Final Brief Oral Argument Scheduled Nov. 14, 2018*
(*PIAA's motion to reschedule pending)

Nos. 18-1037, 18-1043

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 18-1037, 18-1043
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 06-CA-175817
and	)	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Intervenor

Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") was the respondent before the Board in the unfair-labor-practice proceeding on review and is the Petitioner/Cross-Respondent in this court proceeding. The Board's General Counsel was a party before the Board in the unfair-labor-practice proceeding. Office and Professional Employees International Union was the charging party before the Board in the unfair-labor-practice proceeding, and is the Intervenor in

this court proceeding. Amicus curiae in support of PIAA in this court proceeding is the National Federation of State High School Associations.

B. Rulings Under Review

This case is before the Court on PIAA's petition for review of an unfair-labor-practice Decision and Order of the Board, issued on January 26, 2018, and reported at 366 NLRB No. 10. The Board seeks full enforcement of that Order. The Board's Order is based, in part, on findings made in an underlying representation (election) proceeding, and thus the record in that proceeding is also before the Court. 29 U.S.C. § 159(d). The Board's Decision on Review and Order in the underlying representation proceeding issued on July 11, 2017, and is reported at 365 NLRB No. 107.

C. Related Cases

The case on review was not previously before this Court or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

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Dated at Washington, DC
this 3rd day of October, 2018

TABLE OF CONTENTS

Headings **Page(s)**

Statement of jurisdiction 1

Statement of the issues 3

Relevant statutory provisions 3

Statement of the case 3

I. The Board's findings of fact 4

A. Background; PIAA's structure and operations 4

B. PIAA's regulations and eligibility requirements for officials to receive officiating work 6

C. The scheduling of games and assignment of work; officials' payment and compensation 7

D. PIAA's regulation of officials' on-field performance 10

II. The Board proceedings 12

A. The representation case 12

B. The unfair-labor-practice case 14

III. The Board's conclusions and Order 14

Summary of argument 15

Argument 17

PIAA violated the Act by refusing to recognize or bargain with the Union 17

A. The Board reasonably found that PIAA failed to carry its burden in proving that the officials are independent contractors 17

1. Applicable principles and standard of review 17

TABLE OF CONTENTS

Headings-cont'd **Page(s)**

2. The balance of the common-law factors favors a finding of employee status 19

a. PIAA controls the means and manner of the officials' on-field performance and related duties 20

b. The officials are an integral part of PIAA's operations and are not engaged in distinct businesses 25

c. PIAA directs the officials' work while reviewing and supervising their performance 28

d. PIAA certifies the officials and trains them in the required skills on an ongoing basis..... 31

e. PIAA regulates the system of compensation for the officials and dictates their postseason pay..... 33

f. The officials lack significant opportunities for entrepreneurial gain or loss, and are not rendering services in connection with independent businesses 34

g. The remaining common-law factors do not outweigh the factors favoring a finding of employee status..... 38

3. The Board reasonably distinguished its *Big East* decision 41

4. The Court lacks jurisdiction to entertain PIAA's belated argument regarding *FedEx II*, and PIAA's argument lacks merit 45

B. The Board reasonably rejected PIAA's argument that it is an exempt political subdivision..... 48

1. Applicable principles and standard of review..... 48

2. PIAA was not directly created by the state..... 49

TABLE OF CONTENTS

Headings-cont'd **Page(s)**

3. The overwhelming majority of the members on PIAA's Board of Directors are not responsible to public officials 52

Conclusion 56

TABLE OF AUTHORITIES

Cases **Page(s)**

Alois Box Co. v. NLRB,
216 F.3d 69 (D.C. Cir. 2000) 45

Am. League of Prof'l Baseball Clubs,
180 NLRB 190 (1969) 31

Austin Tupler Trucking, Inc.,
261 NLRB 183 (1982) 42

Beverly Enters.-Mass., Inc. v. NLRB,
165 F.3d 960 (D.C. Cir. 1999) 17, 19

Big East Conference,
282 NLRB 335 (1986), *affirmed sub nom.*
Collegiate Basketball Officials Ass'n, Inc. v. NLRB,
836 F.2d 143 (3d Cir. 1987) 29, 32-33, 40, 42-44

BKN, Inc.,
333 NLRB 143 (2001) 19, 38

Boire v. Greyhound Corp.,
376 U.S. 473 (1964) 2

**City Cab Co. of Orlando, Inc. v. NLRB*,
628 F.2d 261 (D.C. Cir. 1980) 19, 21, 24, 28, 35, 38, 41

Cmty. for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 18, 34

Constr. Drivers, Local No. 221 v. NLRB,
899 F.2d 1238 (D.C. Cir. 1990) 45

Corp. Express Delivery Sys. v. NLRB,
292 F.3d 777 (D.C. Cir. 2002) 36

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-cont'd **Page(s)**

Corson & Gruman Co. v. NLRB,
899 F.2d 47 (D.C. Cir. 1990)..... 24, 32

Crew One Prods., Inc. v. NLRB,
811 F.3d 1305 (11th Cir. 2016)..... 27

Drukker Commc'ns, Inc. v. NLRB,
700 F.2d 727 (D.C. Cir. 1983)..... 42, 44

Enter. Leasing Co. of Fla. v. NLRB,
831 F.3d 534 (D.C. Cir. 2016)..... 25, 38, 45

