THIS UNION DRIVE COULD HAVE BEEN AN EMAIL: ADAPTING REPRESENTATION ELECTIONS TO THE INTERNET AGE UNDER THE NLRA

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INTRODUCTION

During its 2024 Session, the Supreme Court of the United States sent shockwaves throughout the field of administrative law.[1] Its decision in *Loper Bright Enterprises v. Raimondo*[2] dramatically changed the level of deference owed to federal administrative agencies.[3] Further, the holding of *SEC v. Jarkesy*[4] imposed an obligation to try some cases concerning administrative penalties "sound[ing] in both law and equity" in an Article III court.[5] These decisions all but guarantee an explosion of litigation in federal court concerning administrative rules, adjudication, and governance.[6] Moving forward, administrative agencies must severely increase their budget allowances for federal litigation, take prophylactic measures to avoid prolonged judicial review, and prepare to slow down their policymaking and governing processes to account for time spent in federal court.[7] The National Labor Relations Board (NLRB or the Board) stands to bear a comparatively increased burden from these decisions as it already operates under severe budget constraints and a progressively increasing load of outstanding cases year over year.[8]

Currently, the Board faces a backlog of cases dealing both with representation and unfair labor practice (ULP) litigation.[9] Workers seeking formal representation brought 3% more cases before the Board in Fiscal Year 2023 than in Fiscal Year 2022.[10] This increase occurred despite the Board

1. *See* Ian Millhiser, *The Supreme Court Just Lit a Match and Tossed It into Dozens of Federal Agencies*, VOX (June 27, 2024, 1:40 PM), https://www.vox.com/scotus/357554/supreme-court-sec-jarkesy-roberts-sotomayor-chaos [https://perma.cc/952Y-YAEK].

2. 144 S. Ct. 2244 (2024).

3. *See id.* at 2273 (holding that federal courts do not need to defer to an agency's interpretation of a statute when it is ambiguous).

4. 144 S. Ct. 2117 (2024).

5. *See id.* at 2129 (holding that defendants have a right to a trial by jury in securities fraud cases).

6. *See* Millhiser, *supra* note 1.

7. *See id.*

8. *See* Drew Friedman, *NLRB 'Doing More with Less' Between Growing Caseload, Stagnating Staffing*, FED. NEWS NETWORK (May 13, 2024, 5:53 PM), https://federalnewsnetwork.com/workforce/2024/05/nlrb-doing-more-with-less-between-growing-caseload-stagnating-staffing/ [https://perma.cc/9DEX-RFNQ].

9. *See* Press Release, NLRB, Unfair Labor Practices Charge Filings Up 10%, Union Petitions Up 3% in Fiscal Year 2023 (Oct. 13, 2023) [hereinafter *Unfair Labor Practice & Union Petition Filings Up*], https://www.nlrb.gov/news-outreach/news-story/unfair-labor-practices-charge-filings-up-10-union-petitions-up-3-in-fiscal [https://perma.cc/86ND-S8PJ].

10. *Id.*

adopting a novel form of the *Joy Silk*[11] doctrine, removing the need for a formal Board proceeding in certain instances.[12] The Board's General Counsel brought 10% more ULP charges over that same time period—Fiscal Year 2022 to Fiscal Year 2023.[13] Even with a larger 2023 budget, the Board ended the year with 191 cases pending, increasing from 145 the year before.[14] The Board additionally faces prospective issues caused by technological advancement; if faced with an influx of litigation prompted by a rapidly changing labor market, it could face an even greater backlog and inefficiency.[15]

This inefficiency presents both internal issues for the Board's own productivity and for the material well-being of the American workforce. The longer a group remains in adjudicative limbo, the more likely they are to lose out on the rights guaranteed by the National Labor Relations Act (NLRA), rights which greatly improve the livelihoods and democratic potential of those benefitting from them.[16] For example, unionized workers, on average, earn 11.2% higher wages than their non-unionized counterparts, allowing for a persisting middle class.[17]

Furthermore, prospective issues compound against the weight of complications modern technology has already created for the Board.[18] The Board continues to apply old doctrine to the rapidly changing circumstances of the modern day, leading to reduced relevance for Board proceedings when organizing workplaces.[19] Labor unions and advocates already participate in Board-structured organization less frequently as time moves on, a trend attributed to policies incongruent with current circumstances and fewer

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11. *See In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949) (holding that, absent a good faith doubt, an employer must recognize a bargaining representative when a union provides evidence of majority support, even without a formal election).

12. *See* Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 130, at 24–26 (Aug. 25, 2023) (explaining the National Labor Relations Board's (NLRB's or the Board's) current approach under which the Board presumes a union has necessary support when a majority of members in a workplace indicate support for representation by signing authorization cards).

13. *See Unfair Labor Practices & Union Petition Filings Up*, *supra* note 9.

14. *Id.*

15. *See* Millhiser, *supra* note 1; *infra* Part II.

16. *See Union Facts: The Value of Collective Voice*, AFL-CIO, https://aflcio.org/formaunion/collective-voice [https://perma.cc/KA7C-DA6V] (last visited Feb. 8, 2025).

17. *Id.*

18. *See* Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 273 (2008).

19. Scholars have noted the lack of amendment to either the text of the National Labor Relations Act (NLRA) or the doctrines the Board utilizes, despite a rapidly changing labor market and desire for reform from labor advocates. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1540 (2002).

functional protections for workers.[20] Whether concerning employee communications, data-worker employee classification, or remote bargaining units, the Board's policies face numerous inconsistencies with the needs of modern workers.[21]

The NLRA, the Board's enabling statute, allows the Board to conduct an election—and subsequently certify a representative—if a majority of the "employees in a unit appropriate for such purposes" vote for representation.[22] When a group of employees seeks to unionize and their employer does not voluntarily recognize the employee organizational group, the bargaining process shifts into the jurisdiction of the Board for a representation election.[23] Per the NLRA, the Board has the unique authority to decide whether the group of employees forms an appropriate voting block for a union, called the bargaining unit.[24]

Labor advocates and professionals suggest that the Board's policies must be updated on a broad scale to better reflect the shape of American labor in the internet age and to preserve the Board's relevance moving forward.[25] This Comment addresses a framework through which the Board could begin to modernize itself and ensure its continued relevance moving forward by updating its process for determining appropriate bargaining units. Part I discusses the Board's history, what events led to the Board's current structure, its authority, and how the Board structures representation elections by establishing a community of interest among workers. Part II explains issues the Board has faced as technology has rapidly changed the landscape of American labor. Part III examines the general trends and issues faced by workers under the NLRA in the internet age, particularly throughout and in the wake of the COVID-19 pandemic. Part IV analyzes past modifications of Board doctrine, deference owed to the Board in federal court, and prior congressional reform. Finally, Part V recommends that the Board modify the community of interest doctrine by removing or lessening the importance of geographic closeness between workers, both addressing modern issues for

20. *See* Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 125–27 (2003).

21. *See, e.g.*, Timekeeping Sys., Inc., 323 N.L.R.B. 244 (1997) (discussing workplace email communications as protected activity); *see also* Hirsch, *supra* note 18; Eugene K. Kim, *Data as Labor: Retrofitting Labor Law for the Platform Economy*, 23 MINN. J.L. SCI. & TECH. 131, 134 (2022) (showing the Board's desire to apply old law to modern circumstances, producing an unworkable result).

22. *See* 29 U.S.C. § 159(a).

23. *See Conduct Elections*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections [https://perma.cc/ZN8F-HYBJ] (last visited Feb. 8, 2025).

24. *See* § 159(b).

25. *See* Hirsch, *supra* note 18.

representation elections and setting forth a framework for the Board to update policies through regulation and statutory amendments.

