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PCC Structurals, Inc. *and* International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge W24. Case 19–RC–202188

December 15, 2017

ORDER GRANTING REVIEW AND REMANDING

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

The Employer requests review of the Regional Director's Decision and Direction of Election, in which the Regional Director found that a petitioned-for unit of approximately 100 full-time and regular part-time rework welders and rework specialists employed by the Employer at its facilities in Portland, Clackamas, and Milwaukie, Oregon, comprise a unit appropriate for collective bargaining.[1] The Employer contends that the smallest appropriate unit is a wall-to-wall unit of 2565 production and maintenance employees in approximately 120 job classifications. For the reasons stated below, we grant review, clarify the applicable standard, and remand this case to the Regional Director for further appropriate action consistent with this Order.[2]

Today, we clarify the correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. In so doing, and for the reasons explained below, we overrule the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*), enfd. sub nom. *Kindred Nursing Centers East, LLC* v. *NLRB,* 727 F.3d 552 (6th Cir. 2013), and we reinstate the traditional community-of interest standard as articulated in, e.g., *United Operations, Inc.*, 338 NLRB 123 (2002).[3]

Background

The Employer manufactures steel, superalloy, and titanium castings for use in jet aircraft engines, airframes, industrial gas turbine engines, medical prosthetic devices, and other industry markets. The Employer's operation in the Portland, Oregon area consists of three "profit and loss centers" located within approximately a 5-mile radius of one another. Petitioner and Employer agree that these three centers comprise the entire Portland operation. As described by the Regional Director, the manufacturing process is the same at all three facilities. That process involves two stages. The first or "front end" stage involves creation of the casting. In this stage, production employees create a wax mold of the customer's product, "invest" the mold by alternately dipping it into a slurry and into sand until a hard ceramic shell is formed around the wax, and then melt the wax away to leave the empty ceramic shell, into which liquid metal is poured to create the casting. The second stage (sometimes referred to as "back end") involves inspecting and reworking the casting. The employees in the petitioned-for unit are welders who work in the "back end" stage of the production process, primarily repairing defects in the metal castings. The exception is the one rework specialist/crucible repair employee, who appears to work in the "front end" or casting portion of the manufacturing process.

To determine the appropriateness of the petitioned-for unit, the Regional Director applied the standard set forth in *Specialty Healthcare*. As a Board majority explained its standard in that decision, when a union seeks to represent a unit of employees "who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit" for bargaining. *Specialty Healthcare*, 357 NLRB at 945–946. If the petitioned-for unit is deemed appropriate, the burden shifts to the proponent of a larger unit (typically the employer) to demonstrate that the additional employees the proponent seeks to include "share 'an overwhelming community of interest'" with the petitioned-for employees, "such that there 'is no legitimate basis upon which to exclude certain employees from'" the petitioned-for unit because the traditional community-of-interest factors "'overlap almost completely.'" Id. at 944 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)).

[1] The Regional Director determined that an additional employee designated in the petition as a rework specialist/crucible repair employee may vote subject to challenge. Discussion of the Regional Director's analysis and findings herein relates to the petitioned-for rework welders and rework specialists.

The election was held on September 22, 2017. The tally was 54–38 in favor of the Petitioner, with two challenged ballots, a number insufficient to affect the result.

[2] We do not rely on the Regional Director's citations to *Guide Dogs for the Blind, Inc.*, 359 NLRB 1412 (2013), a decision that included two members whose appointments were subsequently found invalid by the Supreme Court. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[3] Additionally, for the reasons stated by former Member Hayes in his dissenting opinion in *Specialty Healthcare*, we reinstate the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining appropriate bargaining units in nonacute healthcare facilities. See *Specialty Healthcare*, 357 NLRB at 948–950 (Member Hayes, dissenting).

Applying the foregoing standard, the Regional Director first concluded that the employees in the petitioned-for unit are readily identifiable as a group on the basis that the employees in the proposed unit are welders in related job classifications who repair manufacturing defects in metal castings.

The Regional Director further concluded that the petitioned-for rework welders and rework specialists share a community of interest amongst themselves under the traditional criteria. In this regard, however, he found that two factors weigh against a community-of-interest finding. First, the unit sought by the Petitioner does not conform to an administrative grouping or department within the Employer's organizational structure, and the employees in the proposed unit are scattered throughout numerous departments in the Portland operation. Second, the petitioned-for employees do not share common supervision. Rather, employees with a variety of job titles report to each production supervisor, and no production supervisor oversees only the petitioned-for employees. Thus, rework welders and rework specialists testified that their immediate supervisors "also supervise rework grinders, visual dimensional inspectors, x-ray shooters and readers, and florescent penetrant inspectors."

Notwithstanding these two factors adverse to the proposed unit, the Regional Director found that a number of factors favor a finding that the petitioned-for employees share a community of interest with one another, including shared skills, training, certification requirements, and in-house training requirements. He also found that the petitioned-for rework welders and rework specialists are functionally integrated amongst themselves because they all perform the same work: repairing defects in metal castings.[4] As for employee contact, the Regional Director found that rework welders and rework specialists work either in open-air chambers or in booths, and the booths are adjacent to one another.[5] While evidence of temporary interchange with employees outside the proposed unit was inconclusive, and such interchange appears minimal, the Regional Director found permanent interchange within the petitioned-for unit in that all rework specialists were previously rework welders.[6] The Regional Director also based his community-of-interest finding on evidence that the petitioned-for employees share many of the same terms and conditions of employment, even though all production employees share the same terms and conditions. Thus, all production employees, including the petitioned-for employees, work similar hours, are paid on the same wage scale, receive the same benefits, are subject to the same employee handbook and work rules, wear similar attire and protective gear (steel-toed shoes, safety glasses and hearing protection), work under the same safety requirements, and participate in ongoing training regarding harassment, safety, and other matters.

Turning to the second step of the *Specialty Healthcare* analysis, the Regional Director rejected the Employer's contention that the rest of the production and maintenance employees share an "overwhelming community of interest" with the petitioned-for employees and must therefore be included in the unit. He acknowledged that functional integration weighs in favor of finding an overwhelming community of interest between the petitioned-for employees and the rest of the production employees: rework welders and rework specialists function as part of an integrated production process, repairing defects identified by other employees and working in "rework teams" that include employees in other job classifications. He also recognized that the petitioned-for unit does not track departmental lines and the employees therein are not separately supervised. But he concluded that the Employer did not carry its burden to establish that the smallest appropriate unit is a wall-to-wall production and maintenance unit. In this regard, he determined that shared terms and conditions of employment constituted a neutral factor: on one hand, all of the Employer's production and maintenance employees are subject to the same policies and rules, work similar hours, are paid under the same wage structure, receive the same benefits, and wear the same attire and protective equipment; on the other hand, the welders are paid at the high end of the pay scale, and they use distinctive welding and metalwork equipment. Further, the Regional Director found that the welders' distinct qualifications and training, their performance of distinct job duties, their limited contact with other employees, and the lack of significant interchange across proposed-unit lines all weigh against a finding that the petitioned-for employees share an overwhelming community of interest with the remainder of the production and maintenance employees.

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[4] Rework specialists perform additional tasks as well: training rework welders and providing other project support. Rework specialists outrank rework welders. Applicants for rework specialist positions are required to be step 6 rework welders—the highest rework-welder step—with a minimum of 5 years' experience at step 6.

[5] The Regional Director made no findings regarding the location of the open-air chambers or whether they are adjacent to other open-air chambers or to the welding booths.

[6] Approximately 55 of the petitioned-for welders previously held other positions with the Employer. However, it is rare for welders, who are paid near the high end of the wage scale, to move into nonwelding positions other than managerial positions.

In its request for review, the Employer contends that *Specialty Healthcare* was wrongly decided. Alternatively, the Employer argues that even under the *Specialty Healthcare* standard, the petitioned-for employees are not a readily identifiable group, and they share an overwhelming community of interest with the remainder of the production and maintenance employees. In arguing that the Board should overrule *Specialty Healthcare,* the Employer contends that in *Specialty Healthcare*, the Board effectively abdicated its duty to determine an appropriate unit on a case-by-case basis as required by Section 9(b) of the Act; that it gave controlling weight to the extent of union organizing in making unit determinations; that the *Specialty Healthcare* standard results in the proliferation of fractured bargaining units because it ignores the importance of shared interests among petitioned-for and excluded employees; and that it does not adequately consider the Section 7 rights of excluded employees.

Discussion

A. The Board's Role in Determining Appropriate Bargaining Units

The National Labor Relations Act (NLRA or Act) and its legislative history establish three benchmarks that must guide the Board in making determinations regarding appropriate bargaining units.

First, 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 by the majority of the employees *in a unit appropriate for such purposes*."[7] Thus, questions about unit appropriateness are to be resolved by reference to the "purposes" of representation, should a unit majority choose to be represented—namely, "collective bargaining."[8]

Second, Congress contemplated that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation. Section 9(b) 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."[9] Referring to the "natural reading" of the phrase "in each case," the Supreme Court has stated that

> whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. Under this reading, the words "in each case" are synonymous with "whenever necessary" or "in any case in which there is a dispute." Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, the decision "in each case" in which a dispute arises is to be made by the Board.[10]

Third, the language in Section 9(b) as it now exists resulted from intentional legislative choices made by Congress over time, and the history of those changes reveals an increasing emphasis on the role to be played by the Board in determining appropriate bargaining units. The earliest versions of the Wagner Act legislation, introduced in 1934, did not contain the phrase "in each case," nor did they state that the Board must "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." The initial wording simply stated: "The Board shall determine whether eligibility to participate in elections shall be determined on the basis of the employer unit, craft unit, plant unit, or other appropriate grouping."[11]

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[7] Sec. 9(a) (emphasis added). The Supreme Court has indicated that Sec. 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit." *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991) (emphasis in original; citations omitted). See also *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (the NLRB "need only select an appropriate unit, not the most appropriate unit").

[8] As the Board observed 55 years ago:

> As we view our obligation under the statute, it is the mandate of Congress that this Board "shall decide in each case . . . the unit appropriate for the purpose of collective bargaining." In performing this function, the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because 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 Co., 136 NLRB 134, 137 (1962) (emphasis added; internal footnotes omitted).

[9] NLRA Sec. 9(b) (emphasis added).

[10] *American Hospital Assn. v. NLRB*, 499 U.S. at 611 (emphasis added). See also id. at 614 (Sec. 9(b) requires "that the Board decide the appropriate unit in every case in which there is a dispute.").

[11] See, e.g., S. 2926, 73d Cong. § 207 (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935 (hereinafter "NLRA Hist.") 11 (1949). See also S. 2926, 73d Cong. § 10(a) (1934), reprinted in 1 NLRA Hist. 1095 ("The Board shall decide whether eligibility to participate in a choice of representatives shall be

When reintroduced in 1935, the legislation added a statement that unit determinations were "to effectuate the policies of this Act."[12] When reported out of the Senate Labor Committee, the legislation stated that the Board "shall decide *in each case*" the appropriateness of the unit.[13] Regarding this language, a House report stated:

> Section 9(b) provides that the Board shall determine whether, in order to effectuate the policy of the bill . . . , the unit appropriate for the purposes of collective bargaining shall be the craft unit, plant unit, employer unit, or other unit. *This matter is obviously one for determination in each individual case*, and the only possible workable arrangement is *to authorize the impartial governmental agency, the Board, to make that determination*.[14]

In the final enacted version of the Wagner Act, Section 9(b) stated that the Board's unit determinations "in each case" were "to insure to employees *the full benefit* of their right to self-organization, and to collective bargaining, and otherwise to effectuate the policies of this Act."[15]

In 1947, in connection with the Labor Management Relations Act (Taft-Hartley Act or LMRA), Congress devoted further attention to the Board's unit determinations. The LMRA amended Section 7 so that, in addition to protecting the right of employees to engage in protected activities, the Act protected "the right to *refrain from* any or all of such activities."[16] The LMRA also added Section 9(c)(5) to the Act, which states: "In determining whether a unit is appropriate . . . *the extent to which the employees have organized shall not be controlling*."[17] A House report—although recognizing that the Board possesses "wide discretion in setting up bargaining units"—explained that this language

> strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate. . . . While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and . . . is not to be controlling.[18]

Finally, the LMRA also amended Section 9(b) to state—as it presently does—that the Board shall make bargaining unit determinations "in each case" in "order to assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."[19]

This legislative history demonstrates that Congress intended that the Board's review of unit appropriateness would not be perfunctory. In the language quoted above, Section 9(b) mandates that the Board determine what constitutes an appropriate unit "in each case," with the additional mandate that the Board only approve a unit configuration that "assure[s]" employees their "fullest freedom" in exercising protected rights. Although more

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determined on the basis of employer unit, craft unit, plant unit, or other appropriate unit.").

[12] See S. 1958, 74th Cong. § 9(b) (1935), reprinted in 1 NLRA Hist. 1300 ("The Board shall decide whether, in order to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit.").

[13] See S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 2291 (emphasis added). The full provision stated: "The Board shall decide in each case whether, in order to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit." Id. See also H.R. 7937, 74th Cong. § 9(b), reprinted in 2 NLRA Hist. 2850 (same); H.R. 7978, 74th Cong. § 9(b), reprinted in 2 NLRA Hist. 2862 (same). The Senate report accompanying S. 1958 explained: "Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And *employees themselves cannot choose these units*, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind." S. Rep. 74-573, at 14 (1935), reprinted in 2 NLRA Hist. 2313 (emphasis added). The language remained unchanged when adopted by the Senate. See S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 2891 (version of S. 1958 passed by the Senate and referred to the House Committee of Labor). The same language was contained in H.R. 7978, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 2903 (version of Wagner Act legislation reported by the House Committee on Education and Labor).