FedEx Home Delivery v. NLRB ("*FedEx I*"),
563 F.3d 492 (D.C. Cir. 2009).....35-38, 46-48

FedEx Home Delivery ("*FedEx II*"),
361 NLRB 610 (2014), *enforcement denied*,
849 F.3d 1123 (D.C. Cir. 2017).....12-15, 18, 35, 45-47

Film & Dubbing Prods., Inc.,
181 NLRB 583 (1970)..... 23

Freund Baking Co.,
330 NLRB 17 (1999)..... 2

Holly Farms Corp. v. NLRB,
517 U.S. 392 (1996)..... 49, 52

**Lancaster Symphony Orchestra v. NLRB*,
822 F.3d 563 (D.C. Cir. 2016).....15, 18-25, 31, 34-40, 42-44, 47-48

Local 777, Seafarers Int'l Union v. NLRB,
603 F.2d 862 (D.C. Cir. 1978)..... 27

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-cont'd **Page(s)**

Lynch v. Workmen's Comp. Appeal Bd.,
554 A.2d 159 (Pa. Commw. Ct. 1989) 42

**Midwest Div.-MMC, LLC v. NLRB*,
867 F.3d 1288 (D.C. Cir. 2017) 49, 52-55

NLRB v. Ky. River Cmty. Care, Inc.,
532 U.S. 706 (2001) 19

NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.,
402 U.S. 600 (1971) 48-50, 52-55

NLRB v. Princeton Mem'l Hosp.,
939 F.2d 174 (4th Cir. 1991) 54

**NLRB v. United Ins. Co.*,
390 U.S. 254 (1968) 17-18, 23, 27, 30, 32, 41-42

N. Am. Van Lines, Inc. v. NLRB,
869 F.2d 596 (D.C. Cir. 1989) 38

Parkwood Developmental Ctr., Inc. v. NLRB,
521 F.3d 404 (D.C. Cir. 2008) 46

Pa. Acad. of the Fine Arts,
343 NLRB 846 (2004) 32

Pa. Virtual Charter Sch.,
364 NLRB No. 87, 2016 WL 4524109 (Aug. 24, 2016) 51, 55

Reg'l Med. Ctr. at Memphis,
343 NLRB 346 (2004) 53

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-cont'd **Page(s)**

Research Found. of City Univ. of N.Y.,
337 NLRB 965 (2002) 54-55

Roadway Package Sys., Inc.,
326 NLRB 842 (1998) 18, 26, 42

Sch. Dist. of Harrisburg v. PIAA,
309 A.2d 353 (Pa. 1973) 50-51

Seattle Opera v. NLRB,
292 F.3d 757 (D.C. Cir. 2002) 22, 25

Sisters' Camelot,
363 NLRB No. 13, 2015 WL 5678168 (Sept. 25, 2015) 22, 28, 33, 44

Slay Transp. Co.,
331 NLRB 1292 (2000) 22-23, 26, 38

United States v. L.A. Tucker Truck Lines, Inc.,
344 U.S. 33 (1952) 46

Woelke & Romero Framing, Inc. v. NLRB,
456 U.S. 645 (1982) 45

Yukon-Kuskokwim Health Corp. v. NLRB,
234 F.3d 714 (D.C. Cir. 2000) 48, 52, 54

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Federal Statutes **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. §§ 151 *et seq.*)

Section 2(2) (29 U.S.C. § 152(2)) 48
Section 2(3) (29 U.S.C. § 152(3)) 17, 19, 42
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 3, 14, 17
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) 3, 14, 17
Section 9(c) (29 U.S.C. § 159(c)) 2
Section 9(d) (29 U.S.C. § 159(d)) 2, 47
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(e) (29 U.S.C. § 160(e)) 2, 25, 38, 45-47, 54
Section 10(f) (29 U.S.C. § 160(f)) 2

State Statutes

Pennsylvania Act 91 of 2000
(24 P.S. §§ 16-1601-A *et seq.*)

24 P.S. § 16-1603-A 50-51
24 P.S. § 16-1604-A 30, 50, 54
24 P.S. § 16-1605-A 50-51

Other Authorities

Restatement (Second) of Agency § 220(2) (1958) 20, 31

GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*
Board	National Labor Relations Board
PIAA	Pennsylvania Interscholastic Athletic Association, Inc.
Union	Office and Professional Employees International Union

UNITED STATES COURT OF APPEALS
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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") for review, and the cross-application of the

National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against PIAA on January 26, 2018, and reported at 366 NLRB No. 10. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended ("the Act"). 29 U.S.C. § 160(a). The Board's Order is final with respect to all parties, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. The Office and Professional Employees International Union ("the Union") intervened in support of the Board.