I. THE BOARD, ITS PROTECTIONS, AND THE ELECTION PROCESS

A. The Structure of the Board and its Role in Elections

In 1935, the NLRA established rights for workers concerning the conditions of their employment and an adjudicatory body to enforce them.[26] The NLRA provided for "the right . . . to form and join labor unions, and it obligated employers to bargain collectively with unions selected by a majority of the employees in an appropriate bargaining unit."[27] Upset with what lawmakers viewed as an exceedingly pro-labor structure of the original Board, legislators placed guardrails on the Board through the Taft-Hartley Act, a structural and doctrinal amendment to the NLRA that persists to this day.[28] Taft-Hartley created two more seats on the Board to address labor relations in collective bargaining and invented the office of the NLRB General Counsel and its regional directors, which severed prosecutorial power from Board members.[29]

Before an employer faces an obligation to enter into collective bargaining, a group of workers seeking to organize must secure recognition or certification of union representation.[30] Once a group of employees properly files a petition for representation with the Board, the regional director, a subdivision of the Board's General Counsel, makes a determination on the propriety of the petition.[31] One element of this determination is whether the petitioned-for bargaining unit—the group of employees able to vote for union

26. *See 1933 The NLB and "The Old NLRB,"* NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1933-the-nlb-and-the-old-nlrb [https://perma.cc/WX8C-Q5YZ] (last visited Feb. 8, 2025). Of note, the Board's orders are not self-executing; the Board can only enforce the provisions of the NLRA insofar as the circuit courts are willing to enforce their orders. *See* NLRB v. Constellium Rolled Prods. Ravenswood, LLC, 43 F.4th 395, 404 (4th Cir. 2022).

27. *See 1935 Passage of the Wagner Act*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [https://perma.cc/JJF2-H6CS] (last visited Feb. 8, 2025).

28. *See 1947 Taft-Hartley Substantive Provisions*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions [https://perma.cc/XMA3-6DNL] (last visited Feb. 8, 2025).

29. *See 1947 Taft-Hartley Passage and NLRB Structural Changes*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-passage-and-nlrb-structural-changes [https://perma.cc/Q7AT-P5CK] (last visited Feb. 8, 2025).

30. *See* 29 U.S.C. § 159(a)–(c).

31. *See* L.S. Tellier, Annotation, *Units for Collective Bargaining*, 174 A.L.R. 1275 (1948).

certification—is proper.[32] Importantly, these regional director determinations are subject to review by the Board's five members, acting as the quasi-judicial arm of the Board.[33]

B. Bargaining Units and the Communities of Interest

Section 9 of the NLRA stipulates that a majority of an employee group must vote to certify union representation before an employer faces an obligation to bargain with their employees in the instance of a contested petition.[34] The Board and the federal courts have sought to strike a balance while setting policy that defines an appropriate bargaining unit.[35] If a bargaining unit includes employees who do not have much interaction or have too little in common, then their presence can dilute the power of those employees who would be properly served by representation of a smaller unit.[36] Conversely, if a unit is improperly small, a union certified under such conditions can make unilateral demands that do not represent interested or impacted parties.[37] Additionally, a unit that is too small or underinclusive can create a "free-riding" issue where employees who do not risk representation by a union or do not contribute to its efforts still reap the rewards of representation.[38] The rights created by the NLRA, as Board jurisprudence reiterates, ought to be backed by Board policy so as to "assure to employees the fullest freedom in exercising [those] rights."[39] Determining the appropriate group of employees whose actions will bear on the interests of their coworkers ensures that bad-faith employers, employees, or organizers do not subvert the congressional mandate outlined in the NLRA.[40]

Because the Board governs labor relations for the vast majority of workers in the private sector, its bargaining unit determinations are more complex than those of other agencies tasked with governing relations between labor

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32. *See The NLRB Process*, NLRB, https://www.nlrb.gov/resources/nlrb-process [https://perma.cc/N7UD-GZPJ] (last visited Feb. 8, 2025).

33. *See The Board*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board [https://perma.cc/4F5W-DU96] (last visited Feb. 8, 2025).

34. *See* § 159(b).

35. *See* Kathleen A. Curran, Note, *The National Labor Relations Board's Proposed Rules on Health Care Bargaining Units*, 76 VA. L. REV. 115, 134–35 (1990).

36. *See* NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985).

37. *See* Constellation Brands, U.S. Operations, Inc. v. NLRB, 842 F.3d 784, 791 (2d Cir. 2016) ("[T]he Board does not approve . . . combinations of employees that are too narrow in scope or that have no rational basis.").

38. *See* Quick v. NLRB, 245 F.3d 231, 242 (3d Cir. 2001).

39. PCC Structurals, Inc., 365 N.L.R.B. 1696, 1698 (2017).

40. *See* Tellier, *supra* note 31.

organizations and employers.[41] To accommodate the diverse sectors and employment frameworks under the Board's jurisdiction, neither the NLRA nor Board regulation defines how a bargaining unit may be contoured beyond certain enumerated prohibitions.[42] Instead, the Board relies on an adjudicatory scaffold referred to as the "community of interest" doctrine.[43] In effect, the Board looks to a number of factors to determine whether a petitioned-for unit includes all workers—and only those workers—who would properly be affected by the outcomes of union representation and collective bargaining.[44]

To determine an appropriate bargaining unit, the Board weighs sixteen factors to determine whether the employees included in a petitioned-for unit form a sufficient community of interest and ensure that no employees in this community are excluded from the unit, those being:

> (1) similarity in skills, training, or experience; (2) similarity in job functions or job classifications; (3) similarity in wages, wage scale, or method of determining compensation; (4) similarity in fringe benefits; (5) similarity in work hours; (6) similarity in work clothes or uniforms; (7) similarity of job situs or geographical proximity of employees; (8) interchangeability of employees or job assignments; (9) common supervision; (10) centralization of employer's personnel and labor policies; (11) integration of employer's production processes or operation; (12) similarity of relationship to employer's administrative or organizational structures; (13) common history of bargaining with employer; (14) reflection of industry bargaining pattern; (15) expressed desires of employees; and (16) employees' organizational framework or extent of union organization.[45]

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41. *See* Bhd. of Ry. & S.S. Clerks v. Ass'n for Benefit of Non-Cont. Emps., 380 U.S. 650, 659 (1965) (applying the National Mediation Board's (NMB) regulation for deciding an appropriate bargaining unit). *Compare* 45 U.S.C. § 151 (defining the "carriers" that NMB mediates between as railroads), *with* 29 U.S.C. § 152 (showing that the NMB only considers the needs and contours of labor in the airline and rail carrier industries while the NLRB covers the varied and conflicting interests across the private sector).

42. *See* 29 U.S.C. § 159(b).

43. *See* Nightingale Oil Co. v. NLRB, 905 F.2d 528, 535 (1st Cir. 1990).

44. *See* Leedom v. Kyne, 358 U.S. 184, 186 (1958).

45. Francis M. Dougherty, Annotation, *"Community of Interest" Test in NLRB Determination of Appropriateness of Employee Bargaining Unit*, 90 A.L.R. Fed. 16 § 2 (1988); *see also* Country Ford Trucks, Inc. v. NLRB, 229 F.3d 1184, 1190–91 (D.C. Cir. 2000); NLRB v. Carson Cable TV, 795 F.2d 879, 884–86 (9th Cir. 1986) (finding that centralization of employees, employer control over processes, and common history of industry and employer bargaining can weigh in favor of an appropriate bargaining unit); NLRB v. Williams, 195 F.2d 669, 672 (4th Cir. 1952) (finding that employees in geographically dispersed locations but with a common manner of control could constitute an appropriate bargaining unit).

None of these elements are necessarily dispositive but are rather weighed by the regional director—and by the Board on appeal—to assess the propriety of a bargaining unit.[46] These elements invite analysis of whether the included employees are both sufficiently interconnected so as to clearly not impede effective organization and not underinclusive as to be misrepresentative of workers and create free-riders.[47]

II. THE NATIONAL LABOR RELATIONS ACT AS AN AGING PIECE OF LEGISLATION

In the years just before the passage of the NLRA, over half the American workforce performed labor that required them to work in person, largely dominated by farmers, craftspeople, and physical laborers.[48] The NLRA matured during an age in which people went to work outside their homes, in their own communities, and for other members of that community—an age that is no longer reflective of the American workforce.[49]

Between 1970 and 2015, the American workforce saw a drastic shift from physical labor to highly specialized work.[50] Logging, mining, and manufacturing peaked as a proportion of American labor in the 1980's and has trended downward ever since.[51] Industries like these—centered around localized, plant-oriented labor—shaped Board doctrine for nearly fifty years and serve as the bedrock of the labor movement in the United States.[52] However, jobs that used to be localized, approachable, and readily represented by organized labor—jobs that shaped American labor relations—are consistently being replaced by professional jobs that are geographically dispersed and more individualized.[53] As an example, when compared to 1950s employment rates, coal miners experienced an 88% reduction, rail workers

46. *See* Tellier, *supra* note 31; NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985).

