prior to *Specialty Healthcare*. Nevertheless, the "overwhelming community of interest" standard reflects the Board's historical requirement that, in order to demonstrate that the petitioned-for unit is not sufficiently distinct, a party contesting that unit must show more than a community of interest between the petitioned-for and excluded employees: it must make a heightened showing to demonstrate that the interests of the petitioned-for and excluded employees are so similar that the petitioner is seeking, in essence, an arbitrary segment of an otherwise appropriate unit.[34] In other words, the interests of the petitioned-for and excluded employees must "overlap almost completely" to mandate inclusion.[35]

There is substantial statutory justification for requiring a heightened showing of parties who are seeking to add employees to the petitioned-for unit. As discussed above, an appropriate unit is one that is appropriate *for the purposes of collective bargaining*, and the Supreme Court has stated that what renders a unit appropriate for collective bargaining is the requisite mutuality of interests among the unit employees. Moreover, Section 9(b) of the Act states that the Board's unit determinations must assure employees' "fullest freedom" in pursuing their rights under the Act. In this regard, the Supreme Court has made clear that "[t]he central purpose of the Act [i]s to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations," and that the Act "implies that the initiative in selecting an appropriate unit resides with the employees."[36] Accordingly, if a petitioned-for unit is an identifiable group that has the requisite community of interest—and therefore is broadly appropriate for the purpose of collective bargaining—then the employees should be permitted to organize in their chosen unit (thereby assuring them their "fullest freedom" to organize) unless the contesting party can prove that the petitioned-for unit is arbitrary on community-of-interest grounds—not less optimal, or less efficient, or less appropriate,[37] but truly *arbitrary*, meaning that the differences between the petitioned-for and excluded employees are so minimal that it would be irrational to engage in the process of collective bargaining absent the excluded employees. In requiring a showing of arbitrariness, the "overwhelming community of interest" standard correctly recognizes that the "sufficiently distinct" element is a secondary concern in unit determinations: the primary question remains whether the petitioned-for unit has the requisite mutuality of interests to bargain collectively.[38]

The "overwhelming community of interest" standard also recognizes that there are statutory limitations on how much latitude can be given to petitioned-for units.[39] First, Section 9(c)(5) of the Act provides that the extent of organizing "shall not be controlling" with respect to the Board's unit determinations. This is a relatively narrow limitation: it is well established that Section 9(c)(5) does not render employees' choice of unit irrelevant (to the contrary, the extent of organization "is always a relevant consideration"[40]), but is instead designed to prevent the Board from approving units that "could *only* be supported on the basis of the extent of organization," as the Supreme Court has observed.[41] Consistent with Section 9(c)(5), the "overwhelming community of interest" standard evaluates whether there is a rational basis for excluding particular classifications on community-of-interest grounds, thereby

[33] Id. at 944–945.

[34] See *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999); *Seaboard Marine*, 327 NLRB 556, 556 (1999). In *Specialty Healthcare*, the Board observed that the Board has frequently referred to such arbitrary segmentations as "fractured units." See 357 NLRB at 956. However, we note that the Board has used language referencing "arbitrary segments" in any situation where the petitioned-for unit is arbitrary, gerrymandered, or irrational, including when the petitioned-for unit does not share an internal community of interest (see, e.g., *J. Weingarten, Inc.*, 191 NLRB 149, 150 (1971)) or when it is not identifiable (see, e.g., *F. H. McGraw & Company*, 106 NLRB 624, 626 (1953)). Going forward, we encourage Regional Directors to focus their analysis on each of the three individual elements when making unit determinations, as opposed to using the broader, "fractured unit" phrasing.

[35] 357 NLRB at 944 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d at 422). Our dissenting colleagues assert that *Blue Man Vegas* "cannot bear the weight" that *Specialty Healthcare* places on it, because "[i]n enforcing that decision, the court did not hold that the Board must apply that standard, nor did it have before it the question of whether that standard should apply when a party does contend that the petitioned-for unit is inappropriate." But *Blue Man Vegas* does not "bear the weight" of *Specialty Healthcare* alone: the District of Columbia Circuit has since endorsed the *Specialty Healthcare* framework (as did every other Circuit Court to consider it) and has reaffirmed that the principles articulated in *Blue Man Vegas* are entirely consistent with the Board's prior unit determination case law. See *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 100–101 (D.C. Cir. 2017).

[36] See *Am. Hosp. Ass'n v. NLRB*, supra, 499 U.S. at 609–610.

[37] See *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951) ("There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'") (emphasis in original).

[38] A heightened showing is also justified by the fact that in exercising the statutory right to self-organization, petitioned-for employees are also exercising their broader Constitutional right to freely associate. See 357 NLRB at 941 fn. 18.

[39] See id. at 941–942.

[40] *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964). See also *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441–442 (1965) (explaining that Sec. 9(c)(5) "was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination").

[41] *NLRB v. Metropolitan Life Insurance Co.*, supra, at 441 (emphasis added).

ensuring that the petitioned-for unit is not based solely on the extent of organization.

Second, Section 9(b) directs that the Board determine the appropriate unit "in each case." As the Supreme Court has explained, the purpose of the "in each case" requirement is "simply to indicate that whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute."[42] The Board's consideration of a petitioned-for unit accordingly cannot be perfunctory, but must be undertaken based on the particular facts of the case. Of course, aside from the "overwhelming community of interest" standard, the Board considers, in each case, whether the petitioned-for unit has the requisite community of interest to bargain collectively and whether it constitutes an identifiable grouping of employees. But, in any event, the "overwhelming community of interest" standard requires that—in each case where a party contends that a petitioned-for unit is not sufficiently distinct—the Board carefully scrutinize the similarities and differences between the petitioned-for and excluded employees to determine whether the exclusion has a rational basis.

The "overwhelming community of interest" standard is therefore not a matter of mechanically deferring to employees' desire for representation in the petitioned-for unit. Rather, the Regional Director must find that there are more than minimal differences between the petitioned-for employees' shared interests and the interests of the excluded employees another party contends must be added to the unit. If there are more than minimal differences, the petitioned-for unit has a rational basis such that collective bargaining limited to that unit may appropriately take place. However, the "overwhelming community of interest" standard correctly characterizes this inquiry as placing a burden on the party contesting the petitioned-for unit because—consistent with the Board's traditional unit determination jurisprudence and the statutory policies of the Act—the contesting party must prove that the petitioned-for unit is truly arbitrary on community-of-interest grounds, not just that some other unit configuration is also, or even more, appropriate. The Board's review is no less thorough simply because the Act imposes a relatively high standard (i.e., arbitrariness) on parties seeking to invalidate a petitioned-for unit that is otherwise identifiable and possesses the requisite community of interest to bargain collectively.

In sum, the *Specialty Healthcare* framework, including the "overwhelming community of interest" standard, is entirely consistent with both the Board's traditional unit determination jurisprudence and the statutory policies of the Act. Indeed, as observed earlier, the *Specialty Healthcare* test was upheld by every Circuit Court to review it[43]—an outcome consistent with the deference courts give to the Board's unit determinations in light of the Board's policy-making role and expertise, as noted by the Supreme Court.[44] As these courts recognized, the "overwhelming community of interest" test "is not the invention of the *Specialty Healthcare* case."[45] Instead, this standard "is consistent with earlier Board precedents that imposed a heightened burden on a party who urges the Board to add employees to a unit that has otherwise been deemed appropriate."[46] And again, the "overwhelming community of interest" standard is only one element of the *Specialty Healthcare* framework: the primary focus remains whether the petitioned-for units share a sufficient mutuality of interests to bargain collectively.[47]

[42] *American Hosp. Ass'n v. NLRB*, supra, 499 U.S. at 611–612.

[43] See *Constellation Brands v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 832 F.3d 432 (3rd Cir. 2016); *Nestle Dreyer's Ice Cream Company v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 561 (6th Cir. 2013); *FedEx Freight Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016); *Rhino Northwest, LLC v. NLRB*, supra.

[44] See *NLRB v. Action Automotive, Inc.*, 469 U.S. at 496–497 ("[W]e do not make labor policy under § 9(b); Congress vested that authority in the Board, which brings its extensive experience in the administration of the Act to bear on questions of unit determinations" (citations omitted)).

[45] *FedEx Freight Inc. v. NLRB*, 839 F.3d at 638.

[46] *Constellation Brands v. NLRB*, 842 F.3d at 792. There is accordingly no basis for the dissent's argument that the "overwhelming community of interest" standard is inconsistent with Board precedent merely because the Board did not regularly use that precise phrase in evaluating the "sufficiently distinct" element prior to *Specialty Healthcare*. The courts have recognized as much. See *Kindred Nursing Centers East, LLC v. NLRB*, supra, at 562 ("[T]he Board explained the need to clarify its law, acknowledging that it had used some variation of a heightened standard when a party (usually an employer) argues that the bargaining unit should include more employees.").

[47] In this regard, there is no merit to the dissent's assertion that *Specialty Healthcare* improperly imported the Board's traditional accretion test into initial unit determinations. First, the Board cannot find an accretion on the basis of an overwhelming community of interest alone: it must also find that "the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit." *Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981). Second, the Board applies the "overwhelming community of interest" standard differently in the accretion context, placing an emphasis on the "critical" community-of-interest factors of interchange and supervision. See *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005). There are no "critical" factors under *Specialty Healthcare*. Finally, to the extent that both the accretion test and *Specialty Healthcare* utilize similar language for one element of larger inquiries, that is because both tests implicate a similar issue: whether certain employees must be included in a unit (existing or petitioned-for) because they are too similar to unit employees to be excluded. As the courts have recognized in upholding *Specialty Healthcare*, it makes sense for the Board to apply a broadly similar policy in both instances. See, e.g., *Nestle Dreyer's Ice Cream Company*, supra, at 501 (observing that "[a]s in the accretion context, the question is whether some employees share more than a community of interest with

C. PCC-Boeing

Despite unanimous appellate approval of Specialty Healthcare, the Board overruled the "overwhelming community of interest" standard in PCC Structurals, 365 NLRB No. 160, and in doing so purported to return to the Board's "traditional" test. The Board would later clarify, in Boeing, that the "traditional" test contemplated by PCC Structurals contains three parts:

> First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.[48]

There is no dispute that the first step of this test comports with the Board's traditional unit determination test and with Specialty Healthcare; nor is there any dispute that the third step does so.[49] At the second step, however, the PCC-Boeing test diverges significantly from Specialty Healthcare in terms of what it means for a petitioned-for unit to be "sufficiently distinct." While Specialty Healthcare holds that a petitioned-for unit is sufficiently distinct unless the excluded employees share an "overwhelming community of interest" with the petitioned-for employees, PCC-Boeing holds that the petitioned-for unit is sufficiently distinct only if the "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members."[50] The distinction between these two standards lies at the heart of PCC-Boeing, which focuses almost exclusively on the "overwhelming community of interest" standard and the supposedly undue deference it gave to petitioned-for units.[51]

PCC-Boeing's approach to the "sufficiently distinct" element is flawed for three significant reasons. First, PCC-Boeing fails to articulate a workable alternative to the "overwhelming community of interest" standard, instead propounding a standard that is vague, confusing, and has no support in Board precedent. Second, by eliminating the "overwhelming community of interest" test, PCC-Boeing removes an important safeguard that provides employees with the fullest freedom to organize in units of their choosing. Finally, and perhaps most importantly, PCC-Boeing provides no compelling rationale for why the Board should add employees to units that otherwise possess a rational basis and the requisite mutuality of interests to bargain collectively. When combined, these three flaws lead to a decision that is impractical, damaging to employee interests, and unpersuasive from either a statutory or policy standpoint.