[14] H.R. Rep. 74-969, at 20 (1935), reprinted in 2 NLRA Hist. 2930 (emphasis added).

[15] S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 3039 (emphasis added) (Senate-passed bill reported by the House Committee on Education and Labor). The same language was contained in the version adopted by the House, see S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 3244, in the version adopted by the Conference Committee, see H.R. Rep. 74-1371, at 2, reprinted in 2 NLRA Hist. 3253-3254, and in the version that was enacted. See 49 Stat. 449, S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 3274.

[16] NLRA Sec. 7 (emphasis added). See also H.R. Rep. 80-245, at 27 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 (hereinafter LMRA Hist.) 318 (1948) ("A committee amendment assures that when the law states that employees are to have the rights guaranteed in section 7, the Board will be prevented from compelling employees to exercise such rights against their will . . . . In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.").

[17] NLRA Sec. 9(c)(5).

[18] H.R. Rep. 80–245, at 37 (1947), reprinted in 1 LMRA Hist. 328 (emphasis added), citing *Matter of New England Spun Silk Co.*, 11 NLRB 852 (1939); *Matter of Botany Worsted Mills*, 27 NLRB 687 (1940).

[19] NLRA Sec. 9(b) (emphasis added). See, e.g., S. 1126, 80th Cong. § 9(b), reprinted in 1 LMRA Hist. 117; H.R. 3020, 80th Cong. § 9(b), reprinted in 1 LMRA Hist. 244–245.

than one appropriate unit might exist, the statutory language plainly requires that the Board "in each case" consider multiple potential configurations—i.e., a possible "employer unit," "craft unit," "plant unit" or "subdivision thereof."

It is also well established that the Board may not certify petitioned-for units that are "arbitrary" or "irrational"—for example, where functional integration and similarities between two employee groups "are such that neither group can be said to have any separate community of interest justifying a separate bargaining unit."[20] However, it appears clear that Congress did not intend that the petitioned-for unit would be controlling in all but those extraordinary cases when the evidence of overlapping interests between included and excluded employees is overwhelming, nor did Congress anticipate that every petitioned-for unit would be accepted unless it is "arbitrary" or "irrational." Congress placed a much higher burden on the Board "in each case," which was to determine which unit configuration(s) satisfy the requirement of assuring employees their "fullest freedom" in exercising protected rights.

B. The Board's Traditional Community-of-Interest Test is an Appropriate Framework for Unit Determinations

To ensure that the statutory mandate set forth above is met, the Board traditionally has determined, in each case in which unit appropriateness is questioned, whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit. Throughout nearly all of its history, when making this determination, the Board applied a multi-factor test that requires the Board to assess

> 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.

United Operations, Inc., supra, 338 NLRB at 123.

Thus, in *Wheeling Island Gaming*,[21] where the Board applied its traditional community-of-interest test, the Board indicated that it

> 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.[22]

The required assessment of whether the sought-after employees' interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or "fractured"—that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit; and it ensures that the Section 7 rights of excluded employees who share a substantial (but less than "overwhelming") community of interests with the sought-after group are taken into consideration.

C. The Specialty Healthcare Standard Improperly Detracts from the Board's Statutory Responsibility to Make Appropriate Bargaining Unit Determinations

The Board majority in *Specialty Healthcare* described its decision as a mere clarification of preexisting standards for determining appropriate bargaining units. However, we believe the majority in *Specialty Healthcare* substantially *changed* the applicable standards. Indeed, the Board majority itself in *Specialty Healthcare* referred to the decision as implementing "changes in the law."[23] In any event, it is not essential to our decision today to determine whether *Specialty Healthcare* changed or

[20] *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 120 (D.C. Cir. 1996). See generally *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552, 558–559 (6th Cir. 2013); *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1157 (6th Cir. 1996); *Bry-Fern Care Center Inc. v. NLRB*, 21 F.3d 706, 709 (6th Cir. 1994); *NLRB v. Hardy-Herpolsheimer*, 453 F.2d 877, 878 (6th Cir. 1972).

[21] 355 NLRB 642 (2010).

[22] Id. at 642 fn. 2 (quoting Newton-Wellesley Hospital, 250 NLRB 409, 411412 (1980) (emphasis in *Wheeling Island Gaming*)). In *Newton-Wellesley Hospital*, the Board commented on a proposed "disparity of interests" test that would "require not a showing of similarities among employees in a classification to support a separate unit but instead a showing of a disparity of interests among employees in different classifications which would preclude a combination of those classifications into a single broader unit." 250 NLRB at 411. The Board then observed that "the test of 'disparateness' . . . is, in practice, already encompassed logically within the community-of-interest test as we historically have applied it." Id. at 411–412.

[23] *Specialty Healthcare*, 357 NLRB at 947.

merely clarified then-existing standards. Regardless of how they are characterized, the Board majority in *Specialty Healthcare* did three things that have affected the Board's bargaining-unit determinations since *Specialty Healthcare* was decided.

First, in *Specialty Healthcare*, the majority overruled *Park Manor Care Center*, supra, which set forth the standard for determining appropriate bargaining units in non-acute healthcare facilities.[24]

Second, the majority in *Specialty Healthcare* established that the "traditional community-of-interest approach" would thereafter apply to unit determinations in such facilities rather than the so-called "pragmatic" test described in *Park Manor*. 357 NLRB at 937-941.

Third and most significantly, although the majority in *Specialty Healthcare* nominally was considering unit questions specific to non-acute healthcare facilities,[25] the *Specialty Healthcare* decision applied to *all* workplaces (except acute care hospitals) whenever a party argues that a petitioned-for unit improperly excludes certain employees. Although the majority purported to apply the traditional community-of-interests standard as exemplified in *Wheeling Island Gaming*,[26] the *Specialty Healthcare* standard discounts—or eliminates altogether—any assessment of whether shared interests among employees *within* the petitioned-for unit are sufficiently distinct from the interests of *excluded* employees to warrant a finding that the smaller petitioned-for unit is appropriate.[27] This aspect of *Specialty Healthcare* is obvious from the majority test itself, under which, if the petitioned-for employees are deemed readily identifiable as a group and share a community of interests among themselves, this inward-looking inquiry is controlling, *regardless* of the interests of excluded employees, except for the rare instance where it can be proven that the excluded employees share an "overwhelming" community of interests with employees in the petitioned-for unit.[28] As noted previously, we believe this aspect of *Specialty Healthcare* undermines fulfillment of the Board's responsibility to "assure" to employees "in each case" their "fullest freedom" in the exercise of Section 7 rights, as stated in Section 9(b) of the Act. Moreover, by extinguishing scrutiny of the interests that excluded employees have in common with those in the petitioned-for unit except in the rare case where the employer can satisfy its burden of proving that excluded employees share an "overwhelming" community of interests with employees in the proposed unit, *Specialty Healthcare* created a regime under which the petitioned-for unit is controlling in all but narrow and highly unusual circumstances.

In these respects, *Specialty Healthcare* detracts from what Congress contemplated when it added mandatory language to Section 9(b) directing the Board to determine the appropriate bargaining unit "in each case" and mandating that the Board's unit determinations guarantee to employees the "fullest freedom" in exercising their Section 7 rights. Most importantly, the enumeration of potential unit configurations in Section 9(b) demonstrates, inescapably, that Congress intended that the Board "in each case" would carefully consider the interests of *all* employees. This is evident from the fact that the types of bargaining units mentioned in Section 9(b), to be evaluated by the Board in each case, include "the *employer unit*, craft unit, plant unit, *or subdivision thereof*." In contrast with this language, *Specialty Healthcare* gives all-but-conclusive deference to every petitioned-for "subdivision" unit, without attaching *any* weight to the interests of excluded employees in potential "employer," "craft," "plant," or alternative "subdivision" units, unless the employer proves the existence of "overwhelming"

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[24] As noted above, we reinstate *Park Manor Care Center*. See supra fn. 3. Prior to issuing its decision in *Specialty Healthcare*, the Board issued an invitation to the public to file briefs addressing the *Park Manor* standard and various questions regarding appropriate-unit determinations in non-acute healthcare facilities (which were potentially distinguishable from acute care facilities, in which bargaining-unit determinations are governed by the Board's 1989 healthcare rule, 54 Fed. Reg. 16336–16348 (1989)). See *Specialty Healthcare*, 356 NLRB 289 (2010). However, *Specialty Healthcare* swept far beyond this narrow issue to encompass appropriate-unit determinations in *all* industries.

[25] See fn. 24, supra.

[26] 357 NLRB at 944–946. The majority's claim that it was merely clarifying and not changing the traditional community-of-interests test appeared to be necessitated by the fact that then-Chairman Liebman was in the majority in both *Wheeling Island Gaming* (where the Board applied the traditional community-of-interest standard) and *Specialty Healthcare* (where, as explained in the text, we believe the Board substantially changed the traditional standard).

[27] Indeed, no sooner did the *Specialty Healthcare* majority opinion quote the "sufficiently distinct" standard from *Wheeling Island Gaming* than it set about quibbling with that standard. See *Specialty Healthcare*, 357 NLRB at 945 ("Of course, that language leaves open the question of what degree of difference renders the groups' interests 'sufficiently distinct.'").

[28] The majority in *Specialty Healthcare* announced the following test for making appropriate-unit determinations:

> [W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees *in the group* share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate *or even more appropriate*, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

357 NLRB at 945–946 (emphasis added).

interests shared between petitioned-for employees and those outside the petitioned-for "subdivision." The discrepancy between what Section 9(b) requires, on the one hand, and what *Specialty Healthcare* precludes, on the other, is reinforced by Section 9(c)(5), added to the Act in 1947, where Congress expressly states that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." We believe *Specialty Healthcare* effectively makes the extent of union organizing "controlling," or at the very least gives far greater weight to that factor than statutory policy warrants, because under the *Specialty Healthcare* standard, the petitioned-for unit is deemed appropriate in all but rare cases. Section 9(b) and 9(c)(5), considered together, leave no doubt that Congress expected *the Board* to give careful consideration to the interests of all employees when making unit determinations, and Congress did not intend that the Board would summarily reject arguments, in all but the most unusual circumstances, that the petitioned-for unit fails to appropriately accommodate the Section 7 interests of employees outside the "subdivision" specified in the election petition.

Having reviewed the *Specialty Healthcare* decision in light of the Act's policies and the Board's subsequent applications of the "overwhelming community of interest" standard, we conclude that the standard adopted in *Specialty Healthcare* is fundamentally flawed. We find there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees—both those within and those outside the petitioned-for unit—without regard to whether these groups share an "overwhelming" community of interests. In making this finding, we especially rely on the following considerations.

First, we agree with the view expressed by Chairman (then-Member) Miscimarra in his dissent in *Macy's, Inc*.,[29] that *Specialty Healthcare* constituted an unwarranted departure from the standards that have long governed the Board's appropriate-bargaining-unit determinations.[30] Despite reciting the traditional test and claiming that it was merely clarifying that test, the majority in *Specialty Healthcare* clearly held that "[w]hen the petitioned-for unit contains employees readily identified as a group who share a community of interest" *among themselves*, an employer opposing this unit as inappropriate because it excludes certain employees bears the next-to-impossible burden of proving that "employees inside and outside [the] proposed unit share an overwhelming community of interest."[31] It is *the Board's* responsibility to determine unit appropriateness based on a careful examination of the community of interests of employees both within *and* outside the proposed unit. The Board reaffirmed this approach in *Wheeling Island Gaming*,[32] in which it recognized that the Board's task is to examine "whether the interests of the group sought are *sufficiently distinct* from those of other [excluded] employees to warrant establishment of a separate unit."[33] And in *Wheeling Island Gaming*, the Board quoted with approval from *Newton-Wellesley Hospital*, a decision in which the Board found it unnecessary to adopt a proposed "disparity of interests" test that would "require not a showing of similarities among employees in a classification to support a separate unit but instead a showing of a disparity of interests among employees in different classifications which would preclude a combination of those classifications into a single broader unit" on the basis that such a test "is, in practice, already encompassed logically within the community-of-interest test as we historically have applied it."[34] We reject as implausible the *Specialty Healthcare* majority's statement that they were merely restating and clarifying the Board's traditional test. Yet, as indicated above, we need not conclusively determine whether *Specialty Healthcare* changed or merely clarified the Board's traditional community-of-interest standard governing appropriate-unit determinations. We merely hold that when it is asserted that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board will no longer be constrained by the extraordinary deference that *Specialty Healthcare* affords to the petitioned-for unit. Rather, applying the Board's traditional community-of-interest factors, the Board will determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit; and the Board may find that the exclusion of certain employees renders the petitioned-for unit inappropriate even when excluded employees do not share an "overwhelming" community of interest with employees in the petitioned-for unit.

Second, although the Board in *Specialty Healthcare* stated that its decision was "not intended to disturb" rules developed by the Board regarding particular industries,[35] subsequent decisions have demonstrated that petitioned-

[29] 361 NLRB 12 (2015), enfd. 824 F.3d 557 (5th Cir. 2016), rehearing denied 844 F.3d 188 (5th Cir. 2016), cert. denied 137 S.Ct. 2265 (2017).

[30] *Macy's*, supra at 42 (Member Miscimarra, dissenting).

[31] 357 NLRB at 946.

[32] 355 NLRB at 641–642.

[33] 355 NLRB at 637 fn. 2 (emphasis in original).

[34] 250 NLRB at 411–412.