47. *See* Quick v. NLRB, 245 F.3d 231, 242 (3d Cir. 2001).

48. *See* Ian D. Wyatt & Daniel E. Hecker, U.S. Bureau of Lab. Stat., *Occupational Changes During the 20th Century*, MONTHLY LAB. REV., Mar. 2006, at 35, 36 chart 1 https://www.bls.gov/opub/mlr/2006/03/art3full.pdf [https://perma.cc/BV8M-3JA4].

49. *See id.*

50. *See* Lyda Ghanbari & Michael D. McCall, U.S. Bureau of Lab. Stat., *Current Employment Statistics Survey: 100 Years of Employment, Hours, and Earnings*, MONTHLY LAB. REV., Aug. 2016, at 1, 2, https://www.bls.gov/opub/mlr/2016/article/pdf/current-employment-statistics-survey-100-years-of-employment-hours-and-earnings.pdf [https://perma.cc/59CQ-CDM3].

51. *Id.*

52. *See 1933 The NLB and "The Old NLRB," supra* note 26.

53. *See* Andy Kierz, *20 Jobs Popular in the 1950s that are Almost Gone Today*, BUS. INSIDER (Oct. 10, 2019, 8:00 AM), https://www.businessinsider.com/jobs-popular-in-the-1950s-that-have-almost-disappeared#11-laundering-cleaning-and-dyeing-696742-people-were-employed-in-1950-falling-to-295395-in-2017-a-58-drop-10 [https://perma.cc/WW8R-VAWG].

experienced an 82% drop,[54] and steel workers experienced a 61% loss of job availability in 2018.[55] Technology-related jobs, however, experienced a relative 18% increase over a fraction of that time.[56] Labor has shifted from a centralized exercise to a highly individualized endeavor poorly represented by the structure the Board currently provides.[57] The labor these jobs require can be, and often is, performed from home, making the physical structures of the twentieth-century workforce progressively more obsolete.[58] The legal frameworks borne out of these structures are likewise ill-equipped to deal with modern rights enforcement.

III. REMOTE WORKERS UNDER THE NLRA

While general trends in the American labor market exposed the deficiencies of older Board doctrine, the COVID-19 pandemic threw these doctrinal issues into sharp relief.[59] Where remote work was nearly impossible in the mid-twentieth century—becoming more common in the early twenty-first century—the pandemic's isolation requirements sent rates of remote work skyrocketing.[60] Currently, one in five workers spends at least a portion of their workweek in a remote setting.[61] Even further, a subset of this group

54. Rail workers are included for comparison but do not bear directly on Board practice since rail workers are governed by the NMB, 45 U.S.C. § 154, not by the Board, *id.* § 155.

55. *See* Kierz, *supra* note 53.

56. *See* Lauren Csorny, U.S. Bureau of Lab. Stat., *Careers in the Growing Field of Information Technology Services*, BEYOND THE NOS., Apr. 2013, at 1, https://www.bls.gov/opub/btn/volume-2/pdf/careers-in-growing-field-of-information-technology-services.pdf [https://perma.cc/UJN9-VH9J] (showing an 18% increase in information technology jobs in the United States between 2001 and 2011).

57. *See* William T. Dickens & Jonathan S. Leonard, *Structural Changes in Unionization: 1973–1981* 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 1,882, 1986), https://www.nber.org/system/files/working_papers/w1882/w1882.pdf [https://perma.cc/FN7H-WJPW]; Thomas W. Malone, Robert J. Laubacher & Tammy Johns, *The Big Idea: The Age of Hyperspecialization*, HARV. BUS. REV., July–Aug. 2011, at 56, 60.

58. *See* Louise Sheiner, David Wessel & Elijah Asdourian, *The U.S. Labor Market post-COVID: What's Changed, and What Hasn't?*, BROOKINGS INST. (Mar. 22, 2024), https://www.brookings.edu/articles/the-us-labor-market-post-covid-whats-changed-and-what-hasnt [https://perma.cc/HD7U-ABK9].

59. *See* ILANA GERSHON, THE PANDEMIC WORKPLACE: HOW WE LEARNED TO BE CITIZENS IN THE OFFICE 2 (2024).

60. *See* Alain J. Roy, *The Past, Present, and Future of Remote Work*, FORBES (Dec. 29, 2022, 8:15 AM), https://www.forbes.com/councils/forbesbusinesscouncil/2022/12/29/the-past-present-and-future-of-remote-work/ [https://perma.cc/WX9B-EEW8].

61. *See* Katherine Haan, *Remote Work Statistics and Trends in 2024*, FORBES (June 12, 2023, 5:29 AM), https://www.forbes.com/advisor/business/remote-work-statistics/ [https://perma.cc/76PY-R9F2].

works completely remotely without a physical headquarters to which they could report and is often geographically distant from coworkers.[62] These workers' homes operate as their workplaces, the communities in which they live are often not the communities they serve, and their superiors can govern employees across overlapping jurisdictions.[63] Even more than before, the reality out of which Board doctrine emerged no longer represents the lives of a growing swath of the American workforce.[64]

A union drive from a contingent of remote workers in 1995 made clear how the Board's practices fall short of necessary procedures to comprehensively represent workers in the internet age.[65] In that instance, a group of remote workers for Technology Services Solutions who operated under two middle managers petitioned for union representation and was eventually certified by the regional director.[66] The regional director initially determined that the similarity of interests originating from the middle manager's common control produced sufficient ties to make the petitioned-for bargaining unit appropriate while excluding other remote workers in the area.[67] In an effort to apply an established concept to a novel set of circumstances, the regional director presumed the petitioned-for unit was appropriate because the middle managers under which the petitioning employees worked represented a "single plant."[68] However, the Board rejected this presumption.[69] This single plant presumption emerged from the same early twentieth-century circumstances, which led to the community of interest doctrine and presents similar issues when applied to modern circumstances.[70] Notwithstanding the changes to the American workforce in the twenty years since the *Technology Services Solutions*[71] decision, the Board continues to rely on this framework and emphasized it as recently as 2022.[72]

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62. *Id.*

63. *See* Emma Goldberg, *The ZIP Code Shift: Why Many Americans No Longer Live Where They Work*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/business/zip-code-shift-home-work.html [https://perma.cc/V5W6-S8KN].

64. *Compare* Wyatt & Hecker, *supra* note 48 (showing an increase in office-centric jobs), *with* Haan, *supra* note 61 (displaying Americans' shifting workplaces).

65. *See* Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891, at *2 (July 20, 1995).

66. *Id.* at *1.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631 (1962) (highlighting how the Board presumes a unit is proper if it includes all employees at a singular production plant, echoing concerns proffered for the efficacy of the closeness element).

71. *See* Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891 (1995).

72. *See, e.g.*, Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, at 4 (Dec. 14, 2022) (explaining that "plantwide units are presumptively appropriate under the [NLRA]").

After management from Technology Services appealed the regional director's determination, the full Board found the approved bargaining unit improper for lack of geographic continuity since it excluded employees who were situated close to the petitioning employees, even though they did not share overwhelmingly common interests in hypothetical bargaining.[73] The Board found that the single-plant presumption was wrongly applied as the middle managers on which the regional director based their decision did not represent a static core to which employees had to report.[74] In this instance, the more fluid and less centralized structure of remote work broke down older Board structures when regulators attempted to apply them, leading the Board to hold that more traditional and rigid community of interest factors ought to be applied.[75] The Board decided that the geographic closeness, or lack thereof, of the employees seeking union representation carried such weight as to require the inclusion of all employees in the southwestern geographic region for an appropriate community of interest.[76]

Despite decades passing since the *Technology Services Solutions* decision, its considerations and the impact of remote work on organized labor have reappeared as recently as late 2023.[77] Following the release of the animated feature, *Wish*, ten animators working for The Walt Disney Company—all of whom worked entirely at home—sought representation by the Animation Guild and International Alliance of Theatrical Stage Employees (IATSE).[78] The drive ultimately succeeded, but commentators quickly noted the fortunate nature of these employees working remotely within the geographic jurisdiction of the union chapters with which they sought to affiliate instead of in a more geographically dispersed area.[79] This drive and those like it leave

73. *See Tech. Servs. Sols.*, 1995 N.L.R.B. LEXIS 891, at *2.