First, it is unclear what PCC-Boeing requires in determining whether a petitioned-for unit is "sufficiently distinct." PCC Structurals posits that it is returning to the Board's "traditional" community of interest test, and reiterates that the Board must consider "whether employees in the proposed unit share a community of interest sufficiently distinct from the interests of employees excluded from that unit to warrant a separate bargaining unit."[52] But Specialty Healthcare did not eliminate the "sufficiently distinct" element; rather, it performed the critical function of explicitly articulating, for the first time, exactly what a party must show (an "overwhelming community of interest") in order to demonstrate that a petitioned-for unit is not sufficiently distinct. Accordingly, the onus was on the PCC Structurals Board to provide its own countervailing guidelines for how to determine whether a petitioned-for unit is "sufficiently distinct." As the Board observed in Specialty Healthcare, merely stating that a unit must be "sufficiently distinct" does not explain what degree of distinction is necessary.[53]

PCC-Boeing, however, offers little in the way of constructive guidance. PCC Structurals states that a unit is sufficiently distinct if the "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members."[54] On its face, this language suggests that if the petitioner cannot prove that the petitioned-for employees have more differences from, than similarities with, the excluded employees, then the excluded employees are not sufficiently distinct from the petitioned-for employees and must be included in the unit. That approach, however, is completely at odds with the Board's traditional unit determination jurisprudence. Prior to PCC Structurals, the Board had never used any language resembling this formulation, and neither PCC Structurals nor Boeing (nor our

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the members of the unit."); *Macy's, Inc. v. NLRB*, 824 F.3d at 569 (noting that "the structure and the underlying policy motivations of [the accretion] standard resemble those of the *Specialty Healthcare* overwhelming community of interest test.").

[48] *Boeing*, supra, slip op. at 3.

[49] Although the consideration of industry-specific unit-determination guidelines was not articulated as a separate step or inquiry prior to *Boeing*, it is a well-established component of unit-determination jurisprudence that *Specialty Healthcare* was careful to recognize. See 357 NLRB at 942, 946 fn. 29.

[50] *Boeing*, supra, slip op. at 4 (emphasis in original) (internal quotations omitted).

[51] *PCC Structurals*, supra, slip op. at 6 (contending that *Specialty Healthcare* gives "all-but-conclusive deference to every petitioned-for 'subdivision' unit").

[52] Id. at 11.

[53] See *Specialty Healthcare*, supra, at 945.

[54] Id. (emphasis in original); *Boeing*, supra, slip op. at 4.

dissenting colleagues) cite to any prior Board decisions articulating, explaining, or applying such a standard. Further, if it is indeed the petitioner's burden to prove that the petitioned-for employees are more different from than they are similar to the excluded employees, then this is flatly inconsistent with the Board's traditional unit determination jurisprudence, which has always required the contesting party to prove that the excluded employees have significant, substantial, or otherwise extensive similarities with the petitioned-for employees before mandating inclusion.[55]

Perhaps recognizing this potential failing, *Boeing* elaborates on *PCC Structurals* by explaining that the "[sufficiently distinct] inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate merely because a different unit might be more appropriate."[56] Rather, "what is required is that the Board analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit."[57] But, stating that Regional Directors should explain why certain differences or similarities support "the appropriateness of the unit" provides no guidance as to what types of differences and similarities render a unit appropriate; how heavily they should be weighed; or what threshold must be met to demonstrate that the unit is (or is not) sufficiently distinct.

Simply put, *PCC-Boeing* directs Regional Directors to weigh the varying interests of the petitioned-for and excluded employees without explaining what tips the scales in one direction or the other. In contrast to *Specialty Healthcare*, it never articulates the precise degree of distinction that is necessary to render the unit appropriate without the inclusion of additional employees. And, by failing to articulate clear and consistent guideposts for determining when additional employees must be included in the unit, *PCC-Boeing* invites extensive litigation and makes it more difficult for Regional Directors to quickly resolve preelection disputes over unit appropriateness. This is particularly troublesome in the context of representation cases, where the Board has a duty to expeditiously resolve questions concerning representation.[58]

Second, the removal of the "overwhelming community of interest" test infringes on employees' "fullest freedom" to organize under Section 9(b) of the Act. The Board has long recognized that requiring employees to seek representation in a larger or more comprehensive unit can effectively "deny them their statutory rights to self-organization and bargaining," because larger units are frequently more difficult to organize, especially in situations where the previously excluded employees had not shown any interest in unionizing.[59] Thus, in order to ensure employees the fullest freedom to exercise their rights under the Act, "the Board must be wary lest its unit determinations unnecessarily impede the exercise by employees of these rights,"[60] and it does not require petitioners to organize in larger or more comprehensive units simply because such units may be more optimal or effective than the petitioned-for unit.[61] Accordingly, *Specialty Healthcare*'s "overwhelming community of interest" standard is deliberately protective of the unit configuration chosen by the petitioning employees, holding that a unit with the requisite mutuality of interests for collective bargaining should not be invalidated unless it arbitrarily excludes employees with near-indistinguishable interests. *PCC-Boeing*, in contrast, makes it easier to mandate the inclusion of additional employees by removing the requirement that the contesting party make a heightened showing with respect to the similarities between the petitioned-for and excluded employees. This eliminates an important safeguard that preserves the right of employees to organize as long as their chosen unit is not arbitrary and has the requisite mutuality of interests to bargain collectively.[62]

The final, and perhaps most troubling, problem with *PCC-Boeing* is that it provides no compelling reason for why this safeguard should be removed. *PCC-Boeing* overrules *Specialty Healthcare*'s "overwhelming community of interest" standard because it supposedly "unduly limits its focus to the Section 7 rights of employees in the petitioned-for unit, while disregarding or discounting the Section 7 rights of excluded employees except in the rare case when excluded employees share 'overwhelming' interests . . . with petitioned-for employees."[63] Purporting to better accommodate the excluded employees' Section 7 interests, *PCC-Boeing* requires unit determinations to

[55] See fn. 25, supra, and cases cited therein.

[56] *Boeing*, supra, slip op. at 4.

[57] Id.

[58] See *Neuhoff Bros. Packers, Inc.*, 154 NLRB 438, 438 (1965) (acknowledging "the statutory policy that questions preliminary to the establishment of the bargaining relationship be expeditiously resolved") (internal quotations omitted).

[59] *Ballantine, P. & Sons*, 141 NLRB 1103, 1106 (1963).

[60] Id.

[61] See *Black & Decker Mfg. Co.*, supra, at 828.

[62] Because the Board's dismissal of a representation petition has not been regarded as judicially reviewable, employees have little recourse to achieve representation in their chosen unit should the Board find it inappropriate, except to engage in recognitional picketing under Sec. 8(b)(7) of the Act—a tactic which is rarely used. In contrast, employers can easily seek review of a Board's unit determination by refusing to bargain and then litigating the appropriate unit in the ensuing test-of-certification case.

[63] *PCC Structurals*, supra, slip op. at 7–8.

"consider the Section 7 rights of employees *excluded* from the proposed unit *and* those included in that unit."[64]

Thus, the fundamental premise of *PCC-Boeing* is that excluded employees have certain Section 7 rights that that can only be protected by mandating their inclusion in the unit and that protecting the excluded employees' rights (at the expense of the petitioning employees' fullest freedom to associate in a unit of their choosing)[65] is the purpose of the "sufficiently distinct" element. This fundamental premise, however, fails to withstand even the slightest scrutiny. To begin, it is not the excluded employees who seek to vindicate their rights by arguing for the inclusion of additional employees in the unit, as they are not made party to the representation proceeding. Instead, it is other, usually non-petitioning parties—most frequently employers—who seek to litigate the appropriateness of the unit by contending that additional employees must be added. As the Supreme Court has explained, the interests of an employer are not equivalent to the interests of employees, and "the Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion."[66]

Such skepticism is fully justified in situations where a contesting party is seeking to add employees to the unit because the Section 7 rights of any employees excluded from the unit are not implicated by their exclusion from the unit. Section 7 of the Act provides as follows:

> 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 of such activities . . . .

29 U.S.C. §157. Consistent with Section 7, the excluded employees retain the right to organize separately or to refrain from doing so regardless of whether the petitioned-for employees decide to select a collective-bargaining representative. Further, if the excluded employees desire to join the petitioned-for unit at a later date, they can do so via a self-determination election, as long as they constitute an appropriate voting group and share a community of interest with the existing unit employees[67]—far less than what is required to mandate their inclusion in the petitioned-for unit for purposes of an initial election. Finally, if the excluded employees exercise their right to refrain from organizing entirely, any collective-bargaining agreement reached on behalf of the petitioned-for employees will not dictate terms and conditions for anyone outside of the petitioned-for unit.[68] The Section 7 rights of excluded employees, therefore, are not implicated (much less negatively affected) by their exclusion from the unit. The excluded employees remain free to exercise their rights if and when they choose to do so.

PCC-Boeing provides no meaningful rebuttal to this point, except for asserting that "the possibility that excluded employees may seek separate representation in one or more separate bargaining units does not solve the problem caused by the failure to give reasonable consideration to their inclusion in a larger unit," because the Act requires the Board to "consider the interests of all employees . . . so the Board can 'decide whether the unit should be the 'employer unit, craft unit, plant unit, or subdivision thereof.'"[69] But it does not actually answer the question of *why*, and to what extent, the interests of the excluded employees are relevant when the Board considers whether a particular grouping of employee classifications constitutes an appropriate unit. As just shown, the answer implicitly advanced by *PCC-Boeing*—that the excluded employees' interests are relevant because exclusion from the unit abrogates their rights under Section 7—does not withstand scrutiny.[70]

Moreover, by purporting to guard the rights of excluded employees, *PCC-Boeing* turns the statutory focus of the unit determination on its head. The primary purpose of any unit determination, as the Act itself states, is to determine whether the petitioned-for unit is appropriate *for the purposes of collective bargaining*—an inquiry that focuses on whether the petitioned-for employees share a sufficient mutuality of interests, and which does not implicate the interests of the excluded employees. Further, Section 9(b) mandates that the Board "assure to employees the fullest freedom in exercising the rights guaranteed by the Act," echoing Section 1's commitment to "protecting the exercise by workers of full freedom of association, self-

[64] Id., slip op. at 8 (emphasis in original).