[35] 357 NLRB at 946 fn. 29.

for units are deemed controlling under *Specialty Healthcare* even when a broader unit is clearly compelled by industry standards. Thus, in *Macy's*, supra, a Board majority, over then-Member Miscimarra's dissent, found appropriate a unit limited to employees in the store's cosmetics and fragrances department—one of 11 sales departments in Macy's Saugus, Massachusetts store—notwithstanding the Board's longstanding rule that favors storewide units in the retail industry.[36] In *DPI Secuprint*,[37] the Board majority, over then-Member Johnson's dissent, found appropriate a unit consisting of prepress, digital press, offset bindery, digital bindery, and shipping and receiving employees—excluding the press operators and feeder-tenders at the heart of the employer's functionally integrated production process—even though the smaller unit contravened the Board's "traditional" rule that press and prepress employees should ordinarily be included in the same "lithographic unit."[38] As this history shows, the *Specialty Healthcare* "overwhelming community of interest" standard has effectively superseded the Board's traditional industry-specific rules governing appropriate unit determinations, despite the *Specialty Healthcare* majority's claim to the contrary.[39]

Third, we find that Sections 9(b) and 9(c)(5), considered together, strongly favor applying the traditional community-of-interest standard when making bargaining unit determinations, without giving the petitioned-for unit an artificial supremacy that substantially limits the Board's discretion when discharging its statutory duty to determine unit appropriateness.[40] In short, the Board's role "in each case" should be to undertake a broader and more refined analysis, and to play a more active role, when determining whether or not a proposed unit is "appropriate" than is allowed under the *Specialty Healthcare* standard.

Fourth, applying the historical community-of-interest standard rather than the "overwhelming" community-of-interest requirement will ensure that the Board does not unduly limit 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 (i.e., interests that "'overlap almost completely'") with petitioned-for employees.[41] All statutory employees have Section 7 rights, including employees that have been excluded from the petitioned-for unit. And the two core principles at the heart of Section 9(a)—the principles of exclusive representation and majority rule—require bargaining-unit determinations that protect the Section 7 rights of all employees. Henceforth, the Board's determination of unit appropriateness will consider the Section 7 rights of employees *excluded* from the proposed unit *and* those included in that unit, regardless of whether there are "overwhelming" interests between the two groups. We believe this corrects the imbalance created by *Specialty Healthcare*, which makes "the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances."[42] Even if *Specialty Healthcare* permits the Board to consider the interests of employees excluded from the petitioned-for unit, we believe the overwhelming community-of-interest standard unduly limits the Board's discretion when evaluating unit appropriateness, and nothing in the Act imposes such a requirement on the Board. Thus, we find that considering the interests of excluded employees along with those in the petitioned-for unit, without the "overwhelming" community-of-interest requirement, better effectuates the policies and purposes of the Act, which requires the Board to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act."[43]

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[36] See, e.g., *May Department Stores Co.*, 97 NLRB 1007, 1008 (1952) (calling the "storewide unit" in the retail industry "the optimum unit for the purposes of collective bargaining").

[37] 362 NLRB No. 172 (2015).

[38] See, e.g., *AGI Klearfold, LLC*, 350 NLRB 538, 540 (2007) (citing cases dating back to 1956).

[39] Because we have overruled *Specialty Healthcare*, those decisions applying *Specialty Healthcare*—*Macy's*, supra; *DPI Secuprint*, supra; *DTG Operations, Inc.*, 357 NLRB 2122 (2011); and *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015 (2011)—are no longer precedential.

[40] As recited in the text, the Act and its legislative history indicate that Congress requires the Board to undertake a twofold inquiry. First, the Board "shall decide in *each case* whether" the appropriate unit "shall be the *employer unit*, *craft unit*, *plant unit*, or *subdivision thereof*." NLRA Sec. 9(b) (emphasis added). Second, when making such a decision, the Board must determine which of these groupings "assure[s] to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act." Id. (emphasis added).

[41] *Specialty Healthcare*, supra at 944 (quoting *Blue Man Vegas,* supra at 422).

[42] Id. at 948 (Member Hayes, dissenting). See also *Cristal USA, Inc.,* 365 NLRB No. 82, slip op. at 1–2 (2017) (Chairman Miscimarra, dissenting); *DTG Operations*, supra, 357 NLRB at 2129-2130 (Member Hayes, dissenting); *Northrop Grumman Shipbuilding*, supra, 357 NLRB at 2020-2023 (Member Hayes, dissenting). Further, 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. The Act's requirement that the Board "assure to employees the fullest freedom" in exercising protected rights requires the Board "in each case" to consider the interests of *all* employees—whether or not they are included in the petitioned-for unit—so the Board can "decide" whether the unit should be the "employer unit, craft unit, plant unit, or subdivision thereof." NLRA Sec. 9(b).

[43] Sec. 9(b).

We recognize that several reviewing courts have indicated that the *Specialty Healthcare* standard on its face articulated a permissible standard regarding unit appropriateness. In most of these cases, however, the courts expressly relied on the *Specialty Healthcare* majority's recitation of traditional community-of-interest principles, they attached weight to the claim that the Board was not abandoning those traditional principles, and they relied heavily on the broad deference that courts afford to the Board when interpreting the Act.[44] Moreover, when various courts of appeals have upheld *Specialty Healthcare* as a permissible interpretation of the Act, the reviewing courts have indicated that the community-of-interest test requires the Board to evaluate shared interests both within *and outside* the petitioned-for unit as an essential part of the first step of the *Specialty Healthcare* analysis, where the Board determines whether the petitioned-for employees share a community of interests. Of particular note in this regard is the recent decision of the Second Circuit in *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016). In *Constellation Brands*, the Regional Director only considered the community of interests shared among the employees within the petitioned-for group before shifting the burden to the employer to demonstrate that additional employees shared an overwhelming community of interest with that group. Although the Second Circuit upheld the *Specialty Healthcare* framework, it disapproved of the Regional Director's incomplete community-of-interest analysis at the first step of that framework, and the court remanded the case to the Board to apply a construction of *Specialty Healthcare* that requires the Board, at the first step of the analysis, not only to assess the shared interests among employees within the proposed unit, but also to explain why employees outside the proposed unit "have meaningfully distinct interests . . . that *outweigh* similarities" with the included employees. The court stated:

> Our sister circuits have accepted the *Specialty Healthcare* framework based on the understanding that it requires the Board to ensure, at step one, that employees are not inappropriately "excluded [from a bargaining unit] on the basis of meager differences." To properly apply this framework, the Board must *analyze* at step one the facts presented to: (a) identify shared interests among members of the petitioned-for unit, *and* (b) explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.

[44] See, e.g., *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 637 (7th Cir. 2016) (holding that the "statutory criterion for whether a union can represent a unit of workers is whether the unit is 'appropriate' for collective bargaining, 29 U.S.C. § 159(a), which . . . requires a determination that the members of the unit have common employment concerns—a 'community of interest'—*different from the concerns of the company's other employees*") (emphasis added); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 495 (4th Cir. 2016) (construing the first step of the community-of-interests test to require "examining the community-of-interest factors to determine that the included employees share a community of interest and are unlike all the other employees the Employer would include in the unit") (internal quotations omitted). See also *Macy's Inc. v. NLRB*, 824 F.3d 557, 568–569 (5th Cir. 2016) (rejecting argument that *Specialty Healthcare* looks solely and in isolation at whether employees in petitioned-for unit have interests in common with one another); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. 2016) (relying on *Specialty Healthcare*'s recitation of the community-of-interest test in finding that the Board "does not look only at the commonalities within the petitioned-for unit" but asks "whether the employees are organized into a *separate department* . . . [and] have *distinct* skills and training"); *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 100–101, 103 (D.C. Cir. 2017) (concluding that *Specialty Healthcare* did not depart from prior precedent, but affirming appropriateness of bargaining unit where distinctions between petitioned-for and excluded employees "concerning wages, hours, training, supervision, equipment, and physical working conditions—[were] significant"). We note that the D.C. Circuit in *Rhino Northwest* (867 F.3d at 101) cited and relied on its prior decision in *Blue Man Vegas,* supra, where the court recited the traditional community-of-interest factors as including "whether, *in distinction from other employees*, the employees in the proposed unit have different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit." *Blue Man Vegas,* supra at 421 (internal quotations omitted; emphasis added).

The Board's decision in *Specialty Healthcare* itself was enforced by the Court of Appeals for the Sixth Circuit in *Kindred Nursing Centers East*, supra, where the court found that *Specialty Healthcare* did not change the extant standard and did not constitute an abuse of discretion by the Board. Nevertheless, nothing in *Kindred Nursing Centers* suggests that the Sixth Circuit considered whether *Specialty Healthcare* improperly limits the Board's statutory role, contrary to the Act and its legislative history, by affording too much deference to the petitioned-for unit in derogation of Sec. 9(b)'s requirement that the Board "in each case" undertake a broader and more refined analysis, play a more active role, and consider the Section 7 rights of excluded as well as included employees when determining an appropriate unit. See *Macy's*, supra, 42 fn. 58 (Member Miscimarra, dissenting). While several courts of appeals have concluded that the *Specialty Healthcare* standard reflects a permissible construction of the Act, we respectfully disagree with that assessment. However, we do not base our decision to overturn the *Specialty Healthcare* standard on our position that *Specialty Healthcare* is statutorily prohibited. Rather, we base today's decision on the policies reflected in the Act and its legislative history, the Board's experience in applying the pre—and post–*Specialty Healthcare* standards, and our conclusion that the Act is best served by having the Board determine unit appropriateness in each case without favoring or disfavoring the bargaining unit described in the petition.

Consistent with our return to the traditional community-of-interest standard that the Board applied prior to *Specialty Healthcare*, the Board will continue to apply existing principles regarding bargaining units that the Board deems presumptively appropriate, and nothing in today's decision changes or abandons those principles.

Constellation Brands, 842 F.3d at 794 (quoting *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 500 (4th Cir. 2016)) (emphasis in original).[45]

In sum, the Board's prior approach, to which we return today, permits the Agency to undertake a more vigorous assessment of unit appropriateness, regardless of whether an "overwhelming" community of interest exists between excluded employees and those in the petitioned-for unit. Regardless of whether *Specialty Healthcare* is permissible, we believe abandoning the "overwhelming" community-of-interest standard better serves the Board in carrying out its responsibility to make unit determinations that assure to employees their "fullest freedom" in exercising their rights under the Act. This approach comports better with the statutory language set forth in Section 9(a), 9(b) and 9(c)(5). Obviously, the Act does not compel the Board to give extraordinary deference to the petitioned-for unit. Likewise, when the record establishes that petitioned-for employees share a community of interests with employees excluded from the petitioned-for unit, the Act does not compel the Board to disregard the interests of the excluded employees in all but those rare instances when the different employee groups share an "overwhelming" community of interests, merely because excluded employees were omitted from the petition.

Finally, although the Board overrules *Specialty Healthcare* and will no longer apply the "overwhelming community of interests" standard when determining whether an appropriate bargaining unit must include employees excluded from the petitioned-for unit, the Board retains the discretion—after engaging in an appropriate review of employee community of interests—to *approve* the unit described in the petition, provided that the unit's appropriateness is supported by the record and that the petitioned-for unit will help to assure employees their fullest freedom in exercising rights protected by the Act. Nothing in today's decision disfavors the unit configuration sought by a petitioner or described in a representation petition filed with the Board. Rather, we merely require that the Board undertake an examination of unit appropriateness "'in each case' in which a dispute arises" over that issue,[46] taking into consideration the interests of employees both within and outside the petitioned-for unit, in light of the policies and purposes of the Act.

D. The Regional Director's Decision Illustrates the Deficiencies in the Specialty Healthcare Standard

Turning to the case before us, the Regional Director's analysis under the first step of the *Specialty Healthcare* standard focused on the interests shared among employees *within* the petitioned-for group, without examining whether those interests were distinct from the interests of excluded employees. It was not until after he had shifted the burden to the Employer to demonstrate an "overwhelming community of interest" that the Regional Director considered whether the unit employees' interests are distinct from those of other production employees. The Regional Director's failure to perform a full community-of-interest analysis at step one of the *Specialty Healthcare* test is precisely the flaw that the Second Circuit identified in *Constellation Brands,* supra. Contrary to the Second Circuit's discussion in that case, however, we believe the problem is not in the way the *Specialty Healthcare* standard is being applied, but in the standard itself.[47] Despite its rote recitation of the traditional test, the *Specialty Healthcare* majority shifted to the employer the burden with respect to the critical part of the analy-

[45] Although the Second Circuit in *Constellation Brands* held that the Board erroneously *applied* the *Specialty Healthcare* standard (specifically, the first step of the *Specialty Healthcare* analysis), we believe the Board's error in *Constellation Brands* (i.e., the failure to consider whether the interests of petitioned-for employees were sufficiently distinct from the interests of excluded employees) is inherent in the *Specialty Healthcare* standard itself. Numerous Board decisions demonstrate that *Specialty Healthcare* does *not* permit consideration of the interests of employees excluded from the petitioned-for unit (except in the rare instance where employers can prove such employees have an "overwhelming community of interests" with the petitioned-for employees). In case after case applying the *Specialty Healthcare* standard, the Board has conducted precisely the type of analysis that the Second Circuit has deemed a misapplication of that standard. Thus, it appears that—in *Constellation Brands* and other cases—the Board has applied *Specialty Healthcare* precisely the way the *Specialty Healthcare* majority intended, which means the standard itself is the problem. See, e.g., *DTG Operations*, supra, 357 NLRB at 2126 (finding that employees in the petitioned-for unit share a community of interest based solely on the shared interests of employees *within* the proposed unit); *Northrop Grumman Shipbuilding*, supra, 357 NLRB at 2017 (same); *Macy's*, supra, 361 NLRB at 19–20 (same); *DPI Secuprint*, supra, 362 NLRB No. 172, slip op. at 4–5 (same); *Yale University*, 365 NLRB No. 40 (2017) (denying review of Regional Director's decision to direct nine separate elections in nine petitioned-for units of teaching fellows in nine different academic departments, based on his findings that teaching fellows within each separate academic department share a community of interest *among themselves* and that the University failed to show that the smallest appropriate unit must include all teaching fellows, despite evidence that all teaching fellows "share common duties, hours, wages, and health care benefits" and that the Graduate School of Arts and Sciences "exerts significant centralized control" over the Teaching Fellows Program). In any event, regardless of whether the first step of the *Specialty Healthcare* standard permits or requires the Board to consider the interests of employees outside the petitioned-for unit, it is clear that *Specialty Healthcare* has created significant confusion and uncertainty regarding this important issue (reflected in the above cases, among others), which is an additional consideration that supports abandoning the *Specialty Healthcare* standard.