74. *Id.* at *2–3.

75. *See id.* (showing that Board members in *Technology Services* chose to apply more traditional community of interest factors instead of adapting them to remote workers).

76. *See id.* at *2 (relying heavily on the presumption that a single-location group of employees will be an appropriate bargaining unit).

77. *See* Sadhana Bharanidharan, *Remote Workers at Disney Animation Look to Unionize*, KIDSCREEN (Nov. 29, 2023), https://kidscreen.com/2023/11/29/remote-workers-at-disney-animation-look-to-unionize/ [https://perma.cc/P77H-T9Y3]; Traveling Lab, Inc., Case No. 31-RC-330752 (NLRB Certification of Representative Jan. 22, 2024), https://apps.nlrb.gov/link/document.aspx/09031d4583c3d094 [https://perma.cc/BLF4-P2W5].

78. *See* Bharanidharan, *supra* note 77.

79. *See* Mercedes Milligan, *Remote Disney Animation Workers Make Historic Bid for Union from 6 Different States*, ANIMATION MAG. (Nov. 28, 2023), https://www.animationmagazine.net/2023/11/remote-disney-animation-workers-make-historic-bid-for-union-from-6-different-states/ [https://perma.cc/Y75A-QKH6].

the doctrinal questions of *Technology Services* unanswered.[80] These drives do not provide insight on how the Board might determine appropriate representation for more widely dispersed employees or smaller communities of interest that overlap with other groups of workers.[81] Despite possibly sharing common interests in the type of work they perform or outcomes of their working conditions, union chapters continue to exclude workers from their bargaining units that do not report to or live in geographically consistent areas.[82]

The resolution of these doctrinal issues carries importance because, beyond the general benefits unionization incurs,[83] unions' protective nature takes on a novel shape in the internet age, as employees face increased surveillance, encroachments into their personal lives, and splintering of worker communities.[84] Further, many contract negotiations now hinge on the ability of employees to work from home.[85] The rate at which remote work is expanding suggests a need to adapt to this growing sector, with a projected 32.6 million Americans working remote by 2025—an increase of nearly 16 million when compared to pre-pandemic levels.[86]

Throughout the COVID-19 pandemic, the actions workplaces took in response to rapidly changing circumstances show that workers and employers are capable of adapting to a world that looks much different than it did only five years ago.[87] Congress constructed the Board to create policies that could reflect those rapid changes, maintaining a role as both structural governor and impartial adjudicator.[88] As has been true since the NLRA's passage,

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80. *See Tech. Servs. Sols.*, 1995 N.L.R.B. LEXIS 891, at *4–5; *infra* text accompanying notes 153–154.

81. *See* Joel Heller, *The Labor Gerrymander*, 77 VAND. L. REV. 401, 442–43 (2024); *infra* text accompanying note 158.

82. *See, e.g.*, Milligan, *supra* note 79 (describing The Animation Guild's efforts to include previously-excluded remote workers).

83. *See* AFL-CIO, *supra* note 16 (showing the average benefits incurred across unionized industries).

84. *See* UNI GLOBAL UNION, REMOTE WORK: A REVIEW OF UNIONS' COLLECTIVE BARGAINING RESPONSE 11 (2022), https://uniglobalunion.org/wp-content/uploads/Remote-work_WEB_FINAL_en.pdf [https://perma.cc/AW9P-AJ6K].

85. *See, e.g.*, Molly Weisner, *GAO Union Employees Keep Flexible Work Options in New Contract*, FED. TIMES (Sep. 20, 2023), https://www.federaltimes.com/management/career/2023/09/20/gao-union-employees-keep-flexible-work-options-in-new-contract/ [https://perma.cc/EVY6-SMEW].

86. *See* Haan, *supra* note 61.

87. *See* GERSHON, *supra* note 59, at 56–59.

88. *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 39–40 (6th ed., Cambridge Univ. Press 2019) (explaining that Congress intended the Board to be able to

workers and employers can advocate for their own interests and effectively ensure their own rights are protected; all that the Board need do is make sure that those rights and regulatory scaffolding are reflective of the current state of American labor.[89]

As an arbiter of American labor policy, the Board bears the responsibility of reflecting the overall state of work post-COVID to prevent workers with common interests from being denied collective representation or forced to collaborate with workers who share different motives and goals.[90] Rather than further regulate or deregulate the arena of labor policy, the Board can clarify its position and indicate to unions, workers, and employers the standards by which they will be held when enforcing the protections guaranteed by the NLRA.

IV. LEGAL HISTORY OF THE COMMUNITY OF INTEREST AND OTHER BOARD DOCTRINE

A. Previous Modification of the Community Interest Doctrine

Prior modifications to the community of interest doctrine have been through fact-specific adjudication communicated to the public through official agency publications.[91] Recently, the Board modified the doctrine in a series of cases dealing with so-called "micro-units" for collective bargaining

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adapt to the varied needs of workers to ensure the fullest expression of their rights under the NLRA).

89. *See* Martin H. Malin & Henry H. Perritt, *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 5 (2000) (explaining how conservative nature of the NLRA presumes the efficacy of private governance); JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION 100–01 (1991) (describing how communities effectively self-structure and define mutually understood boundaries).

90. *See, e.g.*, Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891, at *3 (July 20, 1995) (providing an example of a group of workers denied the opportunity to bargain collectively unless they included closer employees who held different interests); *Legislative Hearing on H.R. 2346, Secret Ballot Protection Act, and H.R. 2347, Representation Fairness Restoration Act: Hearing Before the Subcomm. on Health, Emp., Lab., & Pensions of the H. Comm. on Education Educ. & the Workforce*, 113th Cong. 27 (2014) [hereinafter *H.R. 2346 Hearings*] (statement of Glenn M. Taubman, National Right to Work Legal Defense Foundation) ("Top-down organizing is repulsive to the central purposes of the NLRA.").

91. *See generally* OFF. OF GEN. COUNS., NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf [https://perma.cc/J42X-2WVR] (providing an example of the NLRB communicating doctrinal modifications, health care unit determinations, in this case).

that divided up singular workplaces into narrow communities.[92] These cases—coinciding with the shifting opinions of Board members appointed by successive presidents—instituted, rescinded, and reinstituted the "overwhelming community of interest" doctrine.[93] This doctrine allows for a presumption of propriety when a petitioned-for bargaining unit contains a readily identifiable group of employees.[94] This doctrine further relies on a more malleable approach to determining bargaining units, which allows organizers to build unions one piece at a time, rather than organizing an entire industry at once.[95]

This doctrine was first put forward in *Specialty Healthcare & Rehabilitation Center of Mobile*,[96] overturned by the next Board in *PCC Structurals, Inc.*,[97] and then reinstated by the following Board in *American Steel Construction, Inc*.[98] By shaping the community of interest doctrine to apply to individual instances of a rapidly changing workplace, the Board set up a temporary solution on which employers and employees have been unable to rely.[99] The Board in *Specialty Healthcare* stated that it was returning the Board to an application of the traditional "community of interest" standard but impliedly changed the standards for a proper bargaining unit.[100] When discussing the appropriateness of a unit of nursing assistants in a nursing home, the Board rejected the employer's proposition that the smallest appropriate unit included a number of managerial employees and janitorial staff located in the same location.[101] Instead, the Board stated that the legislative intent of the NLRA belied a need for employees to be the source from which an appropriate unit is determined.[102] The Board focused on commonality of duties, uniforms, risks posed, and other elements of the traditional community of interest test to assert that the petitioned-for unit was proper, as the regional director found.[103]

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92. *See* Tanja L. Thompson & Brenda N. Canale, *Has Specialty Healthcare Changed the Landscape in Organizing and Representation Proceedings?*, 29 ABA J. LAB. & EMP. L. 447, 450 (2014).

93. *See* Heller, *supra* note 81, at 442.

94. *See* Thompson & Canale, *supra* note 92, at 449–50.

95. *See, e.g.*, LAVE & WENGER, *supra* note 89, at 35–36 (providing a sociological basis to back up a Board presumption that employees are best equipped to self-identify their community of interest).

96. 357 N.L.R.B. 934, 947 (2011).

97. 365 N.L.R.B. 1696, 1699 (2017).

98. *See* Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, at 17 (Dec. 14, 2022).

99. *See* Thompson & Canale, *supra* note 92, at 464.