[65] As the Board explained in *Specialty Healthcare*, "[a] key aspect of the right to 'self-organization' is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." 357 NLRB at 941 fn. 18. See also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing that "individuals' selection of those with whom they wish to join in a common endeavor" is a key element of freedom of association).

[66] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

[67] See *Warner Lambert Co.*, 298 NLRB 993, 995 (1990).

[68] Nor, for that matter, will it prevent additional employees from petitioning for a self-determination election to join the unit (provided, of course, that the labor organization involved is also willing to represent those additional employees). See, e.g., *UMass Memorial Medical Center*, 349 NLRB 369 (2007).

[69] *PCC Structurals*, supra, slip op. at 8 fn. 42.

[70] Furthermore, as also shown, the overwhelming community of interest test does give "reasonable consideration" to the inclusion of additional employees in a petitioned-for unit; it simply clarifies that the party arguing for their inclusion must meet a high bar in order to prevail on that argument.

organization, and designation of representatives of their own choosing." Consistent with these principles, the Supreme Court has made clear that an important function of the Board's unit determinations is "to prevent a functionally distinct minority group of employees from being submerged in an overly large unit."[71] Employees who file a petition are, of course, exercising their Section 7 rights, and it is, therefore, the petitioning employees' "fullest freedom" with which the Board ought to be concerned. The petitioning employees, and not the excluded employees, are those whose bargaining interests may be submerged (and, by extension, whose rights may be infringed) if the Board is too eager to require additional employees—who are not themselves currently exercising their right to self-organization—to be included in the unit. So long as the petitioned-for employees have the requisite mutuality of bargaining interests, and the unit is not arbitrary, then the Board can, should, and must be vigilant in assuring the petitioned-for employees' fullest freedom in exercising their rights. The overwhelming community of interest standard does that by requiring a heightened showing to include additional employees in the unit; *PCC-Boeing*'s focus on the interests of employees who have not chosen to exercise their right to self-organization—and who will retain all of their rights under Section 7 if they are excluded from the unit—does not.

The remaining statutory arguments relied upon in *PCC-Boeing*—that *Specialty Healthcare*'s "overwhelming community of interest" standard abrogates the Board's duty to consider the appropriate unit "in each case," and that it renders the extent of organizing controlling in derogation of Section 9(c)(5)[72]—are similarly flawed. Neither Section 9(c)(5) nor the Board's duty to determine the appropriate unit "in each case" prevent the Board from requiring a heightened showing from parties seeking to include additional employees in the unit—to the contrary, each of the five circuit courts to consider these arguments has roundly rejected them.[73] Consistent with the "in each case" requirement, *Specialty Healthcare* requires that the Board evaluate whether a unit is "sufficiently distinct" whenever a contesting party contends that additional employees must be included in the unit. And, as we have discussed above, Section 9(c)(5) requires the Board to invalidate units only in circumstances where there is *no* other rational basis for the exclusion of certain employees, such that the exclusion can *only* be explained by the extent of organization[74]—a narrow requirement that is consistent with, and already recognized by, *Specialty Healthcare*'s "overwhelming community of interest" standard. Quite simply, there is no statutory justification for imposing a more stringent standard than what Section 9(c)(5) requires, and the expansive reading of these provisions espoused by *PCC-Boeing* (and rearticulated by the dissent) has, again, been unambiguously refuted by numerous appellate decisions.[75]

In short, the standard articulated by *PCC-Boeing* has a weak foundation in Board law and lacks any clear guiding principle that can be explained by statutory policy or the Act's text for Regional Directors who are charged with applying it. *PCC-Boeing*'s justification for this standard is entirely limited to its criticisms of *Specialty Healthcare.* But these criticisms rest on novel, dubious, and flawed interpretations of statutory provisions that do not withstand scrutiny. Moreover, *PCC-Boeing* incorrectly examines the "overwhelming community of interest" standard in a vacuum and, in overruling it, makes the "sufficiently distinct" element the Board's highest concern, thereby obscuring and ignoring the Board's primary duty in unit determination cases: to determine whether the petitioned-for unit is appropriate for the purposes of collective bargaining.

D. Response to Dissent

As our dissenting colleagues acknowledge, the sole point of disagreement between *Specialty Healthcare* and *PCC-Boeing* is how the Board should evaluate the "sufficiently distinct" element. According to the dissent, the purpose of the "sufficiently distinct" element is not to evaluate whether there is a rational basis for the exclusion of certain classifications, but rather to perform a rigorous balancing test that yields just one correct result in every case, by precisely weighing two supposedly competing considerations: the petitioning employees' right to organize in a unit of their choosing and the excluded employees' presumed interest in participating in the election process. We reject that view.

Like Goldilocks, the dissent wants a unit that is "just right." That unit must maximize the participation of

[71] See *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, supra, at 172–173.

[72] *PCC Structurals*, supra, slip op. at 8.

[73] See *FedEx Freight, Inc. v. NLRB*, 832 F.3d at 943–945; *Nestle Dreyer's Ice Cream Company v. NLRB*, 821 F.3d at 497; *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d at 563–565; *FedEx Freight, Inc. v. NLRB*, 816 F.3d at 525–526; *Rhino Northwest, LLC v. NLRB*, 867 F.3d at 100–102.

[74] See *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. at 441.

[75] Nor does limiting the "sufficiently distinct" inquiry to the narrow requirement imposed by Sec. 9(c)(5) abrogate the Board's role as a neutral decision-maker. As the Supreme Court has explained, "the Board's policy may have the effect of favoring union representation; however, a disparate impact does not violate the principle of neutrality. Indeed, virtually every Board decision concerning an appropriate bargaining unit—e.g., the proper size of the unit – favors one side or the other." *NLRB v. Action Automotive, Inc.*, 469 U.S. at 498.

employees whose interests might be affected by the results of the election (i.e., any employees whose interests are "insufficiently distinct" from those of the petitioned-for employees). At the same time, it must somehow preserve the petitioning employees' "right to self-organize" in a unit that is capable of bargaining collectively (i.e., one that possesses an internal community of interest). This approach has no sound basis in Board precedent. And indeed, it runs directly counter to a core tenet of the Board's unit determination jurisprudence endorsed by the federal courts, including the Supreme Court: that the Board's role is to permit the petitioning employees to organize in *an appropriate* unit, not to ascertain which unit configuration is the optimal one in the Board's judgment.[76]

Despite the dissent's repeated insistence that "decades" of Board precedent support its characterization of the "sufficiently distinct" element, the dissent cites to no Board precedent (aside from *PCC-Boeing* itself) that identifies the excluded employees' interests in the outcome of the election as playing a role in the Board's unit determination framework—much less any case holding that these interests are the key consideration when determining whether the bargaining interests of the petitioned-unit are "sufficiently distinct" from those of the excluded employees.

Similarly, judicial precedent provides no support for the dissent's interpretation of the "sufficiently distinct" element. To the contrary, the Circuit Court cases relied upon by the dissent explicitly frame the "sufficiently distinct" inquiry as a question of arbitrariness,[77] explaining that the Board must thoroughly evaluate the differences and similarities between the petitioned-for and excluded employees in order to avoid "rubber stamping" units based on "arbitrary lines of demarcation" or "meager differences" between the petitioned-for and excluded employees.[78] And this is precisely what the "overwhelming community of interest" standard does.

If a party asserts that additional employees must be included in the unit,[79] then the Regional Director does not *presume* that the petitioned-for unit is appropriate absent these employees; rather, the Regional Director must utilize the Board's traditional community of interest factors to determine whether there is a rational basis for the exclusion in the first instance.[80] That is to say, the Board's analysis "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."[81] If the Regional Director determines that there is no rational basis for the exclusion because there is an overwhelming community of interest

[76] See *Black & Decker Mfg. Co.*, supra, at 828.

[77] While Circuit Court decisions such as *Constellation Brands* explicitly highlight "arbitrariness" as the key concern in evaluating whether a unit is "sufficiently distinct," the dissent mischaracterizes *Specialty Healthcare* as a whole by suggesting that it requires the Board to approve any unit that is not irrational or arbitrary. As we have explained, the overwhelming community of interest standard is but one element of the Board's overall test: if the petitioned-for unit does not possess an internal community of interest that renders it suitable for the purposes of collective bargaining, then it is not appropriate, even if there is a rational basis for the exclusion of certain classifications.

[78] See *Constellation Brands*, supra, at 794–795 (internal quotations omitted). See also *Nestle Dreyer's Ice Cream Company v. NLRB*, supra, 821 F.3d at 499 (observing that the Board's unit determination is deficient if it "fails to guard against arbitrary exclusions").

[79] If no party contends that the unit is insufficiently distinct—i.e., that the unit is inappropriate absent the inclusion of additional employees—then there is no reason for the Board to analyze the distinctions between the petitioned-for and excluded employees. In fact, the Board correctly recognized as much under the *PCC-Boeing* test. See *Macy's West Stores, Inc.*, 32–RC–246415 (May 27, 2020) (not reported in Board volumes) (explaining that the "sufficiently distinct" analysis is only applicable "when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit").

[80] The dissent is therefore incorrect to suggest that the "overwhelming community of interest" standard and the Board's "traditional community-of-interest factors" represent two independent "steps" of the *Specialty Healthcare* framework, as opposed to components of one integrated analysis (the "sufficiently distinct" element). Although both the "sufficiently distinct" element and the "internal community of interest" element use the "traditional community of interest factors," they are separate inquiries. To determine whether a unit is "sufficiently distinct," the Board applies the "overwhelming community of interest" standard by examining the distinctions between the petitioned-for and excluded employees to ascertain whether there is a rational basis for any exclusions. In contrast, the "internal community of interest" element evaluates whether the petitioned-for employees share sufficient common interests to engage in collective bargaining.