[46] *American Hospital Assn. v. NLRB*, 499 U.S. at 611 (quoting Sec. 9(b)).

[47] See supra fn. 57.

sis—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—while also imposing on the employer a nearly insurmountable burden, thus effectively foreclosing meaningful unit determinations.[48]

Accordingly, having overruled *Specialty Healthcare*, we reaffirm that the community-of-interest test requires *the Board* in each case to determine

> 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.

United Operations, supra, 338 NLRB at 123. In weighing both the shared *and* the distinct interests of petitioned-for and excluded employees, we take guidance from the Second Circuit's decision in *Constellation Brands*. Thus, we agree with the Second Circuit that the Board must determine whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *Constellation Brands*, supra at 794. Having made that determination—applying the Board's traditional community-of-interest factors recited above—the appropriate-unit analysis is at an end. Parties who believe that a petitioned-for group improperly excludes employees whose interests are not sufficiently distinct from those of employees within the proposed group will, of course, introduce evidence in support of their position in the pre-election hearing. However, at no point does the burden shift to the employer to show that any additional employees it seeks to include share an *overwhelming* community of interest with employees in the petitioned-for unit. We make clear today that the Board, when determining unit appropriateness, is not constrained by whether or not an "overwhelming" community of interest exists between petitioned-for employees and those excluded from that unit. Finally, where applicable, the analysis must consider guidelines that the Board has established for specific industries with regard to appropriate unit configurations.

E. Response to the Dissent

Most of our dissenting colleagues' objections have been effectively addressed above. However, some of their contentions warrant the following observations.

First, there is no merit in our dissenting colleagues' statement that today's decision constitutes "de facto rulemaking without the legally-required public participation," "unprincipled corner-cutting," or "hypocrisy" because we have not invited amicus briefing. Preliminarily. the Supreme Court has clearly stated that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion," and the "Board is not precluded from announcing new principles in an adjudicative proceeding."[49] Obviously, the Board decided *Specialty Healthcare* without engaging in rulemaking, and with extremely rare exceptions, the Board has strongly favored case adjudication over rulemaking. The Board has similar discretion with respect to whether to invite briefing prior to adjudicating a major issue. We respectfully disagree with our dissenting colleagues' statements that the Board maintains a "routine practice to solicit and accept amicus briefing in significant cases" or a "tradition of inviting amicus briefing in cases . . . where the Board is considering reversing significant precedent." In the past decade, the Board has freely overruled or disregarded established precedent in numerous cases without supplemental briefing. See, e.g., *E. I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old

[48] The Regional Director's Decision and Direction of Election in the instant case also illustrates the confusion that *Specialty Healthcare* has created with respect to specific community-of-interest factors. Among these, the test asks whether petitioned-for employees are functionally integrated with the employer's other employees. The Regional Director correctly described this factor, but in applying it in the first step of his analysis, he only determined that the petitioned-for welders are functionally integrated *with each other*. He concluded that they are because they fulfill the same functions within the production process—essentially restating his rationale for concluding that the unit is readily identifiable as a group. This is precisely the sort of misconception *Specialty Healthcare* invites by eliminating, or at least appearing to eliminate, from the first step of the analysis consideration of the interests of employees in the petitioned-for group in contradistinction from those of employees excluded from that group, and by relegating that consideration to the "overwhelming community of interest" analysis at the second step of the *Specialty Healthcare* test.

[49] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). It is ironic that our colleagues cite *Specialty Healthcare* as an example of the Board soliciting briefs before making "dramatic changes to rules of general applicability governing one of the Agency's core functions." The Board did solicit briefs in *Specialty Healthcare*,[50] but the questions posed in the notice and invitation to file briefs in *Specialty Healthcare* focused primarily on the standard for determining appropriate units in nursing homes and other nonacute healthcare facilities.[51] Although the Board also noted that it was considering whether any revision of the standard applicable to nonacute healthcare facilities "should apply more generally,"[52] the decision that subsequently issued made "changes in the law"[53] affecting employers in *all* industries. In any event, as we recently stated, "[n]either the Act, the Board's Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent." *UPMC*, 365 NLRB No. 153, slip op. at 10 (2017). Finally, our dissenting colleagues obviously have no blanket commitment to "notice . . . and public participation." Just this past week, Members Pearce and McFerran dissented from a request for information that merely asked interested members of the public whether the Board's extensive rewriting of its representation-election procedures should be retained, modified or rescinded.[54]

Second, our dissenting colleagues greatly exaggerate today's ruling by asserting that abandoning *Specialty Healthcare* represents a "radical new approach," nor are they correct that the Board is departing from the principle that a proposed unit need only be *an* appropriate unit and need not be *the most* appropriate unit.[55] As stated previously, nothing in today's decision provides for the Board to reject an appropriate petitioned-for bargaining unit on the basis that a larger unit is *more* appropriate. Our decision merely underscores that the Act requires the Board "in each case" to decide *whether* the petitioned-for unit is appropriate.[56] When evaluating unit appropriateness, as the Act requires, the Board will consider different unit configurations identified in the statute (i.e., "the employer unit, craft unit, plant unit, or subdivision thereof"), and nothing in today's decision precludes the possibility that, in a given case, multiple potential bargaining units may be appropriate. We merely hold that, when a petitioned-for unit excludes certain employees, the Board will consider the possibility that excluded employees must be part of an appropriate unit, without regard to whether or not an "overwhelming" community of interests exists between the petitioned-for employees and those excluded from the unit.

Third, our colleagues suggest that abandoning the "overwhelming" community-of-interest standard will "maximize" the ability of employers "to manipulate the unit sought in the petition." As noted above, we believe the "overwhelming" community-of-interest standard unduly limits *the Board's* discretion when evaluating unit appropriateness. And under the standard we return to today, the Board obviously retains the discretion—after engaging in an appropriate review of employee community of interests—to *approve* the unit described in the petition. Again, nothing in today's decision confers upon employers the ability to "manipulate" the Board's determinations regarding unit appropriateness, nor does today's decision disfavor the unit sought by the petitioner.

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[50] See *Specialty Healthcare*, 356 NLRB at 289 (Notice and Invitation to File Briefs).

[51] Id. Indeed, the "rationale" for the Board's solicitation of briefs in *Specialty Healthcare* focused primarily on considerations relevant to bargaining-unit determinations in long-term and other nonacute healthcare facilities. Thus, the Board's solicitation of briefs stated:

> The long-term care industry in the United States, indeed around the world, has undergone a radical transformation in the past 20 years in the face of an aging population, changing consumer preferences relating to the form and location of long-term care, and a more general restructuring of the provision of health care, most importantly, a drastic reduction in the average length of stays in acute care hospitals. As the Henry J. Kaiser Family Foundation reported in 2007, "Over the past 20 years, nursing home care has changed a great deal." Moreover, "[t]here has been a proliferation of facility-like residential alternatives to nursing homes." Indeed . . . the Board did not resolve the question of appropriate units in long-term care facilities when it engaged in rulemaking ultimately limited to acute health care facilities in 1989 because of "evidence of rapid transition in the industry." In addition, employment in long-term care has experienced dramatic growth in the last 20 years and that trend is projected to continue. Finally, long-term care employees have demonstrated a persistent interest in invoking the statutory process for obtaining representation, filing almost 3000 petitions under Section 9 of the Act during the last decade.

Id. at 290 (footnotes omitted).

[52] Id. at 291.

[53] *Specialty Healthcare*, 357 NLRB at 947.

[54] See 82 Fed. Reg. 58784-58790 (2017) (NLRB Notice and Request for Information, Representation-Case Procedures) (dissenting views of Members Pearce and McFerran).

[55] Sec. 9(a) provides that majority support in favor of union representation for the purposes of collective bargaining must exist in "a unit appropriate for such purposes." It is well established that such a unit need not be the *most* appropriate unit. However, the plain language of Sec. 9(b) makes clear that the Board has the responsibility "in each case" to determine unit appropriateness. Specifically, Sec. 9(b) 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."

[56] Sec. 9(b).

Finally, we do not find persuasive our dissenting colleagues' insistence that the Board must retain the "overwhelming" community-of-interest standard because the Board, applying this standard, has found petitioned-for bargaining units inappropriate in some cases. This does not rectify the fundamental problem of the *Specialty Healthcare* standard. On its face, the "overwhelming" community-of-interest standard requires deference to the petitioned-for bargaining unit unless excluded and included employees share an "overwhelming" community of interests, and this prevents the Board from entertaining the possibility that the smallest appropriate unit must include certain excluded employees even absent an "overwhelming" community of interests. We believe this is contrary to what Congress intended, as prescribed in the Act. In any event, we believe the Act's policies and purposes are better served by overruling *Specialty Healthcare* and abandoning the "overwhelming" community-of-interests standard.

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues warranting review with respect to whether the petitioned-for unit is an appropriate unit for bargaining. Accordingly, this case is remanded to the Regional Director for further appropriate action consistent with this Order, 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.[57]

Dated, Washington, D.C. December 15, 2017

Philip A. Miscimarra, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[57] As evidenced by our remand, we express no opinion with respect to whether the petitioned-for unit is appropriate. Also, contrary to the dissent, our remand does not require a choice between the petitioned-for unit and an all-inclusive production and maintenance employee unit. We note that the Petitioner expressed a willingness at hearing to represent an alternative unit including some non-welder employees if the petitioned-for unit was found inappropriate.

MEMBERS PEARCE AND MCFERRAN, dissenting.

It is a foundational principle of United States labor law that, when workers are seeking to organize and select a collective-bargaining representative, and have petitioned the Board to direct an election to that end, the role of the Board in overseeing this process should be conducted with the paramount goal of ensuring that employees have "the fullest freedom in exercising the rights guaranteed by" the Act. Thus, as numerous courts of appeals have acknowledged, the "initiative in selecting an appropriate unit [for bargaining] resides with the employees." *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016), quoting *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991). When workers seeking a representative have selected a bargaining unit in which they seek to organize, the role of the Board in reviewing that selection is to determine whether the selected unit is an appropriate one under the statute not the unit the Board would prefer, or the unit the employer would prefer. Part of ensuring workers the "fullest freedom" in exercising their right to organize is acknowledging that they can, and should—within the reasonable boundaries that the statute delineates—be able to associate with the coworkers with whom they determine that they share common goals and interests.

With these principles in mind, this case should present no difficult issues for the Board. The Union has filed a petition to represent a bargaining unit of 102 welders at an advanced manufacturing plant in the Portland, Oregon area. The welders are a group of highly-skilled, highly-paid employees performing a distinct function. These workers have gone through specialized training and certifications unique to their positions. They do not significantly interchange with other employees, but instead perform distinct work that no other employees are qualified to do. They are readily identifiable as a group and represent two clearly delineated job classifications within the Employer's organizational structure. The 102 workers in this unit would constitute a significantly larger-than-average bargaining unit when compared to other recently certified units.

Despite these largely uncontested facts, the Employer objected to the proposed unit, claiming that the *only* appropriate unit in which these workers should be able to choose a representative would have to include all 2,565 employees who work in production and maintenance at the petitioned-for facilities. The Regional Director correctly rejected the Employer's contention, and directed an election among the welders. The workers voted 54 to 38 for the Union, and the Employer sought review of the Regional Director's decision with the Board.

The Regional Director's decision was unquestionably correct—these 102 workers clearly share a community of interest under any standard ever applied by the Board.[1] Nonetheless, the majority nullifies the Direction of Election for the unit of welders and orders the Regional Director to reconsider, under more favorable terms, the Employer's argument that welders should not be able to bargain collectively unless they can win sufficient support from all 2565 production and maintenance employees. Instead of performing its statutory duty to affirm these workers' choice to organize in an appropriate unit and allowing them to commence the collective-bargaining process with their employer, the Board's newly-constituted majority seizes on this otherwise straightforward case as a jumping off point to overturn a standard that has been upheld by every one of the eight federal appellate courts to consider it. The newly-constituted Board majority makes sweeping and unwarranted changes to the Board's approach in assessing the appropriateness of bargaining units when an employer asserts that the unit sought by the petitioning union must include additional employees. Without notice, full briefing, and public participation, and in a case involving a manifestly appropriate unit, the majority overturns *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). In its place, the majority adopts an arbitrary new approach that will frustrate the National Labor Relations Act's policies of ensuring that employees enjoy "the fullest freedom in exercising" their right to self-organization and of expeditiously resolving questions of representation. The majority's new approach will bog down the Board and the parties in an administrative quagmire—a result that the majority apparently intends.

The majority's rejection of the *Specialty Healthcare* framework reflects a failure to engage in the sort of reasoned decision-making demanded of the Board and other administrative agencies. First, the majority follows a flawed process. It seizes on a case that does not fairly present the issues that the majority decides—including, most obviously, the resurrection of a standard once applied only in non-acute healthcare facilities (a far cry from the workplace involved here). And, in a sharp break with established practice, the majority completely excludes the public from participating in this case involving the reversal of significant Board precedent.