The Board's Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 06-RC-152861), and thus the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board's actions in the representation proceeding for the limited purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court's rulings. 29 U.S.C. § 159(c); *see Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

PIAA has refused to recognize and bargain with the union that its employees chose in a Board-supervised election to represent them. The ultimate issue is whether the Board properly found that PIAA's refusal violated Section 8(a)(5) and (1) of the Act, which in turn depends on two issues relating to the Board's certification of the Union as representative of the unit in question:

1. Whether the Board reasonably found that PIAA failed to carry its burden in proving that its officials are independent contractors.

2. Whether the Board reasonably rejected PIAA's argument that it is an exempt political subdivision.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached Addendum.

STATEMENT OF THE CASE

As noted, this unfair-labor-practice case concerns the Board's finding that PIAA violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by admittedly refusing to recognize and bargain with the Union as the certified bargaining representative of a unit of PIAA's employees. Before the Board, PIAA contested the validity of the Union's certification by arguing that the lacrosse officials included in the unit are non-employee independent contractors that are excluded from the Act's coverage, and by arguing that PIAA itself is an exempt

political subdivision rather than a statutory employer within the jurisdiction of the Board. The Board rejected those arguments. The Board's findings in the representation and unfair-labor-practice proceedings, as well as the Decision and Order directly on review, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Background; PIAA's Structure and Operations

PIAA is a private nonprofit corporation with the primary purpose of promoting uniformity of standards in interscholastic athletic competitions among its member schools. (JA791; JA58.)[1] A group of high school principals acting in their private capacities with no governmental involvement founded PIAA in 1913. (JA642; JA13.) It was formally incorporated as a nonprofit entity in 1978. (JA670 n.36.)

Among other things, PIAA provides its member schools with access to a pool of "registered sports officials" to officiate regular and postseason games. (JA791; JA58-59, 87-88, 419, 430-31, 455-58.) It has approximately 1,611 member schools at the junior high, intermediate, middle, and high schools levels in Pennsylvania, including nearly two hundred private schools. (JA639, 791; JA26,

[1] "JA" references are to the Corrected Deferred Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to PIAA's opening brief to the Court. "Amicus Br." refers to the amicus curiae brief filed by the National Federation of State High School Associations.

58-59.) PIAA provides officials for a variety of interscholastic sports, and its member schools are divided into twelve geographic districts, which are overseen by PIAA's district committees. (JA648-49; JA7, 59-60, 62-64, 124, 127-35, 258, 420-22.) The present case involves a unit of approximately 140 officials for boys' and girls' lacrosse games in two of PIAA's districts, Districts VII and VIII, covering Pittsburgh and surrounding areas. (JA639-40, 791; JA7, 743-44.)

PIAA maintains a constitution and by-laws governing its operations. (JA791; JA58-103, 105-240.) The constitution specifies the composition of PIAA's Board of Directors: eighteen members are elected directly by PIAA's district committees; twelve members are selected as representatives of various non-governmental interest groups, including PIAA's male and female officials; and one member is appointed by the Pennsylvania Secretary of Education. (JA644-46; JA60, 111-22.) PIAA is administered by an Executive Director and other executive staff hired by the Board of Directors. (JA646-47; JA25, 61-62.) The district committees are comprised of elected representatives of various groups, including active officials. (JA648-49; JA62-64.) The districts are subdivided into sport-specific local chapters, which are comprised of the active officials in that geographic region. (JA651-54; JA426, 439-44.)

B. PIAA's Regulations and Eligibility Requirements for Officials to Receive Officiating Work

In order to be eligible to officiate games for PIAA or any of its member schools, officials must be registered by PIAA and active in one of its local chapters. (JA682; JA18, 39, 87, 426, 450.) Under PIAA's constitution, its Board of Directors is empowered to determine, among other things, "the method of and the qualifications for the registration of officials," the scope of officials' "powers and duties," and any other "policies, procedures, rules, and regulations" necessary for overseeing officials. (JA791; JA61, 122-23.) Registered officials must meet PIAA's discretionary requirements, pay a registration fee, pass a background check, and pass a PIAA-administered exam in their chosen sport. (JA658, 791-92; JA31, 40, 425, 492-95.) PIAA administers the exams four times per year at designated locations, and PIAA's districts or local chapters may hold clinics to help applicants prepare. (JA658, 792; JA31, 36, 48, 425.) PIAA's Executive Director reserves the right to discretionarily deny registration to any applicant. (JA659, 792; JA87, 425.) Documents created and imposed by PIAA state that officials are independent contractors rather than employees. (JA793; JA36, 50, 494, 496.)