Although some of the circuit courts have characterized the Board's unit determinations as incorporating a burden-shifting framework (see, e.g., *Blue Man Vegas*, supra, at 421–422), the Board cannot and does not find a unit "appropriate" unless it determines that the petitioned-for employees are "sufficiently distinct" from the excluded employees on community-of-interest grounds. The Board has never, either as part of its "traditional" unit determination jurisprudence or in applying *Specialty Healthcare*, declared a petitioned-for unit to be "prima facie appropriate" or "presumptively appropriate" after finding that it possesses an internal community of interest and is readily identifiable as a group. Rather, the Board has simply moved on to the next element of the analysis—determining whether the unit is "sufficiently distinct" under the overwhelming community of interest standard. See, e.g., *Macy's Inc.*, 361 NLRB 12, 20–23 (2014), enfd. 824 F.3d 557 (5th Cir. 2016), cert. denied 137 S. Ct. 2265 (2017); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2017–2019 (2011); *DTG Operations, Inc.*, 357 NLRB 2122, 2127–2128 (2011). We believe that this approach is consistent with the concerns articulated in in cases such as *Constellation Brands*—which emphasize that the Board must consider the distinctions between the petitioned-for and excluded employees in order to prevent arbitrary exclusions—and is fully justified by the statutory considerations discussed above.

[81] *Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 2 (2010) (emphasis and citation omitted). We reject any interpretation of *Wheeling Island Gaming* that would create inconsistency with *Specialty Healthcare* or with today's decision, and, even if such an interpretation were correct, then we would limit *Wheeling Island Gaming* to its facts.

between the two groups, then the unit is not "sufficiently distinct," and therefore, not appropriate absent the inclusion of additional employees. Simply put, the Regional Director *cannot* approve a petitioned-for unit based on "arbitrary lines of demarcation" under the overwhelming community of interest standard, nor is the Regional Director permitted to approve units "without any consideration of whether the interests of the included employees are sufficiently distinct from those of excluded employees," as the dissent contends.[82] Although the "overwhelming community of interest" standard properly creates a high bar for the party seeking to demonstrate that the unit is not "sufficiently distinct," that is not equivalent to a "presumption" of appropriateness, as the dissent repeatedly suggests. Nor does *Specialty Healthcare* create an "insurmountable" standard, as the cases applying it demonstrate.[83] In sum, the dissent has failed to demonstrate that the "overwhelming community of interest" standard is somehow contrary to Board or appellate precedent.[84]

The dissent also mistakenly contends that *PCC-Boeing* is preferable to *Specialty Healthcare* as a matter of statutory policy. In this regard, the dissent focuses on two "central policies of the Act" that it believes underscore the approach articulated in *PCC-Boeing*: "ensuring to employees their rights to self-organization and freedom of choice, and fostering industrial peace and stability through collective bargaining."

This first "central policy" argument in the dissent is merely a reframing of the same faulty premise underlying *PCC Structurals*: that the Board should, under the guise of protecting the rights of excluded employees, effectively veto the petitioning employees' choice of an appropriate unit by insisting on what it deems to be the optimal unit.[85] According to the dissent, the Board must protect the excluded employees' interests that might be "collaterally controlled" by unionization. But this is not the Board's role under Section 9 of the Act. Rather—so long as the petitioned for unit is an appropriate unit (and regardless of whether it is the most optimal unit)—the employees must determine for themselves which employees are included in or excluded from the unit. Section 7 gives both the petitioning employees and the excluded employees the same toolbox of rights that they can use to protect their interests in the workplace, including engaging in collective-bargaining and other protected concerted activity, or refraining from such activity. Under *Specialty Healthcare*, the excluded employees retain the "fullest freedom" to utilize every single one of these Section 7 tools to protect their interests in the event that their coworkers attempt to organize. In contrast, *PCC-Boeing* disregards the "fullest freedom" of the organizing employees by placing unnecessary obstacles to representation in the unit of their choice.

The second "central policy" relied upon by the dissent forms the basis of a novel argument in favor of *PCC-Boeing*: that *PCC-Boeing* gives greater weight to the interests of the excluded employees so that the Board can facilitate "efficient and stable collective bargaining." Notably, although *PCC Structurals* and *Boeing* both contained general citations to *Kalamazoo Paper Box*, neither case framed the "sufficiently distinct" inquiry in terms of evaluating whether the petitioned-for unit could engage in effective collective bargaining absent the excluded employees; rather, both decisions focused exclusively on the evaluating the Section 7 interests of excluded employees. Although *PCC-Boeing* indicated that the Board should evaluate the employees' distinct interests "in the context of collective bargaining," this empty directive does not substitute for an explanation of *why* these collective bargaining interests are relevant to the "sufficiently distinct" requirement or *how* they should be weighed.[86]

At any rate, the dissent's arguments on this point are contradictory. On the one hand, the dissent acknowledges that an internal community of interest among the

[82] The dissent argues that *Specialty Healthcare* is "susceptible" to a contrary interpretation. Our decision today, however, is clear as to how the *Specialty Healthcare* framework should be applied and what each element does (and does not) require.

[83] See *Rhino Northwest, LLC v. NLRB*, 867 F.3d at 101 (observing that units have been found inappropriate under *Specialty Healthcare* in *Odwalla, Inc.*, 357 NLRB 1608 (2011), and *A.S.V., Inc.*, 360 NLRB 1252 (2014)). See also *K&N Engineering*, 365 NLRB No. 141 (2017) (finding the petitioned-for unit inappropriate under *Specialty Healthcare*).

[84] Although the dissent frequently cites to the Fourth Circuit's decision in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995), the Fourth Circuit has held that *Specialty Healthcare* is consistent with *Lundy*. See *Nestle Dreyer's Ice Cream Company v. NLRB*, supra, 821 F.3d at 499. *Specialty Healthcare* is also fully consistent with *Nestle Dreyer's Ice Cream*. As we have discussed at length above, the Board does not declare a unit appropriate (much less presumptively appropriate) under *Specialty Healthcare* before evaluating the distinctions between the petitioned-for and excluded employees and determining that there is a rational basis for any exclusions under the "overwhelming community of interest" standard.

[85] Contrary to the dissent's contention, we do not reinstate the "overwhelming community of interest" standard to help unions win more elections—indeed, the data shows that the union win rate did not change under *Specialty Healthcare*. See Br. AFL–CIO, Ex. A, Report of Professor John-Paul Ferguson. Of course, we reject any implication in the dissent that there is something inherently suspect about the petitioned-for unit, or that an employer's preference for a different unit—perhaps one it believes will better suit its interests or achieve its desired outcome—is entitled to any weight in the Board's unit determination.

[86] The same is true of the Board's decision in *Starbucks*, 371 NLRB No. 71 (2022). Although the Board determined that the petitioned-for and excluded employees did not share sufficient collective-bargaining interests requiring a multi-store unit, the decision contained no analysis of whether the exclusion of certain stores would have an effect on the unit's ability to engage in effective collective bargaining.

petitioned-for employees is necessary to facilitate effective collective bargaining. Thus, our dissenting colleagues observe—in agreement with *Allied Chemical*—that a cohesive and homogenous unit reduces internal conflicts and prevents the interests of a minority group from being submerged by the majority. But, on the other hand, the dissent suggests that even where the petitioned-for unit is cohesive and homogenous, the Board can only ensure "efficient and stable collective bargaining" by mandating the inclusion of *additional* employees whose interests are assertedly "closely aligned" with the collective-bargaining interests of the petitioned-for employees. Of course, the inclusion of such employees necessarily threatens to make the unit *less* cohesive and therefore *less* optimal from a collective-bargaining standpoint. Crucially, the dissent makes no effort to explain how permitting the exclusion of employees with assertedly "closely aligned" (but ultimately distinguishable) interests undermines collective bargaining, disrupts labor stability, creates "unworkable situations in the workplace," or precludes parties from reaching collective-bargaining agreements, given that the unit is cohesive and homogenous *without* the excluded employees. Indeed, both the Board and the courts have regularly rejected such arguments in approving smaller units that are segments of a greater whole.[87]

Nor does the dissent acknowledge that, under the "overwhelming community of interest" standard, the Board *does* mandate the inclusion of additional employees under circumstances where the differences between the petitioned-for and excluded employees are so minimal that it would be truly irrational to engage in the process of collective bargaining without them. And this is all that is required: once again, the dissent ignores that the Board's role is solely to determine whether the unit is *an appropriate* unit for bargaining, not the optimal one.

Accordingly, we are unpersuaded by the dissent's arguments that *PCC-Boeing* is preferable to *Specialty Healthcare* from a policy or statutory standpoint. We do not claim that *Specialty Healthcare* is the only permissible unit determination framework under the Act, or that every prior decision of the Board, over many decades, can be completely harmonized with *Specialty Healthcare*. Rather, after careful consideration, we choose the *Specialty Healthcare* framework because it is broadly consistent with the Board's historical treatment of the "sufficiently distinct" element (as the courts have recognized), and, most importantly, because it best serves the goals of the Act as reflected in Section 9.[88]

E. Return to Specialty Healthcare

In light of *PCC-Boeing*'s extensive faults—its cumbersome and confusing approach to the "sufficiently distinct" element, its detrimental effects on the rights of the petitioning employees, and its hollow statutory reasoning—we have decided to overrule *PCC Structurals* and *Boeing* and reinstate the *Specialty Healthcare* test.[89]

Accordingly, the Board will once again approve a petitioned-for "subdivision" of employee classifications if the petitioned-for unit: (1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3) is sufficiently distinct. Of course, the Board need not address each element in every case: if a particular element is not disputed, it need not be adjudicated. But if a party contends that the petitioned-for unit is not sufficiently distinct—i.e., that the smallest appropriate unit contains additional employees—then the Board will apply its traditional community-of-interest factors to determine whether there is an "overwhelming community of interest" between the petitioned-for and excluded employees, such that there is no rational basis for the exclusion. If there are only minimal differences, from the perspective of collective-bargaining, between the petitioned-for employees and a particular classification, then an overwhelming community of interest exists, and that classification must be included in the unit. As the Board noted in *Specialty Healthcare*, this test does not disturb or displace any preexisting rules or presumptions applicable to specific industries or occupations.[90]

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[87] See *Haag Drug*, supra, at 878 (observing that "though chainwide uniformity may be advantageous to the employer administratively, it is not a sufficient reason in itself for denying the right of a separate, homogeneous group of employees, possessing a clear community of interest, to express their wishes concerning collective representation"); *Macy's, Inc. v. NLRB*, 824 F.3d at 566 (rejecting the argument that workers or businesses would suffer "grave consequences" because of the Board approving a departmental unit under *Specialty Healthcare*).

[88] See *Kindred Nursing Centers East, LLC v. NLRB*, supra, 727 F.3d at 563 ("Because the overwhelming-community-of-interest standard is based on some of the Board's prior precedents, has been approved by the District of Columbia Circuit, and because the Board did cogently explain its reasons for adopting the standard, the Board did not abuse its discretion in applying this standard in *Specialty Healthcare*.").