100. *See* Heller, *supra* note 81, at 442.

101. *See Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. at 947.

102. *See id.*

103. *See id.*

Additionally, the Board suggested a need for an almost sociological approach to determining a bargaining unit, looking to the outcomes of a particular group of employees more so than any rigid set of rules, past adjudication, or formal rulemaking, as it did in overruling the *Park Manor Care Center*[104] test in this case.[105] The presumption that a petitioned-for bargaining unit is appropriate, per the Board in this instance, could only be rebutted by an assertion that excluded employees shared an "overwhelming community of interest" with included employees.[106]

The 2017 Board rescinded the *Specialty Healthcare* standard through adjudication and reinstituted the test from *Park Manor* that suggested that an appropriate bargaining unit requires all included employees to share a comprehensive community of interest.[107] In *PCC Structurals*, the Board again asserted that it was reaffirming the "traditional community of interest" criteria.[108] The Board used this decision to suggest that *Specialty Healthcare* operated as a deflection of Board responsibility in determining bargaining units.[109] Only six years after its decision in *Specialty Healthcare*, the Board reversed itself and shifted the burden of proving the appropriateness of a bargaining unit back onto employees and mandated that regional directors adhere to the rigid structure and elements that define a community of interest.[110] The Board effectively suggested that its role was not just to shape American labor policy in a manner that individual communities could apply, but was to ensure that labor relations conformed to adjudicative guidelines through a prescriptive approach.[111]

Ultimately, the Board returned to an acceptance of employee-defined units by basic presumption in *American Steel*.[112] The Board suggested that, while in line with principles concerning bargaining unit determinations, the decision reached in *PCC Structurals* held inconsistencies with Board precedent, Supreme Court precedent, and the policy objectives of the NLRA.[113] Since this determination, Board policy has remained steady, and employee-determined bargaining units have continued to flourish and receive approval

104. 305 N.L.R.B. 872 (1991).

105. *See Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. at 947.

106. *See* NLRB v. FedEx Freight, Inc., 832 F.3d 432, 446–47 (3d Cir. 2016) (providing an example of recent use of the overwhelming community of interest doctrine).

107. *See* PCC Structurals, Inc., 365 N.L.R.B. 1696, 1706 (2017).

108. *See id.* at 1705–06.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See* Am. Steel Constr., Inc., 372 N.L.R.B No. 23 at *17 (Dec. 14, 2022).

113. *See id.* at *1, *16–17.

from regional directors in a number of circumstances.[114] Even considering the backlog of representation cases, the combined readoption of *Specialty Healthcare* and a novel form of the *Joy Silk* doctrine has allowed for the proliferation of union activity during the Biden Administration.[115]

Even still, while well within the authority of the Board as the standard bearer of labor policy in the United States, this oscillation of policy makes it more difficult to understand what unions should expect when setting up a bargaining unit and who employers can expect to be included in negotiations.[116] The standard in recent years has become more malleable but unpredictable.[117]

B. Board Deference and the Board's Past Actions on Rulemaking

As a general trend, recently exemplified by the Board's actions concerning micro-units, the Board has enforced its policies through administrative adjudication rather than promulgating substantive rules.[118] The Board will occasionally instigate rulemaking procedures resulting in final rules, but these are generally only as permanent as the tenure of sitting Board members who hold associated policy objectives.[119] This creates frequent oscillation between policies, often along party lines, as shown in the adoption, rejection, and partial readoption of policies like the *Joy Silk* doctrine.[120]

The Board enjoys a considerable amount of deference concerning the determination of a bargaining unit beyond the bounds of judicial review

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114. *See infra* notes 149, 153–154.

115. *Union Petitions Up 35%, Unfair Labor Practices Charge Filings Up 7% in the First Half of Fiscal Year 2024*, NLRB (Apr. 9, 2024), https://www.nlrb.gov/news-outreach/news-story/union-petitions-up-35-unfair-labor-practices-charge-filings-up-7-in-the [https://perma.cc/FSA9-8LWM] (providing the most recently updated data concerning Board activity).

116. *See* Emily Baver, Comment, *Setting Labor Policy Prospectively: Rulemaking, Adjudicating, and What the NLRB Can Learn from the NMB's Representation Election Procedure Rule*, 63 ADMIN. L. REV. 853, 859 (2011).

117. *See id.*

118. *See id.* at 854.

119. *See, e.g.*, Press Release, NLRB, NLRB Issues Fair Choice–Employee Voice Final Rule (Jul. 26, 2024), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-fair-choice-employee-voice-final-rule [https://perma.cc/F9A7-RVWY] (highlighting the most recent instance of NLRB rulemaking through notice-and-comment).

120. *See* Grace DuBois, Comment, *Jumping for* Joy Silk*: How the Revival of a Mid-Century Labor Union Organizing Doctrine Would Increase Cost Efficiency for the National Labor Relations Board*, 75 ADMIN. L. REV. 159, 168 (2023).

suggested in the Supreme Court's recent decision in *Loper Bright*.[121] While still subject to the arbitrary and capricious standard set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*,[122] bargaining unit determinations are squarely within the statutory authority of the NLRA, and courts have routinely deferred to the determinations of the Board.[123] Importantly, this deference is not owed to the regional directors by the Board.[124]

Of note, certain adjudicative policies or those like them which carry a certain amount of ambiguity could be afforded lowered deference in the near future.[125] The Supreme Court's decision in *Starbucks Corp. v. McKinney*[126] from early in 2024 suggests a modern approach to the Board under which courts might be reluctant to take Board assertions at face value.[127] While not directly overriding the propriety of a Board determination, only its procedures, the *Starbucks* decision sounds of a reduction in the efficacy of Board enforcement when statutory guidelines maintain ambiguous language.[128] Even still, the clear statutory authority granted to the Board over bargaining units likely allows the Board to avoid the foreseeable deluge of judicial review in the wake of the *Loper Bright* decision, a probability bolstered by any policies grounded in firm administrative proceedings.

C. Previous Statutory Reform

Opponents of administrative approaches to Board reform might point to instances of administration-dependent recission of rulemakings in recent

121. *See* 144 S. Ct. 2244, 2273 (2024); NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90 (1995) (explaining that Congress explicitly delegated the Board the job of directing national labor policy and is entitled to deference).

122. 463 U.S. 29 (1983).

123. *See* NLRB. v. J. Weingarten, Inc., 420 U.S. 251, 263 (1995); NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 796 (1990); Hosp. Menonita de Guayama, Inc. v. NLRB, 94 F.4th 1, 14 (D.C. Cir. 2024); Elec. Data Sys. Corp. v. NLRB., 938 F.2d 570, 573 (5th Cir. 1991); *see also* NLRB v. Sw. Reg'l Council of Carpenters, 826 F.3d 460, 460, 464 (D.C. Cir. 2016) (applying the arbitrary and capricious standard to Board decisions); Motor Vehicle Mfgs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. at 43 (defining the arbitrary and capricious standard).

124. *See, e.g.*, Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891 (July 20, 1995) (showing how the Board reviews the determinations of regional directors de novo).

125. *See Loper Bright*, 144 S. Ct. at 2273.

126. 144 S. Ct. 1570 (2024).

127. *See id.* at 1585–87; Molly Coleman, *The Supreme Court's War on Working People Just Got a Little Worse*, BALLS & STRIKES (Jun. 24, 2024), https://ballsandstrikes.org/scotus/starbucks-v-mckinney-supreme-court-working-people-power/ [https://perma.cc/47E8-HENK].