Second, in discarding the Board's judicially-approved approach, the majority relies on arguments that have been specifically rejected by the federal courts—including the remarkable assertion that the *Specialty Healthcare* framework is contrary to the National Labor Relations Act. The majority mistakenly insists that the Board cannot retain *Specialty Healthcare* and then adopts a new standard that is inferior to *Specialty Healthcare* in every important respect, including consistency with the statute.

As reflected by its favorable reception in the federal courts, the *Specialty Healthcare* framework—itself based on an earlier decision of the U.S. Court of Appeals for the District of Columbia Circuit—represented a major improvement to the Board's approach in this area. It brought greater clarity and predictability to unit determinations, while vindicating the goals of federal labor law. There is simply no justifiable reason—certainly not a change in the Board's membership alone—to reverse course and abandon a doctrine that has been so widely accepted and praised. For the reasons that follow, we dissent.

I.

Before addressing the serious shortcomings of the majority's decision, we marvel at the majority's hypocrisy in denying briefing on such a critical issue.[2] A key contention of today's majority decision is that the Board's *Specialty Healthcare* framework allegedly provides too little process by the Board in examining petitioned-for units. Yet, that professed care and concern for process is wholly absent from the majority's consideration of whether and how to reverse *Specialty Healthcare*. The majority not only breaks with the Board's tradition of inviting amicus briefing in cases such as this one where the Board is considering reversing significant precedent, but it fails to even grant the *parties* their traditional opportunity to brief the issue following the Board's grant of review. The choice to issue such a momentous decision—fundamentally changing the Board's unit determination process—without allowing any additional input is completely inconsistent with the Board's practices, and with principles of reasoned decisionmaking. Instead, the majority has undertaken a dramatic overhaul of the Board's jurisprudence through a process carefully calculated to avoid public input.

Until today, inviting briefing over whether to reverse precedent in the representation-case context—as the Board did in *Specialty Healthcare* itself[3]—has been a

[1] Indeed, welders-only units in this exact industry have been approved by the Board in the past. See, e.g., *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).

[2] Member Pearce and Member McFerran voted to issue a notice and invitation to file briefs, but the majority disagreed.

[3] 357 NLRB at 934, citing *Specialty Health Care & Rehabilitation Center of Mobile*, 356 NLRB 289 (2010) (notice and invitation to file briefs). The notice was issued on December 22, 2010, and the Board's decision issued on August 26, 2011 – reflecting careful consideration of

Board norm. Indeed, as we clarify in dissent to *Boeing*—another decision flipping longstanding precedent rushed out without public input—it has become the Board's routine practice to solicit and accept amicus briefing in significant cases.[4] In the representation-case context specifically, over the past decade the Board has consistently invited amicus briefing whenever it is contemplating reversing precedent.[5] (None of the cases cited by the majority diminish the fact that inviting briefs has become an established Board norm—and the majority tellingly cites no recent case in which the Board refused to seek briefing over objections from a member.[6]) It has also

the issues decided and the arguments presented by the parties and the public.

The majority acknowledges, as it must, that the *Specialty Health Care* Board invited briefing—but implies that the public did not, in fact, have advance notice of the ultimate scope of the Board's decision because the notice "focused primarily on the standard for determining appropriate units in nursing homes and other nonacute healthcare facilities." But the notice and invitation specifically invited the public to address two questions that made it plain that the Board was contemplating a change in appropriate-unit jurisprudence generally:

> (7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute healthcare facilities[?] *Should such a unit be presumptively appropriate as a general matter[?]*
>
> (8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.,* 131 NLRB 909, 910 (1961) [a case outside the nonacute healthcare industry], the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest"[?]

356 NLRB at 290 (emphasis added). Notably, a dissenting member objected specifically to the scope of the questions on which briefing was invited, arguing that the case involved only a nonacute healthcare facility and that a broader decision would be inappropriate. Id. at 293-294 (dissent of Member Hayes). The majority responded, defending the breadth of the questions it had posed. Id. at 291.

[4] *The Boeing Company*, 365 NLRB No. 154, slip op. at 31–33 (2017) (Member McFerran, dissenting in part).

[5] See, e.g., *Columbia University*, 364 NLRB No. 90 (2016) (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the National Labor Relations Act); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (whether the Board should adhere to its decision in *Oakwood Care Center*, 343 NLRB 659 (2004), which disallowed inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers); *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (whether the Board should adhere to its existing joint employer standard as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), or adopt a new standard); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (whether the Board should sustain an election objection and overrule its decision in *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), and adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use it for Sec. 7 activity, subject only to the need to maintain production and discipline); *New York University*, Case 02–RC–023481, Notice and Invitation to File Briefs (filed June 22, 2012), *available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3252/ntc_02-rc-23481_nyu_and_polytechnic_notice___invitation.pdf* (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the NLRA); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (whether the Board should modify or overrule its decision in *M.V. Transportation*, 337 NLRB 770 (2002), concerning the bargaining obligations of a successor employer with an incumbent union); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (whether the Board should reconsider its decision in *Dana Corp.*, 351 NLRB 434 (2007), concerning whether, and how long, employees and other unions should have to file for an election following an employer's voluntary recognition of a union); *Dana Corp.*, 351 NLRB 434 (2007) (whether the Board should modify its recognition bar doctrine as articulated in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001)).

Indeed, the Board has invited amicus briefing even on representation cases which merely raise unusual jurisdictional issues. See, e.g., *Temple University Hospital Inc.*, Case 04–RC–162716, Notice and Invitation to File Briefs (filed Dec. 29, 2016), *available at https://apps.nlrb.gov/link/document.aspx/ 09031d45822fb922* (whether the Board should exercise its discretion to decline jurisdiction over the employer and extend comity to a unit certified by the Pennsylvania Labor Relations Board); *Chicago Mathematics and Science Academy Charter School, Inc.*, Case 13–RM–001768, Notice and Invitation to File Briefs (filed January 10, 2011), *available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/chicago_mathematics_brief.pdf* (whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board); *Firstline Transportation Security*, 347 NLRB 447 (2006) (whether the Board should assert jurisdiction over a private company contracting with the Transportation Security Administration for passenger and baggage screening).

[6] The majority asserts that there are "numerous" cases where the Board "has freely overruled or disregarded established precedent . . . without supplemental briefing." But the six decisions the majority cites are easily distinguishable from this one.

None of those cases—*E. I. du Pont de Nemours*, 364 NLRB No. 113 (2016); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016); *Pressroom Cleaners,* 361 NLRB 643 (2014); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014—was a representation case involving the wholesale reconsideration of the standard governing one of the Agency's core statutory functions: to determine an appropriate unit for bargaining. Moreover, in none of these cases did the Board reach out to decide an issue that was not even presented in the case; here, the majority resurrects the empirical community-of-interest standard for nonacute healthcare facilities, which the Employer plainly is not, absent any relevant request or briefing.

Additionally, in *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed requesting, respectively, that the Board reverse or adhere to extant Board precedent.

Further, *Du Pont* and *Lincoln Lutheran* were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of

been the Board's typical practice in representation cases, to decide first *whether* to grant review, and if review is granted, to then allow more extensive briefing by the parties on the issues on which the Board grants review. See Board's Rules and Regulations Section 102.67(c)-(i). But here, the majority grants review and reverses precedent in one fell swoop, without even providing the parties an opportunity to file briefs on whether and how to change the applicable legal standard. As a consequence, the sum total of briefing to the Board on whether *Specialty Healthcare* should be overruled, amounts to less than 10 pages of the Employer's brief *requesting* Board review and virtually no input from the petitioning Union on the issue.

The majority then decides an issue obviously not presented in this case (albeit addressed in *Specialty Healthcare*): the standard for determining an appropriate bargaining unit in nonacute health care facilities, such as nursing homes. In *Specialty Healthcare*, the Board—overruling *Park Manor Care Center*, 305 NLRB 872 (1991)—held that traditional community-of-interest considerations would apply in such settings (as in other industries) and rejected the application of the special test that *Park Manor* had crafted solely for nonacute health care facilities, the so-called "pragmatic or empirical community of interests" approach. The *Specialty Healthcare* Board correctly described the *Park Manor* approach as "both confusing and misguided," explaining that it mistakenly focused on the outdated and inapplicable rulemaking record leading to the Board's 1989 Health Care Rule, which was limited to *acute* care facilities. 357 NLRB at 939. Today, in a case involving solely welders in the aerospace industry, the majority resurrects the *Park Manor* approach—with no notice to the public, no briefing, and no evidentiary record. The majority's approach is not legitimate adjudication, but de facto rulemaking without the legally-required public participation. An administrative agency like the Board "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983), quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). But in resurrecting *Park Manor*, the majority has examined no relevant data, articulated no satisfactory explanation, and established no rational connection between the facts found in this adjudication and the choice to return to the "empirical or pragmatic community of interests" approach.

There is no rational reason for the majority to engage in such unprincipled corner-cutting. No court has so much as questioned the validity of *Specialty Healthcare*. And there is no justification for violating Board norms to rush out a decision now. A new Board majority would have had ample opportunity to reconsider *Specialty Healthcare* without acting contrary to the Board's procedural norms and principles of reasoned decisionmaking.

In a case such as this—involving dramatic changes to rules of general applicability governing one of the Agency's core functions—it is unconscionable for the Board to refuse to solicit briefs from interested parties.[7] It is a dereliction of the duty we owe to the parties and the labor-management community. In *Specialty Healthcare*, which today's decision overrules, the Board issued an invitation to file briefs, and then received at least a dozen substantive briefs filed by the Board's stakeholders. The Board received briefs from the Chamber of Commerce, the Coalition for a Democratic Workplace, the American Hospital Association, the American Healthcare Association, the Retail Industry Leaders Association, the Ranking Member of the Senate Health, Education, Labor, and Pension Committee and colleagues, the AFL–CIO, the Service Employees International Union, the International Union of Operating Engineers, the United Steelworkers, and others. The Board granted extensions of time for briefing and allowed for supplemental briefs to respond to issues raised in the first round of briefing. But here, the Majority rejected our express request to solicit input from our stakeholders who will be affected by the Board's decision. Does the majority think that the public has nothing to add to our deliberations?

The Supreme Court has made clear that Board adjudication is subject to the Administrative Procedure Act's (APA) requirement that an agency engage in "reasoned decisionmaking." *Allentown Mack Sales & Service v.*

deciding between two conflicting branches of precedent. See *E. I. du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel.* See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history).

Finally, as already pointed out, in none of these cases did the Board refuse to request briefing over the objection of one or more Board members.

These six cases thus stand in sharp relief from the present case.

[7] The view expressed by Member Pearce that it is appropriate to provide for public briefing on the subject of reversing the *Specialty Healthcare* legal standard applicable to a massive swath of the Agency's caseload, ironically finds support in his new colleagues' recent testimony during their Senate confirmation process. He agrees with and embraces their sentiments on the importance of public input to the Board's decisional process. In that regard, one of his colleagues pledged to "seek public input where appropriate," and described case adjudication as "a long process, but when it's done right it results in good decisions."

NLRB, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id. To be sure, the "Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). But the Supreme Court has left open the possibility that in some "situations . . . the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." Id. This case, along with some others issued this month by the majority, are clear examples of abuse of discretion. Without good reason, the majority has failed to "solicit[ ] the informed views of those affected in industry and labor before embarking on a new course" and has made no effort to acquire the "relevant information necessary to mature and fair consideration of the issues." Id. at 295. The majority's deficient process, predictably, has led to a manifestly deficient decision.

II.

In *Specialty Healthcare &Rehabilitation Center of Mobile* (*Specialty Healthcare*), supra, affd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Board reviewed and clarified its standards for making unit determinations when a representation petition is filed and the parties cannot agree on an appropriate unit in which to conduct an election to determine whether the employees wish to be represented for purposes of collective bargaining with their employer. *FedEx Freight, Inc.*, 816 F.3d at 522. The Board reiterated that its initial inquiry remains the same: to examine the petitioned-for unit to determine if it is appropriate. Id. at 522, citing *Specialty Healthcare*, 357 NLRB at 941.

The Board articulated a two-step test for determining whether the petitioned-for unit is an appropriate unit. *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 440 (3d Cir. 2016). In the first step, the Board evaluates whether the petitioned-for employees are readily identifiable as a group and applies the traditional criteria to analyze whether the petitioned-for employees share a community of interest. This traditional community-of-interest analysis examines:

> [W]hether 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.

Specialty Healthcare, 357 NLRB at 942–943, 945 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

The Board then clarified that, in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees. *Specialty Healthcare*, 357 NLRB at 934. By clarifying the standard to be used where a party contends that a petitioned-for unit is not appropriate because it does not contain additional employees, *Specialty Healthcare* serves the statutory purpose of assuring to employees the fullest freedom in exercising the rights guaranteed by the Act, reduces unnecessary litigation and advances the Act's policy of expeditiously resolving questions concerning representation, permits employers to order their operations with a view toward productive collective bargaining should employees choose to be represented, and leads to more predictable and consistent results. *Specialty Healthcare*, 357 NLRB at 945–946, enfd. *in pertinent part, Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d at 561, 563.

To date, employers have challenged the validity of *Specialty Healthcare* in eight different circuits, raising arguments echoed by today's majority. Nevertheless, every one of those circuits has upheld *Specialty Healthcare*. *See Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016) , cert. denied, 137 S.Ct. 2265 (2017); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017).

But, apparently, eight is not enough for the majority. Instead, the majority today overturns *Specialty Healthcare*, and *purports* to return to the status quo ante. But that is not what the majority does. Instead, the majority adopts a radical new approach that purportedly focuses on the Section 7 rights of employees outside the petitioned-for unit. As we explain below, this new ap-

proach will frustrate the Act's policies and entangle the Board and the parties in a process that encourages unnecessary litigation and undermines the Act's goal of expeditiously resolving questions concerning representation.