[89] We observe that, aside from establishing the Board's general unit determination test for "subdivisions," *Specialty Healthcare* also overruled *Park Manor Care Center*, 305 NLRB 872 (1991), in which the Board addressed the standard for determining units in nonacute health care facilities (like the employer facility involved there). *PCC Structurals* then reinstated *Park Manor* with no discussion, simply stating that it was doing so for "the reasons stated by former Member Hayes in his dissenting opinion in *Specialty Healthcare*." *PCC Structurals*, supra, slip op. at 1 fn. 3. However, *PCC Structurals* did not involve a unit at a nonacute healthcare facility, and accordingly, we view *PCC Structurals*' reinstatement of *Park Manor* as dicta that is not binding on the Board.

[90] 357 NLRB at 946 fn. 29.

Having reinstated *Specialty Healthcare*, we apply it retroactively to all pending cases.[91] With respect to the present dispute, we acknowledge that our reinstatement of the *Specialty Healthcare* standard alters the burden placed on the Employer in terms of litigating whether the petitioned-for unit is appropriate without the inclusion of additional employees—i.e., whether the unit is "sufficiently distinct." In the interests of fairness, we will therefore remand the case to the Regional Director for action consistent with our decision today and the standard articulated therein, including reopening the record, if necessary.

ORDER

The Regional Director's Decision and Order is reversed, the petition in Case 07–RC–269162 is reinstated, and the case is remanded to the Regional Director for further appropriate action consistent with this Decision, including reopening the record, if necessary, and analyzing the appropriateness of the unit under the standard articulated herein, and for the issuance of a supplemental decision.

Dated, Washington, D.C. December 14, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN AND RING, dissenting:

Collective bargaining under the National Labor Relations Act is premised on the existence of an appropriate bargaining unit within which bargaining will take place. Appropriate for what purpose? Section 9(a) of the Act answers that question. Repeating a key phrase, Section 9(a) specifies that bargaining units must be appropriate "for the purposes of collective bargaining," and it further specifies that the representative of such a unit shall be the exclusive representative of all the employees in that unit "for the purposes of collective bargaining."[1] To ensure that the mandate of Section 9(a) is fulfilled, Section 9(b) of the Act directs the Board to decide, in each case, "the unit appropriate for the purposes of collective bargaining." And Section 9(b) adds a second theme: in making this determination, the Board is to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act."[2]

Accordingly, in determining whether a particular unit is appropriate, the Board must be guided by two central policies of the Act: ensuring to employees their rights to self-organization and freedom of choice, and fostering industrial peace and stability through collective bargaining. *Kalamazoo Paper Box Co*., 136 NLRB 134, 137 (1962). These two policies follow directly from Section 9(b) of the Act, which requires the Board to assure employees their "fullest freedom in the exercise of" their Section 7 rights and to ensure that the unit is "appropriate *for the purposes of collective bargaining*" (emphasis added). Congress also specified several limitations on the Board's unit determinations in Section 9 of the Act. Most pertinently here, Section 9(c)(5) prohibits the Board from making "the extent to which the employees have organized" the controlling factor in unit determinations.

Consistent with these principles, the Board's appropriate-unit determinations turn on whether the employees in a particular unit share a "community of interest." *United Operations, Inc*., 338 NLRB 123, 125 (2002). The traditional community-of-interest factors long considered by the Board in making this determination are

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with

[91] In this regard, we observe that the Board's "usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). Indeed, "[t]he Board's established presumption in representation cases like this one is to apply a new rule retroactively." *BFI Newby Island Recyclery (Browning-Ferris)*, 362 NLRB 1599 (2015), affd. in part and revd. in part 911 F.3d 1195 (D.C. Cir. 2018).

[1] Sec. 9(a) relevantly states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment…

[2] Sec. 9(b) relevantly states:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof

> other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id. at 123. When assessing these factors, the Board

> never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. 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.

Wheeling Island Gaming, 355 NLRB 637, 637 fn. 2 (2010) (emphasis and citation omitted).

When a union petitions for an election in a particular unit, the Board's inquiry begins with the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing Co.*, 337 NLRB 152, 153 (2001). In some cases, however, a party asserts that the petitioned-for unit is inappropriate, and that the smallest appropriate unit must also include additional employees. In *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), and *The Boeing Company*, 368 NLRB No. 67 (2019), the Board articulated a framework for conducting this inquiry. Based on the traditional test for determining appropriate units, the *PCC/Boeing* framework first considers whether the employees in a proposed unit share an internal community of interest. Second, the Board considers whether the interests of employees within the proposed unit are sufficiently distinct from the interests of those excluded from the proposed unit. Third, the Board considers any applicable guidelines that the Board has established for the specific industry involved with regard to appropriate unit configurations. *Boeing*, 368 NLRB No. 67, slip op. at 3.

The *PCC/Boeing* framework effectuates the statutory policies on which unit determinations must be based. First, it gives appropriate weight to employees' right to self-organize by ensuring that the employees in the petitioned-for unit share an internal community of interest. Self-organization among employees with disparate interests or infrequent contact would be challenging at best. Indeed, the interests of employees in the unit proposed by the union may be so disparate that directing an election in that unit would effectively nullify the employees' right to self-organization. In the event that employees do choose union representation, the union's ability to successfully represent them would be severely limited if they did not share common interests.[3] Moreover, if a unit is not cohesive, a minority subgroup's interests may be sacrificed to the interests of other unit employees, and this would infringe on the subgroup's Section 7 rights.[4]

Second, the *PCC/Boeing* framework also gives due consideration to whether the interests of the employees in the proposed unit are sufficiently distinct from those of other employees to warrant a separate unit. This vital inquiry ensures that the Board's unit determinations respect the Section 7 rights of employees excluded from the proposed unit. *PCC Structurals*, 365 NLRB No. 160, slip op. at 8. The "sufficiently distinct" inquiry also ensures that appropriate-unit determinations will result in a unit that is workable "for the purposes of collective bargaining," as Section 9(b) mandates. As the Board explained long ago,

> [b]ecause the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which 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.

Kalamazoo Paper Box, 136 NLRB at 137. A realistic appraisal of a petitioned-for unit in light of the factual situation with which the parties would have to deal were a majority of that unit to choose representation necessarily requires the Board to carefully consider the extent to which the interests of employees excluded from that unit overlap with those of employees in the proposed unit.

In determining whether the interests of employees in the petitioned-for unit are sufficiently distinct from those of excluded employees, the *PCC/Boeing* framework requires the Board to consider whether "'excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.'" *Boeing*, 368 NLRB No. 67, slip op. at 4 (quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016) (emphasis in *Constellation Brands*)). As the Board explained in *Boeing*, this inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate merely because a

[3] See *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 172–173 (1971) (The Board must ensure that the proposed unit groups together "only employees who have substantial mutual interests in wages, hours, and other conditions of employment. Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit" (citation and internal quotation marks omitted)).

[4] Id.

different unit might be more appropriate. Rather, "what is required is that the Board analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the [proposed] unit." Id., slip op. at 4. "Merely recording similarities or differences between employees does not substitute for an explanation of how and why these collective-bargaining interests are relevant and support the conclusion. Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation." *Constellation Brands*, 842 F.3d at 794–795 (quoted in *Boeing*, supra, slip op. at 4).

For most of its history, the Board has applied a standard that affords comparable weight to a petitioned-for unit's internal community of interest and to the distinctness of those interests from those of excluded employees. In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*),[5] however, the Board abruptly departed from its traditional standard. *Specialty Healthcare* replaced that standard with one that gave overriding weight to whether the petitioned-for employees have a community of interest with each other. If those employees "are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" and share a community of interest with each other, *Specialty Healthcare* compels a finding that the unit is appropriate unless the party asserting that the unit must include additional employees shows that those employees "share an overwhelming community of interest" with the petitioned-for employees. Id. at 944–946. Under this framework, the question of whether the interests of excluded employees are truly distinct from those of employees in the proposed unit is at best a secondary consideration. Indeed, under *Specialty Healthcare*, the similarity of excluded employees' interests with those of included employees is simply disregarded unless the interests of included and excluded employees "'overlap almost completely.'" Id. at 944.[6]

Overruling *PCC Structurals* and *Boeing,* our colleagues reinstate *Specialty Healthcare* in today's decision. Because they offer no persuasive justification for this step, we respectfully dissent.

Discussion

To define the precise area of disagreement between ourselves and our colleagues in the majority, we begin by observing that the majority agrees with some of the premises on which the *PCC/Boeing* framework is based. First, our colleagues agree that a proposed unit must "share an internal community of interest." *Boeing*, 368 NLRB No. 67, slip op. at 3. Second, our colleagues agree that the Board's unit determinations must take into account "guidelines that the Board has established for specific industries with regard to appropriate unit configurations." Id., slip op. at 4. Third, the majority also agrees that the employees in the proposed unit must have interests "sufficiently distinct" from those of employees excluded from the proposed unit. That is, the majority agrees that, in their words, "even if the petitioned-for unit exhibits a mutuality of interests and has some coherent organizing principle, it may nonetheless be inappropriate because it excludes employees who cannot rationally be separated from the petitioned-for employees on community-of-interest grounds."

Our colleagues' disagreement with the *PCC/Boeing* framework concerns *how* to determine whether the interests of included employees are "sufficiently distinct" from those of excluded employees. In making this determination, only the *Specialty Healthcare* "overwhelming community of interest" standard will do for our colleagues. As they candidly acknowledge, the interests of the petitioned-for and excluded employees must "overlap almost completely" to mandate including the latter in the unit under that standard. The majority contends that Supreme Court precedent supports this standard, that it provides a workable standard for making unit determinations while the *PCC/Boeing* framework does not, and that their preferred standard better effectuates the policies of the Act. We respectfully disagree in all respects.

A. The "Overwhelming Community of Interest" Standard Is Unsuitable for Appropriate-Unit Determinations.

The "overwhelming community of interest" standard was developed by the Board for the purpose of deciding whether a particular group of unrepresented employees should be added to an existing unit by accretion—that is, without an election. *NV Energy, Inc*., 362 NLRB 14, 16 (2015). The Board appropriately applies a "restrictive policy" in deciding whether to accrete employees to an existing unit because doing so deprives the accreted employees of the right to choose for themselves whether to be represented by a union for the purpose of collective bargaining. Id. Accordingly, the Board finds "a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an *overwhelming community of interest* with the preexisting unit to which they are accreted." *Safeway Stores, Inc*., 256 NLRB 918, 918 (1981) (emphasis added).