128. *See Starbucks Corp.*, 144 S. Ct. at 1574.

years to indicate that a promulgated rule will replicate policy oscillations found in Board adjudications.[129] A more long-term solution to work toward stable policy could involve congressional action to reform the Board, an endeavor previously attempted by Congress concerning bargaining units.[130]

In an effort to address policy oscillation surrounding bargaining unit determinations, Congress attempted to codify the community of interest doctrine with eight enumerated factors as part of the Representation Fairness Restoration Act (House Bill 2347) but has thus far been unable.[131] Both the unsuccessful House Bill 2347 and the successful Taft-Hartley Act represent congressional action to curtail the power of unions by modifying the NLRA.[132] Regardless of ideology or rationale, these acts both show the power of Congress to make clearer their intent in shaping labor policy and prevent policy oscillation by issuing directives to the Board.[133]

House Bill 2347 additionally provides an example of the issues and processes that Congress, the public, and the Board could take into consideration when reforming the NLRA's statutory mandate.[134] Representative Tom Price, a congressperson from Georgia at the time of the *Specialty Healthcare* decision, introduced House Bill 2347 as a means to circumvent the adjudicative and rulemaking powers of the Board.[135] House Bill 2347 was repeatedly put forward as a calcification of the policies and rigid elements utilized by the Board in determining bargaining units before *Specialty Healthcare* allowed for the organization of sectors of employees on nearly any reasonable common interest.[136] During subcommittee hearings on the bill,

129. *Compare* Representation-Case Procedures, 79 Fed. Reg. 74,308, 74,308 (Apr. 14, 2014) ("But the Board's experience has also revealed problems—particularly in fully litigated cases—which cannot be solved without changing current practices and rules."), *with* Press Release, NLRB, NLRB Rescinds Four Provisions of the 2019 Election Rule and Delays Implementation of Remaining Provisions After DC Circuit Court Decision (Mar. 9, 2023) [hereinafter *NLRB Rescinds Four Provisions*], https://www.nlrb.gov/news-outreach/news-story/nlrb-rescinds-four-provisions-of-the-2019-election-rule-and-delays [https://perma.cc/H4VN-YZPH] (providing an example of a rule promulgated by the Board and then rescinded by the following Board in response to litigation).

130. *See 1935 Passage of the Wagner Act*, *supra* note 27.

131. *See generally* Representation Fairness Restoration Act, H.R. 2347, 113th Cong. (2013) (seeking to modernize the NLRA).

132. *See id.*; *1947 Taft-Hartley Substantive Provisions*, *supra* note 28.

133. *See* H.R. 2347.

134. *See H.R. 2347: Representation Fairness Restoration Act Fact Sheet*, H. COMM. ON EDUC. & THE WORKFORCE (Jun. 13, 2023), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=338852 [https://perma.cc/27PS-2J8C].

135. *See id.*

136. *See id.*

Representative Phil Roe, Chairman of the Congressional Subcommittee on Health, Employment, Labor, and Pensions at the time, asserted that *Specialty Healthcare* represented a partisan departure from the Board's statutory mandate and undermined the NLRA's goals of ensuring citizens the greatest access to the freedoms and rights created by the NLRA.[137] To remedy this perceived issue, the bill put forward eight enumerated factors the Board must use for deciding an appropriate bargaining unit and sought to codify a version of the community of interest doctrine, mandating that all employees sharing these factors in their employment be included in the bargaining unit unless a smaller group shared an overwhelming commonality.[138]

Representative Roe's arguments surrounding House Bill 2347 echo the Board's justification for modifying bargaining units in *Specialty Healthcare*, albeit in direct opposition.[139] Both representatives and witnesses supporting the bill at the hearing couched their discussion of House Bill 2347 in a reverence to Board precedent—the exact precedent the Board explained as unrepresentative of the modern realities the Board must deal with between cases.[140] House Bill 2347, regardless of its merits, purportedly sought to increase reliability in union elections and collective bargaining—among other effects that fell along more ideological lines.[141]

V. POLICY RECOMMENDATION: MODERN UPDATE OF THE COMMUNITY OF INTEREST DOCTRINE

A. Eliminating the Geographic Closeness Element

The community of interest doctrine should be modified so that bargaining units are no longer evaluated in part by the geographic closeness of the employees within a unit. Because the shape of the American labor market has

137. *See H.R. 2346 Hearings*, *supra* note 90, at 3 (statement of Rep. Roe, Chairman, House Subcommittee on Health, Employment, Labor, & Pensions); *id.* 16–17 (statement of Fred Feinstein, Senior Fellow, University of Marlyand) ("In my view, one of the strengths of the NLRA is an underlying premise that workplace relations are best left to be worked out by employees and employers.").

138. *See* H.R. 2347.

139. *Compare* Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 943–46 (2011), *with H.R. 2346 Hearings*, *supra* note 90, at 3 (statement of Rep. Roe, Chairman, House Subcommittee on Health, Employment, Labor, & Pensions) (arguing that both the *Specialty Healthcare* decision and Representation Act increase workplace harmony and reliability, while being mutually exclusive).

140. *See* Am. Steel Constr., Inc., 372 N.L.R.B. No. 23 at 17 (Dec. 14, 2022).

141. *See H.R. 2346 Hearings*, *supra* note 90, at 3 (statement of Rep. Roe, Chairman, House Subcommittee on Health, Employment, Labor, & Pensions).

changed so drastically, the NLRB should change its criteria to better reflect the working conditions of an increasingly large class of workers.[142] As evidenced by the recent litigation over micro-units, the NLRB can put forward policies surrounding bargaining units in direct opposition to its past policies.[143] These determinations are also owed deference by courts since the NLRA grants express statutory authority to interpret the propriety of a petitioned for bargaining unit.[144]

Congress enacted the NLRA to ensure that certain rights in the workplace are enforced.[145] The mechanisms of that enforcement ought to change as the systems they regulate change alongside them.[146] The closeness element was born out of the need to prevent employers from busting unions by involving unreachable or impracticable communities in a union election.[147] As evidenced by the advent of the internet and communicative abilities, the connections between workers are now less about geographic closeness and instead hinge much more on reporting officers, common workload, and similar training, all three of which are already elements within the community of interest analysis.[148]

Under current Board policy, the issues apparent in *PCC Structurals* and *Technology Services* do not complicate organization for units of employees that take on an abnormal shape.[149] The adherence to *Cemex Construction Materials Pacific, LLC*[150] and *Specialty Healthcare* allows for units of employees who share an identifiable community of common interest to organize themselves, either through formal Board proceedings or expedited private processes.[151] In the

142. *See* Malin & Perritt, *supra* note 89, at 18.

143. *See Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23 at 17.

144. *See* 29 U.S.C. § 159(b); *see* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89–90 (1995).

145. *See 1935 Passage of the Wagner Act*, *supra* note 27.

146. *See* Kim, *supra* note 21, at 140–41.

147. *See* NLRB v. Action Auto., Inc., 469 U.S. 490, 494–95 (1985).

148. *See* Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 302 (2003).

149. *See, e.g.*, PGA Tour Ent., Case No. 12-RC-304626 (NLRB Certification of Representative Dec. 20, 2022), https://apps.nlrb.gov/link/document.aspx/09031d45839451a0 [https://perma.cc/V5PM-F9FB] (highlighting the successful unionization of all remote telecasters for the Professional Golf Association).

150. Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 130, at 24–26 (Aug. 25, 2023).

151. *See* Press Release, NLRB, Board Issues Decision Announcing New Framework for Union Representation Proceedings (Aug. 25, 2023), https://www.nlrb.gov/news-

past three years, remote workers have been able to form their own units and secure union representation.[152] Within the past year, the remote animators working for The Walt Disney Company provide one example from 2024.[153] Additionally, a collection of remote nurses succeeded in securing an accretion to an existing unit of in-person nurses who all reported to the same hospital, showing how more traditional workplaces can effectively organize with a rapidly modernizing workforce.[154] Even further, all remote technical workers who support the Professional Golf Association succeeded in forming their own isolated unit after showing a sufficient commonality of duties and control despite wide geographic dispersion.[155] These successful drives—all within the last year—show the current availability of collective action to remote workers under *American Steel* by allowing remote workers to secure representation even when historic Board policy works against them, a reality subject to change following a possible change in Board leadership.[156]

Even accepting that current policies have made it easier to organize wide groups of remote workers, the geographic closeness element of the community of interest doctrine presents issues and uncertainties for organizing in the internet age.[157] The aforementioned examples of remote worker organization skipped over the doctrinal issue presented in *Technology Services*, that being how to properly structure remote bargaining units when smaller communities of interest may not include every worker at a remote workplace.[158] Instead of carving out units for smaller sections of the company that share more similarities concerning other elements, recent instances of remote unionization have taken a comprehensive approach, including all remote workers as

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outreach/news-story/board-issues-decision-announcing-new-framework-for-union-representation [https://perma.cc/XC9E-UR2T]; PGA Tour Ent., Case No. 12-RC-204626.