III.

The majority offers few factual and legal arguments in support of its decision. Most prominent is the unfounded assertion that the test articulated in *Specialty Healthcare* is somehow contrary to the National Labor Relations Act.

First, the majority contends that *Specialty Healthcare* contravenes Section 9(b)'s requirement that the Board decide "in each case" the appropriate unit in which to conduct an election. Citing various language that Congress considered in enacting the Wagner and the Taft Hartley Acts, the majority claims that Section 9(b) calls for the Board to make a more robust unit determination than *Specialty Healthcare* allows.

However, the majority's claims of statutory infirmity fail as they ignore authoritative Supreme Court precedent and misstate what *Specialty Healthcare* actually provides. The-Supreme Court has already reviewed Section 9(b)'s "sparse legislative history" and construed the statutory language, and has concluded that all Section 9(b) requires in relevant part is that when there is a dispute over the unit in which to conduct the election, the Board must resolve it. *American Hospital Assn. v. NLRB*, 499 U.S. at 611, 613. It certainly does not preclude the Board from evaluating the appropriateness of a unit pursuant to broadly applicable principles. Indeed, the Court has expressly stated that the "requirement that the Board exercise its discretion in every disputed case cannot fairly or logically be read to command the Board to exercise standardless discretion in each case." Id. at 612.

Consistent with this guidance, *Specialty Healthcare* requires the Board to exercise its discretion to determine whether the petitioned-for unit is appropriate. Thus, under *Specialty Healthcare*, the Board cannot direct an election in a petitioned-for unit when that unit is disputed by an employer without first concluding, among other things, that (1) the petitioned-for employees are readily identifiable as a group; (2) the petitioned-for employees constitute an appropriate unit under the traditional community of interest test; and (3) the employer fails to show that the employees it seeks to add to the unit share an overwhelming community of interest with the petitioned-for employees. See *Rhino Northwest, LLC v. NLRB*, 867 F.3d at 101 (rejecting employer's claim that the *Specialty Healthcare* framework has caused the Board to abdicate its statutory duty to decide the appropriateness of a proposed unit "in each case."). The majority cannot plausibly argue that the Board is not deciding in each case whether the unit is appropriate.

The majority also claims that *Specialty Healthcare* contravenes Section 9(c)(5) by making the extent of organizing controlling. The majority appears to reason that this is so because, in its view, the petitioned-for unit will always be deemed appropriate under *Specialty Healthcare*, except in the "rare" case where the employer can demonstrate that additional employees outside the unit share an overwhelming community of interest with the petitioned-for employees.

However, the courts have uniformly rejected the majority's position. Section 9(c)(5) of the Act provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling." The Supreme Court has construed this language to mean that although "Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization, . . . the provision 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." *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441–442 (1965). In other words, as the Board noted in *Specialty Healthcare*, "the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner's preference), that the proposed unit is an appropriate unit." *Specialty Healthcare*, 357 NLRB at 942.

Specialty Healthcare plainly does not permit the Board to find a petitioned-for unit appropriate based only on the extent of organization. Rather, under *Specialty Healthcare*, the Board must apply the multifactor, traditional community-of-interest test to determine whether the petitioned-for employees constitute an appropriate unit—aside from the fact that the union has organized the unit. See *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d at 564–565 (*Specialty Healthcare* does "not assume" that the petitioned-for unit is appropriate, but instead mandates application of the community-of-interest test to find that there are substantial factors establishing that the petitioned-for unit is appropriate aside from the fact that the union has organized it). The Board does not apply the overwhelming community-of-interest standard until after it has determined that the petitioned-for employees are readily identifiable as a group and share a community of interest under the Board's traditional test. See *Rhino Northwest, LLC v. NLRB*, 867 F.3d at 101 (*Specialty Healthcare* does not give controlling weight to the extent of employees' organization be-

cause it does not apply the overwhelming community of interest standard until after the proposed unit has been shown to be prima facie appropriate under the Board's traditional community of interest analysis). Accord: *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d at 495–497.[8]

Nor does *Specialty Healthcare* impose a "next-to-impossible burden" on nonpetitioning parties. The majority's claim to that effect is empirically false, as the courts have recognized. See *Rhino Northwest, LLC v. NLRB*, 867 F.3d at 101 (both before and after *Specialty Healthcare*, the Board and its Regional Directors have rejected proposed units); *NLRB v. FedEx Freight, Inc.*, 832 F.3d at 444 ("the Board has been clear that it will not approve 'fractured' units or arbitrary segments of employees."); *FedEx Freight, Inc. v. NLRB*, 816 F.3d at 525–526 (same). Thus, there are numerous examples of the Board's Regional Directors rejecting units proposed by petitioners.[9] The Board has also rejected a number of proposed units in published cases.[10]

Thus, contrary to the majority's unsupported assertions, the outcome of a unit determination under *Specialty Healthcare* is neither foreordained nor coextensive with the extent of organizing. Instead, the courts have uniformly found that the Board's approach correctly provides an individualized inquiry into the appropriateness of the unit, consistent with what the Act requires.

IV.

The majority also argues that *Specialty Healthcare* "constituted a[] departure from the standards that have long governed the Board's appropriate bargaining-unit determinations". This argument—like the majority's statutory claims—has been uniformly rejected by every reviewing court to consider the question.

Repeating then-Member Miscimarra's dissent in *Macy's Inc.*, 361 NLRB 12, 32–44 (2014), the majority claims that *Specialty Healthcare* departs from precedent because it permits the Board to narrowly focus the appropriate unit analysis on interests that employees in the petitioned-for unit share while discounting—or eliminating altogether—any assessment of whether those shared interests are sufficiently distinct from the interests of the excluded employees to warrant a finding that the petitioned-for unit is appropriate. But *Specialty Healthcare*'s community of interest analysis at step one did not just examine the interests of the petitioned-for CNAs in isolation; it contrasted them with those of other employees. See *Specialty Healthcare*, 357 NLRB at

[8] The majority is also simply wrong in claiming that *Specialty Healthcare* deems the petitioned-for unit "controlling . . . even when a broader unit is clearly compelled by" industry-specific guidelines or standards, in contravention of *Specialty Healthcare*'s pledge that it was not intended to disturb rules developed by the Board regarding particular industries. Then-Member Miscimarra made precisely the same claim in *Macy's, Inc.*, 361 NLRB 12, 40–42 (2014), and the Fifth Circuit squarely rejected it. See *Macy's Inc. v. NLRB*, 824 F.3d at 570 ("even if a store-wide unit were presumptively appropriate in the retail industry—a contention to which the Board strenuously objects . . .—the application of *Specialty Healthcare* to the retail context would not mark a deviation from Board precedent" because "'the suggestion that there is only one set of appropriate units in an industry runs counter to the statutory language and the main corpus of [Board] jurisprudence, which holds that the Board need find only that the proposed unit is an appropriate unit, rather than the most appropriate unit, and that there may be multiple sets of appropriate units in any workplace.'") (citation omitted). Thus, even where the Board has declared certain units to be presumptively appropriate, a union is not required to petition for one of those units. See *Macy's, Inc.*, 361 NLRB at 27–28 fn.65. And, as shown, when a union petitions for a unit that is not presumptively appropriate, the Board does not assume that the petitioned-for unit is appropriate, but rather applies the traditional community-of-interest test at step one to determine if the petitioned-for unit is appropriate. Accordingly, the Board in no way deems the petitioned-for unit "controlling."

[9] For example, Regional Directors have frequently concluded that nonpetitioning parties had met their burden of showing that additional employees share an overwhelming community of interest with petitioned-for employees. See, e.g., *Benteler Automotive Corp.*, 25-RC-135839 (October 28, 2014); *Dyno Nobel, Inc.*, 19-RC-075260 (March 29, 2012); *Golden State Overnight Delivery Service*, 31-RC-185685 (Nov 4, 2016); *Jawanio, NJ*, 22–RC–084183(Aug. 9, 2012); *PHS/MWA Aviation Services (WENCOR)*, 21–RC–184349 (Oct. 20, 2016); *Weyerhouser NR Company*, 06–RC–079980, (June 11, 2012); *Alternative Mechanical, LLC*, 19–RC–070030 (Jan. 11, 2012); *NYC 2-Way International, Ltd.*, 29–RC–063657 (Nov. 17); *GKN Aerospace Monitor, Inc.* 29–RC–062580 (Mar. 9, 2012); *General Dynamics Land Systems,* 19–RC–076743 (May 31, 2012); *General Electric Co.*, 14–RC–073765 (Mar. 12, 2012); *Allied Blending & Ingredient, Inc.,* 25–RC–155188 (July 21, 2015); *Loyola Marymount University*, 31–RC–118850 (Jan. 15, 2014); *Lotz Trucking*, 25–RC–165041 (Dec 24, 2015); *Faurecia Emissions Control Technologies USA, LLC*, 09–RC–139624 (Nov. 24, 2014); *MHM Services*, 04–RC–100225 (April 22, 2013) ; *Keystone Automotive Industries*, 32–RC–137319 (Jan. 23, 2015); *First Student, Inc.*, 21–RC–089564 (Oct. 24, 2012); *BFI Waste Services LLC*, 15–RC-–165961 (Jan. 6, 2016); *Woods Maintenance Services* 31–RC–132303 (Nov. 7, 2014); *Becker College,* 01–RC–081265 (June 22, 2012); *Ritz-Carlton Hotel Co.* 20–RC–187862 (December 6, 2016); *Down to Earth Landscaping, Inc.*, 04–RC–076495 (April 6, 2012); *IKEA US East, LLC*, 01–RC–176529 (June 16, 2016); *Curtis Bay Energy, Inc.,* 05–RC–137563 (Oct. 27, 2014); *United Way Community Services*, 27–RC–169883 (Mar. 17, 2016).

[10] See, e.g., *Odwalla, Inc.,* 357 NLRB 1608 (2011) (rejecting petitioned-for unit of route sales drivers, relief drivers, warehouse associates, and cooler technicians because merchandisers shared an overwhelming community of interest with the petitioned-for employees); *Bergdorf Goodman*, 361 NLRB No. 11 (2014) (rejecting petitioned-for unit of women's shoe sale associates because they do not share a community of interest); *K&N Engineering, Inc.*, 365 NLRB No. 141 (2017) (in ruling on determinative challenges, Board reversed RD and rejected petitioner's claim that maintenance techs should not be included in stipulated unit absent a showing that they share an overwhelming community of interest with employees in the stipulated unit; Board found the stipulated unit was inappropriate in the first instance, and therefore it need only be shown that the maintenance techs shared a community of interest to merit inclusion).

942-943 (noting the CNAs' distinct training, certification, supervision, uniforms, pay rates, work duties, shifts and work areas).[11]

It is thus not surprising that the courts have uniformly rejected the majority's contention. As the Eighth Circuit explained in affirming *Specialty Healthcare*, *Specialty Healthcare*'s test "does in fact compare the interests and characteristics of the workers in the proposed unit with those of other workers . . . [and] . . .[t]he precedents relied on by the Board in *Specialty Healthcare* make clear that the Board does not look at the proposed unit in isolation." *FedEx Freight, Inc. v. NLRB*, 816 F.3d at 523. Similarly, the Fifth Circuit found the precise claim "unconvincing," noting that the Board's community-of-interest test articulated in *Specialty Healthcare* "does not look only at commonalities within the petitioned-for unit," and "conform[s] to established precedent." *Macy's Inc. v NLRB*, 824 F.3d at 568–569. See also *NLRB v. FedEx Freight, Inc.*, 832 F.3d at 440 (holding that *Specialty Healthcare*'s initial community-of-interest test is "in line with Board precedent."); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d at 792 ("Step one of *Specialty Healthcare* expressly requires the RD to evaluate several factors relevant to 'whether the interests of the group sought were sufficiently distinct from those of other employees to warrant the establishment of a separate unit.'") (citation omitted).[12]

The majority claims that *Specialty Healthcare* constitutes a departure from precedent for the additional reason that it imposes on nonpetitioning parties (mostly employers) the new, heightened burden of proving that the employees it seeks to add to the petitioned-for unit share "an overwhelming community of interest" with the petitioned-for employees before those employees will be added to unit. However, as the Board explained in *Specialty Healthcare*, the Board and the courts had consistently required a heightened showing from the party arguing for the inclusion of additional employees in a unit that satisfies the traditional community of interest test. *Specialty Healthcare,* 357 NLRB at 944. Citing the D.C. Circuit's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (2008), the Board noted "Although different words have been used to describe this heightened showing, in essence, a showing that the included and excluded employees share an overwhelming community of interest has been required." *Specialty Healthcare*, 357 NLRB at 944.[13]

Not surprisingly therefore the courts have also unanimously rejected the claim, repeated by the majority today, that the overwhelming community-of-interest test at

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[11] The majority also notes that *Specialty Healthcare* overruled *Park Manor Care Center's* test for determining appropriate bargaining units in non-acute healthcare facilities. That is true but irrelevant, for this case does not involve a nonacute healthcare facility and therefore this case would not have been governed by *Park Manor* even had the Board never decided *Specialty Healthcare*.