[5] Enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[6] Quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008).

This "restrictive" standard, applicable in accretion cases, is identical to the "overwhelming community of interest" standard that the Board applied to unit determinations under *Specialty Healthcare* and that our colleagues reinstate today.[7] As the majority states, this standard requires the party objecting to the proposed unit on the ground that the smallest appropriate unit must include additional employees to show that "there is no rational basis" for excluding the disputed employees because there are "only minimal differences" between excluded and included employees' interests—or, in an even more forceful articulation of the standard our colleagues adopt, because the interests of the employees the objecting party seeks to add are "near-indistinguishable" from those of the employees within the proposed unit. In our view, it is irrational to apply to unit determinations made for the purpose of *directing an election* the same standard used to decide whether to include employees in a unit *without an election*. To the contrary, as the Fourth Circuit recognized more than 25 years ago, applying the "overwhelming community of interest" standard outside of the accretion context "effectively accord[s] controlling weight to the extent of union organization . . . . because 'the union will propose the unit it has organized.'" *NLRB v. Lundy Packing Co.,* 68 F.3d 1577, 1581 (4th Cir. 1995) (quoting *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)). As noted above, this is specifically prohibited by Section 9(c)(5) of the Act.[8]

As the Board further explained in *PCC Structurals*, applying the "overwhelming community of interest" standard to initial unit determinations also improperly undermines the Board in fulfilling its statutory duty, under Section 9(b) of the Act, to "assure" to employees "in each case" their "fullest freedom" in exercising their Section 7 rights. 365 NLRB No. 160, slip op. at 6. It does so because it sharply circumscribes the Board's role. Rather than conduct a thorough analysis of shared and distinct interests between included and excluded employees, the Board is limited by the "overwhelming community of interest" standard, and by the assignment of the burden of proof to the objecting party, to determining whether the objecting party has shown that the interests of excluded employees are nearly indistinguishable from those of included employees. Our colleagues find this unproblematic. They focus on the Section 7 rights of the petitioned-for employees, to the near exclusion of the rights of excluded employees. They say that in a subsequent representation case, excluded employees may petition for separate representation, or to be added to the existing unit. But in doing so, they fail to honor Congress's requirement that the Board assure "employees"—all employees, both those included in and those excluded from a proposed unit—"in each case"—not some employees in one case and other employees later on, if there ever is a subsequent case—the "fullest freedom" in exercising their Section 7 rights.

B. No Precedent Compels the "Overwhelming Community of Interest" Standard, Which Is Inconsistent with the Traditional Community of Interest Inquiry.

No court has rejected the *PCC/Boeing* framework or questioned it in any way. Nor has any court held that the Act compels the Board to apply the "overwhelming community of interest" standard. Indeed, the application of that standard to initial unit determinations has dubious antecedents at best. The Board applied it in *Lundy Packing Co.*, 314 NLRB 1042 (1994), where a divided Board found that a petitioned-for unit of production and maintenance employees was appropriate, excluding quality assurance technicians. As Member Stephens persuasively noted in dissent, the *Lundy Packing* majority cited no prior case in which that standard had been applied to an initial unit determination. Id. at 1046. The Fourth Circuit agreed, properly recognizing that the "overwhelming community of interest" standard was a "novel legal standard" in this context. *NLRB v. Lundy Packing Co.*, 68 F.3d at 1577.

The Fourth Circuit was correct that the Board had not previously applied the "overwhelming community of interest" standard in making initial unit determinations but instead had used other formulations, a point our colleagues effectively concede. See, e.g., *Colorado National Bank of Denver*, 204 NLRB 243, 243 (1973) ("[T]he unit sought is too narrow in scope in that it excludes employees who share a substantial community of interest with employees in the unit sought."); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) ("[T]ruckdrivers enjoy a sufficient community of interest separate and apart from the mechanics to warrant finding them to be a unit appropriate for collective bargaining."). Neither did the Board apply an "overwhelming community of interest" standard in

[7] Our colleagues deny that *Specialty Healthcare* "improperly imported" the accretion standard into initial unit determinations, asserting that accretion is found only if the excluded employees also have little or no separate group identity and could not be an appropriate unit on their own. But this is a distinction without a difference, as *Specialty Healthcare* imposes a similar burden on parties seeking to challenge a petitioned-for unit. More realistically, our colleagues admit that the accretion standard and *Specialty Healthcare* are "broadly similar polic[ies]."

[8] The Fourth Circuit subsequently upheld *Specialty Healthcare* as consistent with *Lundy Packing* in *Nestle Dryers Ice Cream Co. v. NLRB*, 821 F.3d 489, 500 (4th Cir. 2016). However, the court's decision lends no real support to the majority's position for the reasons explained below.

cases decided after *Lundy Packing*. See, e.g., *United Rentals, Inc.*, 341 NLRB 540, 541 (2004) (finding that excluded employees share such a "substantial community of interest with the petitioned-for employees that they must be included in the unit"); *Engineered Storage Products Co.*, 334 NLRB 1063, 1063 (2001) ("[T]he test is whether the community of interest they share with [employees in the proposed unit] is so strong that it requires or mandates their inclusion in the unit."). At best, then, the "overwhelming community of interest" standard's use for initial unit determinations had its origin in an unexplained departure from precedent.

Undeterred, the Board applied that standard again in the representation case reviewed by the Court of Appeals for the District of Columbia Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), a case on which *Specialty Healthcare* and the majority heavily rely. In *Blue Man Vegas*, the D.C. Circuit affirmed a Board decision finding that a unit of Las Vegas stage crew employees was an appropriate unit notwithstanding the exclusion of musical instrument technicians (MITs) who worked on the same show. As summarized by the court, the regional director found that the petitioned-for unit was appropriate—*indeed, that no party had contended otherwise*—and then proceeded to find that the inclusion of the MITs was not required because they did not share an "overwhelming community of interest" with the stage crew employees. Id. at 423. In enforcing that decision, the court did not hold that the Board must apply that standard, nor did it have before it the question of whether that standard should apply when a party *does* contend that the petitioned-for unit is inappropriate.[9] Accordingly, *Blue Man Vegas* simply cannot bear the weight that *Specialty Healthcare* and our colleagues place on it.[10]

The Supreme Court precedent cited by our colleagues is not to the contrary. As noted above, the Supreme Court has recognized that the Board's unit determinations must ensure that the employees in the unit share "substantial mutual interests." *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. at 172. But the issue before the Court in that case was whether the Board had properly found that retirees were part of a bargaining unit of active employees such that changes to retiree health care benefits were a mandatory subject of bargaining. The Court's holding that retirees did not share the required mutual interests with active employees says little about whether particular active employees belong in the same unit as other active employees because they do share mutual interests, much less about the standard to be applied in making that determination. Decades of precedent establish that unit determinations must prevent a group of employees whose interests sufficiently align with those of employees in a petitioned-for unit from being improperly excluded from the unit, and nothing in the Court's opinion in *Allied Chemical* is to the contrary.

The majority contends that "individuals' selection of those with whom they wish to join in a common endeavor" is a key element of freedom of association, quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). But the majority neglects to acknowledge the actual holding in *Roberts*, in which the Supreme Court found that a state human rights act was lawfully applied to *prohibit* an organization from refusing to allow women to join. Accordingly, the Court held that the free association rights of Jaycees' members were not "absolute" but, rather, may be infringed upon in light of other compelling governmental interests. Id. at 623. Here, of course, the employees' freedom of association must be considered in the context of Section 9(b) and 9(c)(5) of the Act, in which Congress mandated that the Board must decide in "each case" whether a unit is appropriate "for the purposes of collective bargaining" and, most importantly, that the extent of organizing shall not be controlling.

Citing *American Hospital Association v. NLRB*, 499 U.S. 606, 609–610 (1991), the majority stresses that "the initiative in selecting an appropriate unit resides with the employees." Nothing in *PCC Structurals* or *Boeing* disputed that proposition. In practice, however, petitions in representation cases are typically filed by unions, and so it is they who decide the scope of the petitioned-for unit they seek to represent—and "'the union will propose the

[9] Similarly, the application of the "overwhelming community of interest" standard to initial unit determinations was upheld in *Nestle Dreyers Ice Cream Co. v. NLRB*, 821 F.3d at 500, and *Macy's, Inc. v. NLRB*, 824 F.3d 557, 568 (5th Cir. 2016), but only after a unit first had properly been found appropriate based on a consideration of whether the interests of the included employees were "sufficiently distinct" from those of other employees. As discussed below, *Specialty Healthcare* is at the very least susceptible to an interpretation that effectively deems petitioned-for units presumptively appropriate without meaningfully considering whether the interests of included employees truly are sufficiently distinct from the interests of excluded employees. Indeed, the majority admits that under *Specialty Healthcare*, the Board determines whether a unit is "sufficiently distinct" by "examining the distinctions between the petitioned-for and excluded employees to ascertain whether there is a rational basis for any exclusions," applying the "overwhelming community of interest" standard. And *Specialty Healthcare* indisputably places the burden of proving an overwhelming community of interest on the party opposing the unit.

[10] We further note that the unit at issue in *Blue Man Vegas* likely would have been found appropriate under any permissible standard. Among other things, the MITs shared few relevant interests with the stage crew employees, and the two groups of employees were customarily organized in different units in that industry.

unit it has organized.'" *NLRB v. Lundy Packing*, 68 F.3d at 1581 (quoting *Laidlaw Waste Systems v. NLRB*, 934 F.2d at 900). In any event, it does not follow from the fact that the initiative resides with employees or unions that the unit they choose must be presumed appropriate or that the party opposing it must sustain the all-but-insurmountable burden of showing that the interests of excluded employees are "near[ly] indistinguishable" from those of included employees.