152. *See* Milligan, *supra* note 79; Traveling Lab, Inc., Case No. 31-RC-330752 (NLRB Certification of Representative Jan. 22, 2024), https://apps.nlrb.gov/link/document.aspx/09031d4583c3d094 [https://perma.cc/8UMY-E6B7].

153. *See* Traveling Lab, Inc., Case 31-RC-330752 (highlighting the successful unionization of all remote animators employed by The Walt Disney Company).

154. *See* Am. Oncologic Hosp., Case No. 04-RC-322632 (NLRB Certification of Representative Sept. 22, 2023), https://apps.nlrb.gov/link/document.aspx/09031d4583b5b22c [https://perma.cc/W8CJ-YCF4] (highlighting the successful accretion of remote registered nurses to an existing bargaining unit in Pennsylvania).

155. *See* PGA Tour Ent., Case No. 12-RC-204626.

156. *See supra* notes 149, 153–154.

157. *See, e.g.*, Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891, at *1–2 (July 20, 1995) (showing how demanding remote workers be geographically close when organizing can create unwieldy bargaining units).

158. *Id.* at *5.

a single unit.[159] The lack of clarity on the rights of remote workers, when combined with a renewed lack of Supreme Court deference and the possibility of policy oscillation following future federal elections, suggest that a removal of the geographic closeness element supports the policy objectives of the NLRA.[160] While the Board is squarely within its authority when defining bargaining units, current Supreme Court jurisprudence suggests that longstanding patterns of deference and authority may be overturned in the future.[161] Recent successes in representation and subsequent administrative adjudication do not guarantee that the Board will seamlessly transition into the future as the American economy continues to adapt to the internet age without codification or further action by the Board or Congress.[162]

B. Redistribution of Community of Interest Elements

As an alternative solution, the Board could retain the geographic closeness element in a more dynamic fashion to retain its historical purpose of protecting workers' rights. If the Board retains the closeness element, the Board should afford less weight to the closeness of employees when evaluating a union petition depending on the types of positions or working conditions involved.[163] If the Board seeks to certify a union at a traditional in-person workplace, the interests of geographic closeness maintain their importance and should be afforded great weight in applying the single-plant

159. *See supra* notes 149, 153–154.

160. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (creating an administrative landscape where federal courts will defer to agency interpretation less than in the past); *see, e.g.*, Press Release, NLRB, National Labor Relations Board Issues Final Rule to Restore Fair and Efficient Procedures for Union Elections (Aug. 24, 2023), https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-issues-final-rule-to-restore-fair-and [https://perma.cc/FF8S-V86F] (providing an example of administration dependent policy oscillation); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 170–75 (1985) (explaining how policy oscillation refers to policies the Board enforces in wildly different and often diametrically opposite ways depending on the presidential administration).

161. *See generally* Starbucks Corp. v. McKinney, 144 S. Ct. 1570 (2024) (showing how the Supreme Court has recently overridden the authority of the Board even when concerning a statutory mandate; in this case, the NLRA's § 10(j) injunction).

162. *See supra* notes 149, 153–154 (showing recent successes in organizing efforts under current Board doctrine formed by administrative adjudication).

163. *Cf.* LAVE & WENGER, *supra* note 89 (explaining a framework for structuring communities that relies heavily on the purpose of that community when defining its boundaries, allowing for more dynamic determinations).

principle.[164] However, if a modern workplace is geographically dispersed, the reality of those workers' situations should be recognized by the Board, and greater weight should be given to elements that reflect the outcome interests of those workers like common duties, training, benefits, and supervision.[165] The same approach taken under *Specialty Healthcare*, relying on the intentions and desires of petitioning employees rather than a strict set of elements, produces outcomes in which the right of union representation can more easily be exercised by employees linked by common goals and realities.[166] The general impacts and interest of remote workers seeking to organize have not been widely tested in recent circumstances due to the particular focus American labor has had on in-person workplaces.[167] Even still, the workers' interests in organizing under common supervision in *Technology Services* show that elements like common duties and reporting officers reflect the operations of remote workers more than geographic closeness—especially when working for a company without a physical headquarters.[168]

The generalized redistribution of weight afforded to elements of community of interest determinations could operate as a catch-all solution that allows for future malleability of the doctrine and represents a way for the Board to adapt in the future.[169] As scholars have noted, the Board faces a number of issues as its current policies and doctrine are applied to workers in the internet age.[170] Historically, the Board has set the direction in the field of labor relations, which is then interpreted or implemented by private

164. *See* NLRB v. Guardian Armored Assets, LLC, 201 F. App'x 298, 306 (6th Cir. 2006) (explaining that the Board follows a presumption that a single-location group of employees is an appropriate unit).

165. *See* LAVE & WENGER, *supra* note 89, at 35–36 (explaining one theoretical framework for establishing a community of interdependent workers against which the community of interest doctrine can be compared); Dougherty *supra* note 45.

166. *See* Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 947 (2011).

167. *See, e.g.*, Amelia Lucas, *Starbucks, Workers United Made 'Significant Progress' in This Week's Contract Talks*, CNBC (Apr. 26, 2024, 11:23 AM), https://www.cnbc.com/2024/04/26/starbucks-workers-united-union-make-progress-in-negotiations.html [https://perma.cc/9U8K-8353]; Michelle Chapman & Haleluya Hadero, *Amazon Labor Union Members Vote Overwhelmingly in Favor of an Affiliation with the Teamsters*, ASSOCIATED PRESS (Jun. 18, 2024), https://apnews.com/article/amazon-union-teamsters-labor-warehouse-0d0d751d6800495ed0296e33b4f5835e [https://perma.cc/R7GS-VW5P].

168. *See* Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891, at *3 (July 20, 1995); Haan, *supra* note 61.

169. *See, e.g.*, Thompson & Canale, *supra* note 92, at 449–50.

170. *See* Hirsch, *supra* note 18; Estlund, *supra* note 19, at 1536; Getman, *supra* note 20.

parties.[171] The continued relevance of the Board as a watchdog or enforcement body is imperative to the applicability of legal remedies in labor relations.[172] By affording less weight to the geographic closeness element when determining an appropriate unit, the Board may retain this element, which has served a historically important purpose.[173] Retention of the element could function as a showing by the Board that they recognize the adaptability of current doctrine. Accepting the reality of the internet as a disruptive force in the workplace can show a departure from previous Board decisions, which sought to force older doctrine into novel issues presented in the internet age.[174]

Determining an appropriate bargaining unit quickly and effectively is critical in both preventing and prosecuting eventual ULPs during the election process.[175] Litigation over the nature of a petitioned-for unit allows for extended time during which employers can break up support for a union.[176] For this purpose, a clear and crystalized policy on the shape of an appropriate bargaining unit, one which is predictable and shapes bargaining units dynamically around similarly interested workers, is imperative to the continued efficacy of the Board—especially in light of recent Supreme Court decisions.[177] Continuing to consider geographic closeness with reduced weight allows the Board to recognize older types of ULPs that are still possible in the modern day while addressing the needs of new types of units, representing a new facet of the balance the Board already seeks to achieve in determining units.[178]

Technology Services suggests that this balance will come back to the forefront of discussions surrounding secret-ballot elections and Board certification if current policies are undone either by administrative adjudication or judicial

171. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500 (1978) (holding that the Board wields "the authority to develop and apply fundamental national labor policy"); NLRB v. J. Weingarten Inc., 420 U.S. 251, 266 (1975) (explaining that the Board is well suited to designing labor policy due to their "[c]umulative experience" doing so).

172. *See* Hirsch, *supra* note 18.

173. *See* NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985).

174. *See* Guard Publ'g Co., 351 N.L.R.B. 1110, 1116 (2007); Hirsch, *supra* note 18.

175. *See NLRB Rescinds Four Provisions*, *supra* note 129.

176. *See id.*

177. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (suggesting that a clear basis for agency action is going to be required in future litigation over rules); PCC Structurals, Inc., 365 N.L.R.B. No. 160, at 4 (Dec. 15, 2017) (finding that the NLRA creates rights which should be protected and enforced by Board policy to ensure the "fullest freedom" to employees in the exercise of those rights).