[12] The majority claims that there have been instances where the *Specialty Healthcare* test has been misapplied. Even assuming that is true, it does not warrant throwing the baby out with the bath water and overturning it. Indeed, in *Constellation Brands*, the Second Circuit upheld the *Specialty Healthcare* test, notwithstanding that it found that the test had been misapplied in that case. See *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d at 787. See also *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d at 499 ("We need not . . . hold that an application of the *Specialty Healthcare* standard will never run afoul" of the Act in order to uphold it). Parties who believe that the test has been misapplied by a Regional Director may file a request for review with the Board; and parties who believe that the Board has misapplied the test—or failed to correct Regional Director misapplications—may seek review in an appropriate court of appeals via the well-established technical 8(a)(5) procedure. The majority distorts the holding of these cases—that explicitly upheld the *Specialty Healthcare* analysis—to support its decision to reverse *Specialty Healthcare*. The majority fails to appreciate that the issue of whether the employees have a distinct community of interest under the community-of-interest test in step one of the *Specialty Healthcare* analysis does not answer the question of whether the only appropriate unit includes employees who were not in the petitioned-for unit, which is the question in step two. On that question, the Board in *Specialty Healthcare* stated—and the circuit courts have unanimously affirmed—that the relevant question is whether the employer has established that the excluded employees share an overwhelming community of interest. 357 NLRB 934,945, fn. 28. The Board's reason for allocating the burden as it did was because it is consistent with the Board's obligation to first consider whether the petitioned-for unit is appropriate, it parallels the Board's jurisprudence when a unit is presumptively appropriate, and because the employer is in full, and often near-exclusive, possession of the relevant evidence. The majority's decision eliminates that burden allocation, without addressing the reasons for doing so discussed in *Specialty Healthcare*, and replaces it with an amorphous inquiry into whether employees in the petitioned-for unit share an unspecified level of community of interest with the excluded employees.

We also note in passing that although the majority claims that the Board denied the employer's request for review of the Regional Director's decision to direct nine separate elections in *Yale University*, 365 NLRB No. 40 (2017), the Board in fact merely denied the employer's request for extraordinary relief (expedited review and a stay or impoundment of ballots). As the majority is well aware, the merits of the Employer's request for review remain pending before the Board.

[13] Because the use of slightly varying verbal formulations to describe the standard applicable in this recurring situation did not well serve the Act's purposes, the Board took the opportunity to clarify that when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at 945. The D.C. Circuit recently concluded that it was "fitting" for the Board to do so. *Rhino Northwest, LLC v. NLRB*, 867 F.3d at 100.

step 2 constitutes a departure from precedent. Writing for the Seventh Circuit, Judge Posner noted, "'overwhelming community interest' is not the invention of the *Specialty Healthcare* case; one can find it in two 40–year–old NLRB cases . . . . Moreover, 'overwhelming' appears to be treated by the NLRB as a synonym for 'inappropriate, . . . for 'truly inappropriate,' . . . and for 'clearly inappropriate—terms that pull the sting of 'overwhelming.'" *FedEx Freight, Inc. v. NLRB*, 839 F.3d at 638. Similarly the Sixth Circuit concluded that it is "just not so" that the overwhelming community of interest standard represents a material change in the law. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d at 561 ("The Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare II* is not new.") And after conducting an independent review of the relevant precedent, the D.C. Circuit recently stated that the "'overwhelming community of interest' formulation . . . encapsulate[s] decisions that, in our words, 'conform[ed] to a consistent analytic framework'", leading the court to "join seven of our sister circuits in concluding that *Specialty Healthcare* worked no departure from prior Board decisions." *Rhino Northwest, LLC v. NLRB*, 867 F.3d at 100–101.[14]

V.

In lieu of *Specialty Healthcare*, the majority advocates that when the parties cannot agree on the unit in which to conduct an election, the Board should not focus on the Section 7 rights of employees who seek to organize in the petitioned-for unit, but must instead consider the statutory interests of employees *outside* the unit, as advanced by the employer. In the majority's view, in other words, the statutory right of employees to seek union representation, as a self-defined group, is contingent on the imputed desires of employees outside the unit who have expressed no view on representation at all—with the employer serving as their self-appointed proxy. Of course, the extent of employees' freedom of association (which, by definition, includes the freedom *not* to associate) is not a matter for *employers* to decide. As the Supreme Court has made clear, the Board is entitled to "giv[e] a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

[14] The Board's decision in *Specialty Healthcare* has also been criticized for facilitating a proliferation of micro-units that would wreak havoc in the workplace. Like other criticisms of the decision, this has been proven baseless, and the majority tellingly does not invoke this canard to justify overturning *Specialty Healthcare*. Indeed, *Specialty Healthcare* has not driven down the median size of bargaining units. See *www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections.*

As we show below, (A) the majority's approach is inconsistent with the statute and will frustrate the Act's policies; (B) *Specialty Healthcare* does not impair the Section 7 rights of employees outside the petitioned-for unit; and (C) the majority's approach will entangle the Board and the parties in an administrative quagmire.

A.

The majority's approach is plainly inconsistent with the statute and will frustrate the Act's policies. In Section 1 of the Act, Congress declared it to be the policy of the United States to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment[.]" The first and central right set forth in Section 7 of the Act is the employees' "right to self-organization." As the Board has explained, "A key aspect of the [Section 7] right to 'self-organization' is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." *Specialty Healthcare*, 357 NLRB at 941 fn. 18. The majority's approach flies in the face of Section 9(a)'s instruction that representatives need be designated only by a majority of employees in "a unit appropriate" for collective bargaining, not in "the most appropriate" unit. The majority's approach breaches Section 9(b)'s command that the Board's unit determinations "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act, i.e., that of *self*-organization and collective bargaining.[15] The majority ignores the Supreme Court's authori-

[15] Indeed, the legislative history of 9(b) shows that Congress used the language "fullest freedom" to refer to the ability of employees to organize in a unit with co-workers who share a community of interest and that the Board should be limited in its discretion to find that only a larger unit is appropriate. The Labor Management Relations Act (LMRA or Taft-Hartley) of 1947 amended Sec. 9(b) of the NLRA to include the relevant language—that the Board's unit determination decisions shall protect the fullest freedom of employees' right to organize. The language originated with the draft legislation from the Senate Committee on Labor and Welfare. The Committee report explains that the purpose of the amendments to 9(b) was "to limit the Board's discretion in determining the kind of unit appropriate for collective bargaining." Senate Report No. 105 on S. 1126, reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 (LMRA Hist.) 431 (1948). To effectuate that policy, the LMRA would amend the NLRA to provide greater protection for professionals and craft units to organize separately. In Congresses' view, the Board's protection of the right to organize by subsets of employees had been inadequate. Accordingly, the central rationale for the relevant statutory language was to limit the Board's discretion in finding less than employer-wide units inappropriate. On the Senate floor, Senator Taft, the chief sponsor of the LMRA, stated that the purpose of the amendment to 9(b) was to give "greater power to the craft unions to organize separately." 2 LMRA History 1009 (1948). Therefore, the majority decision—arguing that the Board must more thoroughly consider the interest of excluded employees in order to protect all employees' fullest free-

tative interpretation of Section 9(c)(5) to the effect that the Board may consider the extent of organization in making unit determinations, so long as it is not the controlling factor. And its approach fails to acknowledge that pursuant to Section 9(c)(1), the unit described in the petition "necessarily drives the Board's unit determination." *Overnite Transportation Co.*, 325 NLRB 612, 614 (1998).

It is because of the foregoing statutory language that the Board and courts have long recognized that employees are *not* required to seek what the Board would consider to be the most appropriate unit. See, e.g., *NLRB v. FedEx Freight, Inc.*, 832 F.3d at 439 (in upholding *Specialty Healthcare*, the Third Circuit notes that the "Supreme Court has held that section 9(a) 'implies that the initiative in selecting an appropriate unit resides with the employees' and that 'employees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit.'"); *FedEx Freight, Inc. v. NLRB*, 816 F.3d at 523 (noting the "'longstanding principle' of unit determination under the community of interest test that 'the Board need only certify '*an* appropriate' bargaining unit, rather than '*the* most appropriate' one'") (citations omitted). In fact, until today, the Board's "declared policy" was "to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining." *Overnite Transportation Co.,* 322 NLRB 723, 723 (1996); *Black & Decker Mfg Co.*, 147 NLRB 825, 828 (1964). Even prior to *Specialty Healthcare*, it was black letter law that once the Board determines that the petitioned-for unit is appropriate, the Board's inquiry ends. See, e.g., *Boeing Co.*, 337 NLRB 152, 153 (2001) ("The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends."); *Wheeling Island Gaming, Inc.*, 355 NLRB 637, 637 fn. 2 (2010); *Metropolitan Life Insurance Co.*, 156 NLRB 1408, 1415 (1966) ("[T]here is no reason to compel a labor organization to seek representation in a larger unit than the one requested unless the smaller requested unit is itself inappropriate."). See *FedEx Freight, Inc. v. NLRB*, 816 F.3d at 523 ("The Board explained well before *Specialty Healthcare* that '[i]n deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate.' If the Board concludes that the petitioned for unit is 'an appropriate unit,' it has fulfilled the requirements of the Act and need not look to alternative units." (internal cites omitted)).

The majority's approach stands well-settled principles on their head. First, under the majority's approach, even if the petitioned-for unit is appropriate under the Act, the Board may not direct an election in that unit if the Board concludes that another unit would be more appropriate. Until today, the Board had refused to do precisely that. See *Overnite Transportation Co.*, 322 NLRB at 725 (requiring the Board to decide which is the best or most appropriate unit "would stand on its head the statutory concept of *an* appropriate unit. We do not believe that Congress intended such an outcome, especially since Congress set forth more than one appropriate unit in Section 9(b).") (emphasis in original); *Montgomery Ward & Co., Inc.*, 150 NLRB 598, 601 (1964) ("the issue here is simply whether [the petitioned-for unit] is appropriate in the circumstances of *this* case, and *not* whether another unit . . . would also be appropriate, more appropriate, or most appropriate."). [16]

Second, as previously discussed, the majority decision disregards the Board's decades-old policy, approved by the Supreme Court, that the petitioner's desire is always a relevant consideration.[17] Relatedly, the majority casts aside extant Board law that, when a proposed unit describes employees readily identifiable as a group who share a community of interest, "both the Board and courts of appeals have necessarily required a heightened showing to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees." *Specialty Healthcare*, 357 NLRB at 944, *citing Blue Man Vegas, LLC, v. NLRB,* 529 F.3d at 421. The majority rejects this existing framework and replaces it with an open-ended inquiry that provides no standard for uniformly evaluating whether a petitioned-for unit is appropriate and no guidance to employees interested in bargaining collectively.[18]

dom—is in significant tension with the legislative history of the statutory language on which it purports to rely and subverts the basic principles underlying employees' freedom of association.

[16] And as explained below, by expanding the nature of the Board's unit inquiry, the majority's approach clearly frustrates "the Act's policy of expeditiously resolving questions concerning representation." *Northeastern University*, 261 NLRB 1001, 1002 (1982).

[17] See *Marks Oxygen Co. of Alabama*, 147 NLRB 228, 230 (1964). See, e.g., *Rhino Northwest LLC v. NLRB*, 867 F.3d at 99–100; *Mc-Mor-Han Trucking Co., Inc.*, 166 NLRB 700, 701 (1967); *E. H. Koester Bakery Co., Inc.,* 136 NLRB 1006, 1012 (1962).

[18] The majority claims that we greatly exaggerate the scope of today's ruling when, according to the majority, it is merely returning to the pre-*Specialty Healthcare* analysis. But the majority's assertion that the Board will neither favor nor disfavor the petitioned-for unit is simply irreconcilable with cornerstone principles that have guided the Board's unit determination decisions for decades: that the desire of the petitioner is always a relevant consideration and that there is a heightened showing required of a party arguing for the inclusion of additional employees in a petitioned-for unit that satisfies the traditional commu-

The majority simply misunderstands that Congress neither intended to maximize the *Board's* free choice in selecting the unit in which to conduct the election, nor maximize the *employer's* ability to manipulate the unit sought in the petition. Rather, it was the intent of Congress to facilitate employee free choice in this regard.[19]

Furthermore, the majority's approach falls apart in practical application. The facts of this case are a clear illustration. As noted above, the petitioned-for unit includes 102 welders, who voted 54 to 38 to bargain collectively with the Employer. But the Employer contends that the only appropriate unit is all 2,565 of the production employees. If the Employer is correct that, in order to safeguard the fullest freedom of all employees in all the possible unit configurations, the only appropriate unit is all 2,565 production employees, the only way that the welders can secure a representation election is if there is an adequate showing of interest among that larger unit. This would mean that the welders would need 770 employees to sign authorization cards in the short period of time that the Board affords petitioners to satisfy the showing- of-interest-requirement when the Board directs an election in a significantly larger unit than initially sought by the petitioner. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sections 11023.1, 11031.1 (Jan. 2017). That is, obviously, a daunting undertaking for the welders who voted to bargain collectively. Does the majority truly believe that this is the intent of the Act? It certainly is contrary to the Act's underlying policy—to protect and facilitate employees' opportunity to organize unions to represent them[20]—to make it so difficult for a readily identifiable group of employees to obtain union representation when, as in this case, they constitute an appropriate unit under the Board's traditional community-of-interest test.

B.

Contrary to the majority, *Specialty Healthcare* respects the Section 7 rights of employees outside the petitioned-for unit to organize. Employees outside the petitioned-for unit have the right, as well as the opportunity, to organize and to encourage their coworkers to do the same. And those workers' statutory rights remain firmly intact whether or not the petitioned-for employees unionize. Cf. *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) (certification of unit of drivers, which excluded mechanics, protected the rights of both groups; mechanics subsequently organized under the banner of a different union).

The majority disputes this and appears to be of the view that the excluded employees may wish to be included in the petitioned-for unit, and that the *Specialty Healthcare* test somehow violates their supposed right to such inclusion. Thus, the majority asserts, "[T]he 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."