Our colleagues say that Section 9(c)(5) does not prevent the Board from considering the extent of organizing as *one* factor among others in its unit determinations, citing *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441–442 (1965). But neither the Act nor the Court's decision provides any support for our colleagues' elevation of that factor so that it is, for all practical purposes, controlling—and Section 9(c)(5) does prohibit that.[11]

Reviewing courts have, however, repeatedly rejected the notion that a unit could be found appropriate without any consideration of whether the interests of included employees are sufficiently distinct from those of excluded employees. See *Constellation Brands v. NLRB*, 842 F.3d 784, 792 (2d Cir. 2016); *Nestle Dreyer's Ice Cream Company v. NLRB*, 821 F.3d 489; *FedEx Freight, Inc. v. NLRB*, 832 F.3d 432, 441 (3d Cir. 2016). As these courts implicitly acknowledge, addressing sufficient distinctness only at step two of the analysis, where the overwhelming-community-of-interest standard is applied, and not at step one, where the traditional community-of-interest factors are applied, would represent a significant departure from the Board's traditional test discussed above. Cases applying *Specialty Healthcare* have nevertheless done just that. See, e.g., *DPI Secuprint, Inc.*, 362 NLRB 1407, 1410 (2015) (finding that "the employees in the petitioned-for unit are a readily identifiable group who share a community of interest, and that the Employer has not demonstrated that the offset-press employees share an overwhelming community of interest with the petitioned-for employees"); *Macy's Inc.*, 361 NLRB 12, 32–44 (2014) (considering "distinctions between the petitioned-for employees and other selling employees" only as part of employer's rebuttal burden under the overwhelming community-of-interest standard), enfd. 824 F.3d 557 (5th Cir. 2016), cert. denied 137 S. Ct. 2265 (2017); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2017–2018 (2011) (same); *DTG Operations, Inc.*, 357 NLRB 2122, 2126 (2011) (finding that petitioned-for unit "is an appropriate bargaining unit—subject to the Employer's proving that the unit must include additional employees" because the petitioned-for employees "unmistakably share a community of interest").

This is hardly surprising, since *Specialty Healthcare* effectively deems a petitioned-for unit presumptively appropriate if an internal community of interest is shown, and it takes account of whether the included employees have interests sufficiently distinct from those of excluded employees only if a party objecting to the unit proves that excluded employees' interests are not sufficiently distinct under the "overwhelming community of interest" standard discussed above. In effect, a critical aspect of the traditional analysis was excised from the Board's purview and shunted to the employer in a stringent and nearly insurmountable burden shifting more suited to an adversarial proceeding than a representation-case analysis required by statute to be conducted by the Board. This curtailment of the Board's role in performing a complete analysis of unit appropriateness undermined the mandate of Section 9(b), under which the *Board* must determine the appropriate bargaining unit "in each case."[12]

Reinstating *Specialty Healthcare,* our colleagues perpetuate that error. As explained above, *Specialty Healthcare* is at the very least susceptible to the interpretation that it permits petitioned-for units to be found appropriate solely on the basis that the included employees share an internal community of interest and are "readily identifiable" as a group, without any consideration of whether their interests are "sufficiently distinct" from those of excluded employees unless a party contending that they are not raises the issue and proves it under the onerous "overwhelming community of interest" standard. Our colleagues "reinstate the *Specialty Healthcare* test" without any explicit modification.[13] Their decision

[11] Citing a phrase from *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996), the majority also makes the irrelevant point that it is employers who are invariably the ones seeking to add additional employees to a petitioned-for unit and that employers cannot be trusted to have the unit employees' Sec. 7 interests in mind. See id. at 790 (finding employer unlawfully refused to execute a collective-bargaining agreement due to professed doubts about the union's majority status, and stating that "the Board is entitled to suspicion when faced with an employer's benevolence as its workers' champion"). First, an employer's motives for seeking to add employees to a petitioned-for unit are irrelevant to the *Board's* duty to evaluate the appropriateness of a unit *in each case*. Second, the motivations of an employer provide no basis for eliminating the requirement that the extent of organizing shall not be controlling. Third, the majority's generalized expression of hostility toward employers, based on a phrase lifted from an unfair labor practice case involving a specific employer, gives the appearance of bias and undermines public trust. We repudiate it.

[12] The majority asserts that *Specialty Healthcare*'s placement of the burden of proof on the objecting party finds support in precedent that imposes a similar burden of proof on a party that disputes the appropriateness of a petitioned-for unit that is presumptively appropriate. But that is precisely the point: *Specialty Healthcare* improperly treats unit that are not presumptively appropriate as though they are.

[13] The majority tries to finesse this point by announcing what sounds for all the world like a three-step standard that incorporates sufficient distinctness as an essential element. This illusion is dispelled, however,

appears to suggest in some places that the *Specialty Healthcare* test considers whether the interests of included employees are "sufficiently distinct" as part of the internal-community-of-interest inquiry, an inquiry courts have held must be undertaken before the overwhelming-community-of-interest standard may properly be applied. But any such consideration is at best attenuated and indirect, since the internal-community-of-interest inquiry is primarily focused on the interests of the petitioned-for employees. In any event, the majority opinion also repeatedly emphasizes that *Specialty Healthcare* requires the Board to "determin[e] whether the unit is 'sufficiently distinct' *under the overwhelming community of interest standard*" (emphasis added), and that "the 'overwhelming community of interest' standard properly creates a high bar for the party seeking to demonstrate that the unit is not 'sufficiently distinct.'"

This interpretation of *Specialty Healthcare* represents an unexplained and unjustified departure from the traditional community-of-interest test for the reasons previously stated. Indeed, the majority implicitly acknowledges that *Specialty Healthcare* is at least in tension with that precedent. Although they say that they reject any interpretation of *Wheeling Island Gaming*, supra, one of the leading cases setting forth the traditional standard, "that would create inconsistency with *Specialty Healthcare* or with today's decision," they admit that *Wheeling Island Gaming* may be so interpreted when they add that "even if such an interpretation were correct, then we would limit *Wheeling Island Gaming* to its facts."[14]

The majority's reinstatement of *Specialty Healthcare* is flawed in other respects as well. Throughout their decision, our colleagues rely heavily on vague and subjective terms that are susceptible to a range of interpretations—e.g., "irrational" and "arbitrary"—in their attempt to redefine what it is for a unit to not be appropriate. (Variations on "rational" and "irrational" are used nearly 15 times in today's decision, and "arbitrary" is used even more frequently, to state what an employer has to prove to show that a petitioned-for unit is inappropriate.) We do not believe that Congress intended that every petitioned-for unit would be accepted unless it is "arbitrary" or "irrational." To the contrary, Congress directed the Board to determine "in each case" "the unit appropriate for the purposes of collective bargaining." *PCC Structurals,* 365 NLRB No. 160, slip op. at 3.[15] In this respect, it is telling that in the

by their explanation of how this standard is to be applied. Specifically, the majority holds as follows:

> Accordingly, the Board will once again approve a petitioned-for "subdivision" of employee classifications if the petitioned-for unit: (1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3) is sufficiently distinct. Of course, the Board need not address each element in every case—if a particular element is not disputed, it need not be adjudicated. But, if a party contends that the petitioned-for unit is not sufficiently distinct—i.e., that the smallest appropriate unit contains additional employees—then the Board will apply its traditional community-of-interest factors to determine whether there is an "overwhelming community of interest" between the petitioned-for and excluded employees, such that there is no rational basis for the exclusion. If there are only minimal differences, from the perspective of collective-bargaining, between the petitioned-for employees and a particular classification, then an overwhelming community of interest exists, and that classification must be included in the unit.

[14] The majority asserts that pre–*Specialty Healthcare* precedent provided "no clarifying principle for what degree of difference renders a unit 'sufficiently distinct.'" We believe that the decades of experience embodied in the traditional community-of-interest standard deserve more respect than this. Moreover, there is little merit in providing a "clarifying principle" for determining sufficient distinctness when the principle selected—i.e., that a petitioned-for unit readily identifiable as a group and possessing an internal community of interest is sufficiently distinct unless an objecting party proves that the interests of excluded employees are "near[ly] indistinguishable" from the interests of those within it (and good luck with that)—derogates from the Board's fulfillment of its duties under Sec. 9(b) of the Act and contravenes Sec. 9(c)(5), as we have shown.

We note that prior to *PCC Structurals*, there was significant confusion among union and management practitioners, regional directors, and reviewing courts about the interpretation and application of *Specialty Healthcare*. As described above, confusion existed regarding the proper application of the community-of-interest test—specifically, whether the interests of the petitioned-for unit *as distinct* from those of excluded employees were to be assessed in the first step of the analysis. See, e.g., *DPI Secuprint, Inc.*, above; *Macy's Inc.*, above; *DTG Operations, Inc.*, above. Such confusion required clarification by reviewing courts. See, e.g., *Constellation Brands*, above. By contrast, the majority decision fails to identify any cases demonstrating that the approach reflected in *PCC Structurals* was a source of significant confusion in its application. Despite the established confusion over the application of *Specialty Healthcare*, our colleagues heedlessly embrace that ambiguous approach, which is seemingly strategically designed to ensure that, for all practical purposes, the extent of organizing will be controlling but, as a hedge against reversal, includes contrary assurances at the expense of clarity.

[15] While our colleagues cite cases in which petitioned-for units were found arbitrary or inappropriate without the inclusion of additional employees, those cases do not hold that arbitrariness is the threshold for defining what it means for a unit to be inappropriate. See, e.g., *Casino Aztar*, 349 NLRB 603, 607 (2007) (petitioned-for unit of beverage employees inappropriate where "beverage employees have little community of interest with each other that is not also shared with most of the [excluded] catering and restaurant employees"); *Brand Precision Services*, 313 NLRB 657 (1994) (petitioned-for unit of operators inappropriate where excluded laborers and leadmen, with whom they had constant contact, shared the same training, skills, and functions); *Champion Machine and Forging Co.*, 51 NLRB 705, 707–708 (1943) (proposed unit was "clearly arbitrary" where it did not track craft or department lines and arbitrarily excluded employees performing similar work while including employees performing the same function as others who were excluded). Notably, it is at the very least an open question whether those units would have been found inappropriate under *Specialty Healthcare* or today's decision, inasmuch as they were decided without imposing any burden of proof on the party opposing the unit and did not apply the "overwhelming community of interest" standard.

years during which *Specialty Healthcare* was the governing precedent, there was only one published decision in which the Board found that an employer met its burden under *Specialty Healthcare*. See *Odwalla, Inc.*, 357 NLRB 1608 (2011).[16]

C. The PCC/Boeing Framework Provides a Clear Standard for Unit Determinations.

Contrary to our colleagues, the *PCC Structurals/Boeing* framework provides a clear standard for determining whether a petitioned-for unit is inappropriate because it excludes particular employees. Specifically, the *PCC/Boeing* framework requires the Board to analyze the distinct and similar interests of included and excluded employees and determine "whether the employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities." *Boeing*, 368 NLRB No. 67, slip op. at 4 (quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d at 794 (emphasis in *Constellation Brands*)). Contrary to the majority, this standard does not contemplate a numerical tally of shared versus distinct community-of-interest factors, a point the Board made clear in *Boeing*. Id. Rather, it requires the Board to determine whether "the excluded employees have distinct interests *in the context of collective bargaining*." Id. (internal quotation omitted; emphasis added). This qualitative standard follows directly from Section 9(b) of the Act, which requires the Board to determine "the unit appropriate *for the purposes of collective bargaining*" (emphasis added).