178. *See* Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 942 (2011).

review.[179] A generalized change or fact-specific modification is within the realm of authority of the Board, but major policy changes create uneven ground for parties to collectively organize.[180] The gaps present in *Technology Services* create situations in which remote workers could be vulnerable to employer pressure that would unnecessarily fragment units across massive geographic regions in an effort to bring all employees at a national company under one unit.[181] The weight of the elements should be redistributed or made dependent on the type of unit sought so that varied types of units can develop and succeed in a manner that is predictable, at least as a general matter, by both workers and employers.[182]

C. Using 553(c) Rulemaking to Improve Reliance

Irrespective of the direction taken, the Board should implement this change through a promulgated rule or regulation, rather than through adjudication.[183] As shown before with the community of interest doctrine, the enforcement of the doctrine is subject to the whims of the current Board's members and can be undone by a single case.[184] While still subject to Board desire, a rule promulgated through the Notice-and-Comment process allows for the creation of a public record on which policy can be made and modified in the future, if necessary.[185] A regulation, eventually codified in the Code of Federal Regulations, would further allow for union organizers and employers throughout an organizing process to rely on the Board and would better allow for interested parties to prepare for an organizing drive.[186]

Since the needs of units are consistently changing, adapting the community of interest doctrine should take on a more static form on the side of the

179. *See* Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891, at *4 (July 20, 1995) (applying a presumption created for in-person work to remote worker circumstances).

180. *See* Baver, *supra* note 116.

181. *See Tech. Servs. Sols.*, 1995 N.L.R.B. LEXIS 891, at *4 (issuing a mandate for a bargaining unit including the entire southwestern region).

182. *See* Malin & Perritt, *supra* note 89 (explaining an underlying presumption for the NLRA that employers and employees in communities are best equipped to organize themselves).

183. *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (establishing agencies' rulemaking process, including public participation).

184. *See* Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, at 2 (Dec. 14, 2022).

185. *See generally* 5 U.S.C. § 553(c) (explaining what must be disclosed to the public in a statement of basis and purpose, including grounds for legal authority and policy objectives).

186. *See* Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n, 599 P.2d 31, 37–38 (1979) (explaining the requirements of an agency statement of basis and purpose to comply with procedural due process).

Board while still allowing individual units to act reliably when organizing themselves with their employers.[187] Rulemaking would also provide insulation from judicial review that could further confuse and uproot processes, which often take extended periods of time when challenged.[188] Again, since the Supreme Court has recently positioned itself in a manner showing less deference to the Board in *Starbucks*, explaining in great detail through 553(c) rulemaking the need, statutory grounds, and administrative intent behind a change in policy like the one proposed in this Comment would allow workers, employers, and the courts to operate on a more level floor.[189]

D. The Potential for Statutory Reform

Furthermore, House Bill 2347 and the Taft-Hartley amendments show the ability of Congress to propose legislation that fundamentally alters the shape, obligations, or policies of the Board.[190] The Taft-Hartley amendments have persisted since their initial introduction and have had a lasting impact on both policy and procedure.[191] The Board still operates under the structure of largely the Board, General Counsel, and staff attorneys put forward in Taft-Hartley, suggesting statutory reform provides a stable scaffold for Board governance.[192] If Congress changes the mandate of the Board, or even clarifies it, that becomes a persistent framework that can only be undone by a similar legislative action, rather than through the action of a newly appointed Board.

As witnesses discussed during hearing testimony of House Bill 2347, the Board was not meant to be a pervasive arm of the federal government, which was felt in all aspects of the collective bargaining process.[193] The precise determinations of who is impacted by a bargaining agreement and who serves best to argue on behalf of their fellow employees are determinations best left

187. *See H.R. 2346 Hearings*, *supra* note 90, at 21 (statement of Marlene Felter, Medical Records Coder) (providing testimony by an employee confused and distressed by an unpredictable organizing process).

188. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259 (2024) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)) (explaining that the persuasive nature of an agency's argument is now increasingly important in judicial review).

189. *See* Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1579 (2024).

190. *See 1947 Taft-Hartley Passage*, *supra* note 29.

191. *See* NLRA, 29 U.S.C. §§ 151–69.

192. *See The Board*, *supra* note 33; *Organization Chart*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/organization-chart [https://perma.cc/FB7D-8BJT] (last visited Feb. 8, 2025).

193. *See H.R. 2346 Hearings*, *supra* note 90, at 16–17.

to the parties involved.[194] However, general guidelines are both important for understanding the legislation and for giving shape to the rights the NLRA creates. Echoing the Board's ability to update the community of interest doctrine, Congress should make clear that a community of interest should not be overturned by determinations that could become arbitrary, like the geographic closeness of employees who work remotely. The role of the Board has historically been most effective as the setter of general direction and as a watchdog of rights that deal with particularities dependent on the circumstances of individual workplaces.[195] Instead of prescribing specific benchmarks that each workplace has to meet in order to achieve the platonic ideal of an appropriate bargaining unit, the Board should make clear, and Congress should codify, that groups of employees who sufficiently demonstrate common duties, circumstances, and material interests can vote for or against their own representation.[196]

As the American economy continues to change and develop, the Board should not be held to adapt its own policies to what it acknowledges are highly fact-specific determinations.[197] The determinations of appropriate bargaining units are both so varied as to make an exhaustive list of elements ineffective and so nebulous as to require national direction to ensure rights are upheld.[198] By either removing the geographic closeness element or by promulgating a rule that allows for a more dynamic unit determination process, the Board can show how the more rigid aspects of Board policy are ill-suited to serving American workers.[199]

CONCLUSION

The National Labor Relations Board currently faces issues with a backlog of cases and a stagnant budget that has inhibited the continued efficacy of the agency tasked with being a watchdog of private labor relations in the United States.[200] In light of recent decisions from the Supreme Court like

194. *See* Malin & Perritt, *supra* note 89, at 5; LAVE & WENGER, *supra* note 89, at 35–36.

195. *See* GOULD, *supra* note 88, at 40 (arguing that the Board functions best as a generalized arbiter of labor policy); ALEXANDRA HEGJI, CONG. RES. SERV., R42526, FEDERAL LABOR RELATIONS STATUTES: AN OVERVIEW 19 (2012), https://sgp.fas.org/crs/misc/R42526.pdf [https://perma.cc/SJ5T-FGWD].

196. *See, e.g.*, Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 944 (2011) (allowing for the creation of bargaining units defined by community interest more than rigid factors).

197. *See id.* at 941.

198. *See, e.g.*, Tech. Servs. Sols., 1995 N.L.R.B. LEXIS 891 (July 20, 1995).

199. *See supra* Part I.A–B.

200. *See* Friedman, *supra* note 8.

Starbucks and *Loper Bright*, the resources of the Board and the deference owed to it are currently subject to significant scrutiny.[201] The continued reliance on the Board, available to both employers and employees, hinges on the Board's ability to speak clearly and adapt to the rapidly changing scope of the U.S. labor force, shifting from in-person labor and centralized places of business to fragmented communities across wide swaths of the United States.[202]

The community of interest standard presents an opportunity not only to create just outcomes for unions on a case-by-case basis but also creates an opportunity for the Board to modernize itself generally.[203] In adapting itself to a modern circumstance in one small element, the Board can show its ability to remain relevant without throwing away its doctrines and policies wholesale. This should be done, first, by doing away with or severely reducing the importance of the geographic closeness element when applied to remote unions or, generally, as the other elements accomplish the same protective measures.[204] To accomplish this in a more comprehensive way, the Board should update the community of interest analysis through 553(c) rulemaking rather than adjudication.[205]

Even then, statutory reform in the shape of amendments that have already come to pass is likely the most effective means to update the Board into the modern day and create a reliable structure for workers, employers, and unions. Congress has the power to modify the Board and its enabling statute to better reflect its purpose of reducing industrial strife and fostering collective action in the modern age.[206] Instead of adjudicating policies in contradictory ways, both a promulgated rule and a new legislative mandate can improve reliability in a field that impacts nearly every citizen's life.[207] The rights guaranteed by the NLRA safeguard the American workforce, and it is imperative that the triggering event for those rights reliably identifies groups of workers who impact each other and share material interests regardless of their physical circumstances.

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201. *See* Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1579 (2024); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

202. *See* GERSHON, *supra* note 59, at 2; Hirsch, *supra* note 18.

203. *See supra* Part IV.

204. *See supra* Part V.B.

205. *See* Administrative Procedure Act, 5 U.S.C. § 553(c); *see also* Baver, *supra* note 116.

206. *See* GOULD, *supra* note 88, at 41.

207. *See* Baver, *supra* note 116.