But, the majority's argument is without foundation. The majority points to no case in which employees claim that their interest in being included in a unit has been ignored. Nor is there any evidence in this case that when the Union filed its petition it excluded employees who sought admission, or that any employees outside the petitioned-for unit displayed any interest in collective bargaining or self-organization.[21] In any event, as the Supreme Court recognized long ago, individuals who fall within the Act's broad definition of "employee" have "*no* statutory right to be included in collective-bargaining units under § 9(b)." *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 497–498 (1985) (emphasis added).[22]

Specialty Healthcare also fully protects the Section 7 rights of the excluded employees to refrain from engag-

nity of interest test. In failing to reconcile these inconsistencies, the majority fails to satisfy the legal standard that an agency may depart from its precedents only "provided the departure is explicitly and rationally justified." See *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d at 560, citing *State of Mich. v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986).

[19] See *Federal Electric Corp., Western Test Range*, 157 NLRB 1130, 1132 (1966) (In effectuating 9(b)'s mandate that the Board make unit determinations which will assure to employees the fullest freedom in exercising rights guaranteed by the Act, i.e., the rights of self-organization and collective bargaining, the Board has "emphasized that 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."); *Mc-Mor-Han Trucking Co., Inc.*, 166 NLRB 700, 701 (1967) ("[I]t is not the Board's function to compel all employees to be represented or unrepresented at the same time or to require that a labor organization represent employees it does not wish to represent, unless an appropriate unit does not otherwise exist."); *FedEx Freight, Inc v. NLRB.*, 816 F.3d at 523 (rejecting employer's contention that the Board must consider other possible units before determining whether the union's proposed unit is appropriate).

[20] See *American Hospital Assn. v. NLRB*, 499 U.S. at 609, 613.

[21] If Congress believed that, even absent any evidence that the non-petitioned-for employees seek to exercise their Sec. 7 rights, the Board must include them in the unit in order to protect their rights to organize and bargain collectively, Congress would have mandated elections in employer-wide units in all cases. But Congress did no such thing.

[22] Nor, contrary to the majority's fleeting suggestion, does *Specialty Healthcare* undermine the principles of majority rule and exclusive representation. After all, if employees outside the petitioned-for unit are shown to have an overwhelming community of interest with the petitioned-for employees such that there is no legitimate basis for excluding them (see *Blue Man Vegas, LLC v. NLRB*, 529 F.3d at 421), *Specialty Healthcare* mandates that they be included in the unit. And if a majority of the totaled ballots from both groups are for representation, the petitioner will be their exclusive representative.

ing in union activity. These employees have the right to refrain from organizing a union and to encourage their coworkers to do the same. In fact, it would appear that in cases where the petitioned-for employees outnumber the excluded employees, it is the majority's approach that would put those employees' rights to refrain from union activity at risk by potentially requiring them to be included in the unit even though neither they nor the petitioned-for employees seek their inclusion.[23]

C.

The majority's approach will also entangle the Board and the parties in an administrative quagmire. In cases such as this where there are numerous possible units between that petitioned for by the Union and the all-encompassing alternative unit proposed by the Employer, the majority's approach would seemingly require the Board to consider other possible permutations before selecting the unit in which to conduct the election. And to the extent the majority is truly concerned with the Section 7 rights of employees outside a petitioned-for unit (as opposed to simply improving an employer's chances of defeating the union by enlarging the unit), the majority's approach would appear to mandate an inquiry into whether employees outside the petitioned-for unit—and which group(s) of such employees—seek to be included in the petitioned-for unit. For how else can the Board decide, as now required by the majority, which unit best assures to all employees—both those inside the petitioned-for unit and those outside the petitioned-for unit—the fullest freedom in exercising their rights?

Needless to say, such an approach will lengthen hearings—imposing costs on the Government and the parties—and delay resolution of the question of representation, even though no party has requested that the Board consider those other units and even though the petitioned-for unit is an appropriate unit in which to conduct the election. And it flies in the face of the well-established principle that the Board is to consider only whether the petitioned-for unit is an appropriate unit, not whether it is the most appropriate unit. The majority certainly provides no persuasive reason for empowering an employer to argue that the interests of excluded employees render the petitioned-for unit inappropriate. The petitioning employees would understandably view with skepticism any employer claim that it was seeking to add employees to the petitioned-for unit at those employees' request—rather than to ensure the employer "a better chance of winning the election" in a larger unit, which is obviously "not a reason recognized in the National Labor Relations Act for rejecting" a petitioned-for unit. *FedEx Freight, Inc. v. NLRB*, 839 F.3d at 637.

The majority claims that today's decision does not increase the opportunity for employers to manipulate the unit, but that is manifestly incorrect. First, the majority discards the clarity that *Specialty Healthcare* provided to the Board's unit determination jurisprudence. Then, the majority exacerbates the confusion by eliminating the consideration that the Board has traditionally given to the petitioned-for unit. The majority's new approach provides no basis to distinguish between cases where the excluded employees share a sufficient community of interest to render the petitioned-for unit inappropriate versus merely finding that a larger unit would be more appropriate. The vagueness of the majority's test should be fatal to its adoption. Even worse, the majority undercuts the central purpose of the Act by failing to provide employees seeking to organize any confidence in predicting whether they can bargain collectively with their employer without wasteful and time-consuming litigation over the contours of the unit. The unmistakable consequence of the majority's amorphous test is to make unit determination more unpredictable, more frequently a subject of litigation, and more subjective. The more subjective the standard is the greater the opportunity to litigate the appropriateness of the unit, and, consequently, the greater the opportunity to delay and frustrate employees' right to organize.

It is no wonder that the Board has never followed the majority's untenable approach.

VI.

Turning to the facts of this case, we agree with the Regional Director that the petitioned-for unit—which, as previously noted, is comprised of 102 highly-skilled, highly-paid welders, who perform distinct work and who occupy two specific job classifications (rework welders and rework specialists) out of approximately 120 job classifications in PCC's manufacturing operation—constitutes an appropriate unit for the purposes of collective bargaining.[24] The unit is appropriate under *Specialty Healthcare*, because the welders are readily identifiable as a group[25] and share a distinct community interest,[26]

[23] See *Macy's, Inc. v. NLRB*, 824 F.3d at 566 (rejecting claim that *Specialty Healthcare* will undermine employee rights).

[24] The Regional Director permitted a third classification occupied by a single employee—the rework specialist/crucible repair employee--to vote subject to challenge because there was insufficient evidence to resolve its unit placement.

[25] As the Regional Director correctly found, the 102 welders are readily identifiable as a group because they occupy the only two job classifications that share the function of repairing manufacturing defects in metal castings.

[26] We agree with our colleagues that the Regional Director did not explicitly address at step one of the *Specialty Healthcare* analysis whether the petitioned-for employees' share a distinct community of

and PCC has not shown that the more than two thousand employees whom it seeks to add to the unit share an overwhelming community of interest with the petitioned-for welders.

The highly-skilled nature of the welders' work (as demonstrated by the high qualifications and training required) strongly supports finding the welders' interests to be distinct from those of their less-skilled coworkers. The two classifications in the petitioned-for unit are the rework welder, the entry-level welding position, and the rework specialist, the most experienced welders. Even at the entry level, the rework welder job description requires that the applicant qualifications *include advanced welding skills*. Most of the witnesses testified that they had completed a community college curriculum in welding prior to being hired for their position. In order to be hired, the rework welders have to pass a visual welding certification examination by demonstrating their welding skills to the weld examiner and complete a 120 hour initial certification class. But that is not the end of their training; next, the welders undergo intensive on-the-job training, over multiple years, to obtain the requisite certifications, to maintain their certifications, to work with specific alloys, and to advance through PCC's pay grades and steps. Ultimately, to be eligible for a position as a rework specialist, an employee must have a minimum of 5 years in step 6 as a rework welder.

Moreover, the welders' self-training and evaluating structure unquestionably supports a finding that their interests are distinct, even from their coworkers occupying other job classifications with whom they may share nominal supervision. Once on the job, the training of welders is done by other welders. The initial welding certification examination is administered and reviewed by the weld examiner, who is also a rework specialist. There are designated welding training coordinators who facilitate the training at the various facilities. Again, those training coordinators are rework specialists, whose job descriptions—as corroborated by hearing testimony—specifically list responsibility for training rework welders. Although the welders may share paper-supervision with employees in other classifications, one welder testified that he only interacted with his non-welder supervisor regarding vacations and administrative matters.[27]

As some of PCC's most highly-paid employees, the welders also share a distinct community of interest in wages. PCC's wage scale has pay grades between 5 and 20, with the welders all occupying grades 15, 16, and 18. The welders testified that their compensation was in the range of roughly $30/hour, approximately twice that of employees at the bottom of PCC's pay scale earning $14.21/hour. As the Regional Director found, only a small number of PCC employees are paid at the welders' high rate.

The welders' distinct functions and lack of interchange with other production and maintenance employees further supports finding their community of interest to be distinct from other employees. The role of the rework welders and rework specialists is to weld metal to fix any castings defects. This work takes place at the "back end" of PCC's production process, after a full-scale wax version of the desired casting is created; a ceramic shell is placed around the wax mold and the wax is melted out; metal is poured into the ceramic shell to create the final casting; and the metal casting is inspected for defects. No other employees do the metal welding work to fix defects, ever. And once qualified, trained and paid as welders, it is extremely rare for welders to transfer into other nonmanager employee positions. Moreover, welders only perform non-welding work if the welding work is so slow that they would otherwise be sent home. And even when the welders perform less-skilled, nonwelding work, they are still paid at the welders' wage rate.

There are a number of other considerations that also demonstrate the distinct role of welders in the workplace. Welders work apart from other employees in their own open air chambers or welding booths. They also use

interest. However, for the reasons discussed below, we conclude that the record fully supports a finding that the welders share a community of interest distinct from the diverse array of the employer's other production and maintenance employees.

[27] Member McFerran further notes that the self-training and evaluating structure is a telltale feature of highly-skilled craft units, which are presumptively appropriate under the Act. See generally, *Burns and Roe Services*, 313 NLRB 1307, 1308-1309 (1994). Previously, the Board has found that welders in the aerospace industry are an appropriate craft unit. See, e.g., *Boeing Airplane Co.*, 124 NLRB 689 (1959); *CNH America*, 25–RC–116569, (2014) (not reported in Board volumes) (Member Miscimarra dissenting, stating that "the Board has not found a craft unit of welders to be appropriate since 1955 *except in the aerospace industry*.") (emphasis added). Here, PCC is in the aerospace industry: it manufactures airplane engines and frames. Accordingly, the petitioned-for unit is a presumptively appropriate craft unit under the Board's long-standing jurisprudence, explicitly noted and incorporated by *Specialty Healthcare*. 357 NLRB at 940, fn. 16, citing *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). Finding an appropriate craft unit here is particularly apt given that the Regional Director should and did consider whether welders were so functionally integrated with other employees as to lose their separate identity. See *American Cyanamid,* 131 NLRB 909, 910 (1961). See *E.I. Dupont de Nemours*, 162 NLRB 413, 419 (1966) (explaining that integration of a manufacturing process is a factor to consider, "[b]ut it is not in and of itself sufficient to preclude the formation of a separate craft bargaining unit, unless it results in such a fusion of functions, skills, and working conditions between those in the asserted craft group and others outside it as to obliterate any meaningful lines of separate craft identity.").

their own unique tools of their craft. In addition, they perform the only job function with an engineer among management employees (the welding engineer) specifically dedicated to their work. Finally, while the welders may not exist as a department on PCC's organization chart, the welders themselves provided consistent, unrebutted testimony that they regularly had welders-only meetings and that they considered themselves and were considered by colleagues to be a stand-alone department.

For all these reasons, it is clear that the welders share a distinct community of interest from their less skilled, lower paid coworkers who perform different functions throughout PCC's production and maintenance process. It is also more than reasonable to conclude, as we do, that the many strong characteristics favoring the welders' community of interest are not overcome by their functional integration with other production and maintenance employees.[28] At most, the welders were shown to sometimes communicate with other employees about their work or, on rare occasions, to work in teams on quality control issues. But this evidence does not demonstrate a fusion of functions, skills, and working conditions between the welders and the more than two thousand production and maintenance employees who PCC seeks to add to the unit.

Turning to the second step in the *Specialty Healthcare* analysis, we agree with the Regional Director that PCC failed to demonstrate that employees excluded from the petitioned-for unit share an overwhelming community of interest with the petitioned-for employees. The Regional Director carefully considered PCC's argument that the only appropriate unit was all 2565 production and maintenance employees, thoroughly analyzed whether the excluded employees shared an overwhelming community of interest with the welders, and, in our view, correctly determined that they did not. Accordingly, for the reasons discussed, we would find that the Regional Director properly certified the unit of rework welders and specialists and would uphold the election results.

VII.

In sum, the majority has done a serious disservice to the labor-management community and the Agency itself by casually discarding—without briefing—precedent that is so central to workers' rights and to one of the Agency's core functions. The shortcomings in the majority's process of denying stakeholder input are exceeded only by the shortcomings in their decision. Not only does the Majority's radical new approach contravene the Act, but its unmistakable consequences will frustrate employees' rights to self-organization and needlessly delay resolution of questions concerning representation.

Accordingly, we dissent.

Dated, Washington, D.C. December 15, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

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[28] The majority criticizes the Regional Director's decision because it considered whether the employees in the petitioned-for unit were functionally integrated with each other, rather than with other production and maintenance employees. But the Regional Director's inquiry was whether the welders were an appropriate unit, even though there was not a unified welding department on PCC's organizational chart. In such circumstances, it was appropriate for the Regional Director to look at whether the welders were functionally integrated with each other to determine whether they shared a community of interest, despite the fact that they worked out of different departments according to PCC's organizational chart.