The Act requires the Board to determine an appropriate unit for the purpose of collective bargaining—not, as our colleagues appear to believe, for the purpose of making it easier for unions to win elections. And the purpose of collective bargaining is inseparable from the primary goal of the Act itself, which is to "achiev[e] industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. at 790 (emphasis added). Correspondingly, one of the Board's primary responsibilities under the Act is to foster labor-relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."). Moreover, collective bargaining was intended by Congress to be a process that could conceivably produce agreements. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523 (1941) (recognizing that the object of collective bargaining under the Act is "an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract"); *Altura Communications Solutions, LLC*, 369 NLRB No. 85, slip op. at 4 (2020) (same), enfd. 848 Fed. Appx. 344 (9th Cir. 2021). Accordingly, the *PCC/Boeing* framework requires the Board to consider whether the differences or similarities between petitioned-for and excluded employees will foster or undermine "efficient and stable collective bargaining." *Kalamazoo Paper Box*, 136 NLRB at 137. And whether efficient and stable collective bargaining will be fostered depends to a significant extent on "the circumstances within which collective bargaining is to take place," which are largely defined by the composition of the unit. Id.

Although it did not involve the *PCC Structurals/Boeing* framework, the Board's recent decision in *Starbucks*, 371 NLRB No. 71 (2022), aptly illustrates how this inquiry works. In *Starbucks*, the Board considered whether the nature and frequency of interchange between employees in a petitioned-for unit and excluded employees working at other stores negated the presumptive appropriateness of a single store unit. The Board there stated that "the key question [was] the nature and degree of interchange and its significance *in the context of collective bargaining*." Id., slip op. at 1 (emphasis added). The limited evidence of interchange in that case demonstrated that the petitioned-for employees did not have "frequent contact" with other employees and that they could "operate with relative independence." Id. Mandating the inclusion of employees with whom the petitioned-for employees had little contact would have impeded employees' ability to self-organize. And a separate unit was appropriate for the purposes of collective bargaining because it could operate with "relative independence." Id. As such, the unit corresponded to "the factual situation with which the parties must deal" at the negotiating table. *Kalamazoo Paper Box*, 136 NLRB at 136.

D. The PCC/Boeing Framework Effectuates the Policies of the Act, While Specialty Healthcare Undermines Them.

As we have explained, *PCC/Boeing* effectuates the statutory policy of fostering labor-relations stability. The *Specialty Healthcare* standard the majority reinstates today, in contrast, focuses almost exclusively on facilitating organizing while giving little, if any, weight to whether the unit thus organized will facilitate efficient and stable collective bargaining. As a result, extent of organization

[16] The majority points to two other cases in which it says that proposed units were found inappropriate under *Specialty Healthcare*: *A.S.V., Inc.*, 360 NLRB 1252 (2014), and *K&N Engineering, Inc.*, 365 NLRB No. 141 (2017). But in *A.S.V.*, no party requested review of the Regional Director's finding that the petitioned-for unit was inappropriate, so that issue was not before the Board for decision. 360 NLRB at 1252 fn. 1. And in *K&N Engineering*, the proposed unit was found inappropriate because it lacked an internal community of interest, not on overwhelming-community-of-interest grounds. 365 NLRB No. 141, slip op. at 3–4.

is prioritized, contrary to the policy if not the letter of Section 9(c)(5), and "efficient and stable collective bargaining is undermined rather than fostered." *Kalamazoo Paper Box*, 136 NLRB at 137.

Contrary to the majority, the *PCC/Boeing* framework does not improperly diminish employees' Section 7 right to self-organize. As explained above, it protects the Section 7 rights of included employees by requiring, in each case, that the unit have an internal community of interest. *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. at 172–173. Moreover, *PCC/Boeing* explicitly recognizes that a proposed unit need only be an appropriate unit and need not be the most appropriate unit. *PCC Structurals*, 365 NLRB No. 160, slip op. at 12; *Boeing*, 368 NLRB No. 67, slip op. at 3.

Unlike the *Specialty Healthcare* standard, the majority reinstates today, however, *PCC/Boeing* accords appropriate weight to the Section 7 rights of employees who have been excluded from the petitioned-for unit, correctly recognizing that the two core principles at the heart of Section 9(a)—exclusive representation and majority rule—require bargaining-unit determinations that protect the Section 7 rights of all employees. *PCC Structurals*, 365 NLRB No. 160, slip op. at 8.[17] Remarkably, our colleagues take the position that employees who are not included in a petitioned-for unit have no Section 7 interests that could be implicated by a Board determination that the unit is appropriate. We disagree. Employees improperly excluded from a unit under the majority's scheme may be sufficiently aligned with their unit coworkers and have sufficiently similar interests that their working conditions will be collaterally controlled by a collective-bargaining agreement from which they derive no benefit. Such an agreement may impact supervision shared with unionized coworkers, the ability to perform tasks flexibly and shift among tasks, opportunities to perform work that may be newly deemed unit work, and advancement if some of the work excluded employees previously performed is limited or denied them on that basis. The impact of contract terms negotiated for coworkers whose interests align closely (but not overwhelmingly) with those of excluded employees may affect excluded employees' seniority and consequently their vulnerability to layoffs, the cost of benefits for smaller groups of similarly positioned employees who cannot participate in a union plan, and myriad other effects on excluded employees who are closely aligned with the unit employees but fail to meet the "overwhelming community of interest" test. All of these potential impacts resulting from an inappropriately approved bargaining unit implicate the excluded workers' Section 7 rights to engage in or refrain from union activity—rights the *Specialty Healthcare* framework the majority reinstates today all but disregards.

Also, unlike *Specialty Healthcare*, *PCC/Boeing* accords appropriate weight to the policy of fostering efficient and stable collective bargaining, which the Board emphasized in *Kalamazoo Paper Box,* 162 NLRB at 137. The majority views this as a novel argument in favor of *PCC/Boeing* despite the fact that *Kalamazoo Paper Box* was decided in 1962 and was cited and quoted at length in *PCC Structurals* itself. 365 NLRB No. 160, slip op. at 3 fn. 8. This quibble aside, the majority agrees that fostering efficient and stable collective bargaining is an important statutory policy and that the Board's unit determinations must take it into account. In light of the importance of this statutory goal, however, we disagree with our colleagues' view that the Board should mandate the inclusion in a petitioned-for unit of additional employees only if "the differences between the petitioned-for and excluded employees are so minimal that it would be truly irrational to engage in the process of collective bargaining without them."

In the end, the animating principle of the majority's position is clear. For them, the primary goal of a unit determination is to facilitate employees' ability to organize in the unit selected by the petitioning union. Indeed, our colleagues question why the Board should ever "add employees to units that otherwise possess a rational basis and the requisite mutuality of interests to bargain collectively." After all, the majority observes, excluded employees can always petition for inclusion later through a self-determination election. See *Warner Lambert Co.*, 298 NLRB 993, 995 (1990) (incumbent union may add unrepresented employees to its existing unit if the employees sought to be included share a community of interest with unit employees and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group"). Unions may well be more successful if they petition for segments of a workforce as they are organized, but this system of unit determinations effectively makes the extent of organizing the controlling factor, contrary to Section 9(c)(5) of the Act.[18] In our view, the policies of the Act are better served

[17] Contrary to the majority, nothing in *PCC Structurals*, *Boeing*, or our opinion in this case remotely supports the claim that we seek to "maximize the participation of employees whose interests might be affected by the results of the election." Rather, we believe that the interests of excluded employees should be given "appropriate weight." Our colleagues, for their part, deny that those employees have any cognizable interest, and therefore give those interests no weight at all.

[18] The majority fails to ground its standard in a meaningful discussion of the concerns that animated Congress in amending Sec. 9(b) and enacting Sec. 9(c)(5)—specifically, in requiring that the Board shall determine the appropriate unit in "each case" and ensure that the extent of

by endeavoring to reach the correct unit determination the first time.[19]

We believe that our approach best effectuates the neutral role that Congress envisioned that the Board would play in making unit determinations. Accordingly, we agree with the Fourth Circuit that

> the significance of neutral rationales for inclusion or exclusion of particular employees in collective bargaining units cannot be overstated. Otherwise, reviewing courts will have no means of enforcing § 9(c)(5)'s prohibition; the Board can selectively rely on differences when the union desires exclusion of employees—and on similarities when the union desires inclusion. See Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B. U. L. Rev. 387 (1995). The deference owed the Board as the primary guardian of the bargaining process is well established. It will not extend, however, to the point where the boundaries of the Act are plainly breached.

NLRB v. Lundy Packing, 68 F.3d at 1583. The majority's decision today simply cannot be reconciled with these principles.

CONCLUSION

PCC Structurals and *The Boeing Company* facilitate the Board's accomplishment of its statutory duty to consider in each case the interests of petitioned-for *and* excluded employees and embody the traditional community-of-interest standard the Board has applied for decades. By overruling *PCC Structurals* and *Boeing* and returning to *Specialty Healthcare*, the majority guts that standard, undermines labor-relations stability, and shackles the Board in fulfilling its duties under Section 9(b) of the Act. Because our colleagues advance no valid justification for taking this step, we respectfully dissent.

Dated, Washington, D.C. December 14, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

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organizing shall not be controlling. To be sure, the majority repeatedly refers to the Board's undisputed statutory duty to ensure employees the fullest freedom to exercise their rights under the Act and to organize in unions of their choosing. It is equally clear, however, that Congress placed limitations on such aspirational words, indicating that employees' freedom to select their desired bargaining units is not controlling and that their choice must be rejected when they seek to create inappropriate bargaining units. Congress created this limitation in order to prevent inappropriate units from derailing the collective-bargaining process and to avoid disruptions resulting from, for example, gerrymandering, undue proliferation of units, and circumstances whereby an inappropriate unit creates an unworkable situation in the workplace as a whole. Our colleagues' failure to recognize and address these specific concerns undermines the legitimacy of their decision today.

[19] Our colleagues disparage the *PCC/Boeing* standard as a "Goldilocks"-style insistence on unit determinations that are "just right." To the extent that our colleagues mean by this that our analysis requires that a proposed unit be the "most optimal" configuration, we have explicitly stated in this opinion that it does not, a point also emphasized in *PCC Structurals* and *Boeing* themselves. For all their criticisms of *PCC Structurals*, our colleagues cannot with any accuracy identify any case applying that decision that illustrates their claim. What we do contend is that Congress actually meant something when it enacted Section 9(c)(5), that excluded employees also have statutorily protected interests that may be trampled on by the approval of inappropriate bargaining units, and that fostering stable collective bargaining requires neutral and balanced assessments of petitioned-for units in the context of the workplace as a whole. We make no apology for insisting that unit determinations should properly reflect these principles.