After officials are approved for registration by PIAA, they are required to affiliate with one of its local chapters within fifteen days. (JA658-59, 792; JA426, 440.) An official may not affiliate with more than one chapter in the same sport,

and may not officiate games outside the geographic area of the official's own particular chapter. (JA792, 799; JA426.) Officials are not formally prohibited from officiating non-PIAA-sponsored games for other employers. (JA793.) PIAA maintains comprehensive regulations governing the officials, including, along with its constitution and by-laws, a lengthy Officials' Manual and an Officials' Code of Ethics. (JA657, 792; JA67, 417-65, 490-91.) Pursuant to those regulations, officials are required to attend at least six local chapter meetings during the course of a season, as well as an annual rule-interpretation meeting at which officials are trained in their sport's current rules. (JA659, 792; JA17, 32, 40, 426-28, 433, 442.) In order to be eligible to officiate postseason games, officials must attend PIAA's statewide convention at least once every five years. (JA793; JA38, 40, 154, 457, 496, 498.) Officials are subject to discipline by PIAA, including suspension or removal, for failing to comply with the requirements contained in PIAA's regulations. (JA667-68, 792; JA22, 58, 67, 88-89, 143-48, 428-31, 445, 453-55, 461-65.)

C. The Scheduling of Games and Assignment of Work; Officials' Payment and Compensation

PIAA dictates the overall scheduling parameters for each season, including the length of preseason practice, the maximum length and maximum number of regular season games, and the date by which each of its district's games must be completed. (JA792; JA14, 89-95, 98, 245.) During the regular season, PIAA's

member schools schedule individual games and arrange for officials from PIAA's pool of registered officials to be assigned to them, typically by utilizing the services of a third-party assignor. (JA792; JA26, 29, 153-54, 456.) Officials indicate their availability for particular dates, and are offered assignments to officiate individual games. (JA660-61, 792; JA50-51.) Officials may decline regular season assignments without being penalized for doing so, though they are required to contact the assignor to arrange for a replacement if they are unable to appear for an accepted assignment. (JA792; JA37, 46, 50.) The lacrosse officials average two to three games per week for the seven-week regular season, and, for varsity games, there are typically two or three officials assigned to each game. (JA792; JA29, 37-38.) After the regular season ends, PIAA unilaterally sets the scheduling and selects the officials for all postseason games, including district playoffs, inter-district competitions, and the statewide championship. (JA661, 793; JA29, 32, 154-55, 181-85, 199-202, 267-68, 288-91, 456-57, 498-505.)

Once an official accepts an assignment for a game during the regular season, PIAA's regulations require the official and the host school to enter into a form contract that is provided by PIAA. (JA792; JA87-88, 103, 430.) PIAA helps enforce the contracts by penalizing individual officials or member schools for infractions. (JA792; JA83-86, 88, 155, 430-31, 458.) PIAA mandates that officials provide host schools with tax documents and other information in a timely

manner, and requires host schools to prepare a check for payment prior to each game. (JA792; JA155, 457-58.)

The individual officials and host schools are nominally free to negotiate over the amount of compensation for each game. (JA792; JA431, 457-58.) PIAA, however, expressly discourages any attempt to negotiate fees collectively, and states that it does not sanction, recognize, or support the establishment of minimum or maximum fees. (JA792; JA20, 155, 431, 457.) Officials are paid directly by the host schools during the regular season, and no withholdings are made for tax purposes. (JA792; JA42, 457-58.) For varsity games during the regular season, the amount of compensation averages approximately $70 per game, regardless of its ultimate length. (JA666, 792; JA29, 41.) Throughout the regular season and the postseason, PIAA provides its officials with liability insurance, supplemental medical insurance, and accidental death and dismemberment insurance, but officials do not receive regular medical insurance, workers compensation insurance, or unemployment insurance. (JA667, 793; JA29, 31, 538-631.)

During the postseason, PIAA's member schools are not involved in the scheduling, assignment, or payment process. (JA793; JA153-54, 161, 456-57.) PIAA selects eligible officials to officiate the games, and it unilaterally establishes a set fee of $80 for each postseason game. (JA793; JA17, 32, 456-57.) Officials

are paid directly by PIAA for postseason games, and once again no withholdings are made. (JA793; JA29.)

D. PIAA's Regulation of Officials' On-Field Performance

PIAA maintains regulations governing officials' on-field performance and their conduct during games, as well as their ancillary duties in connection with officiating games on behalf of PIAA. (JA663, 792-93; JA67, 89, 417-65, 490-91.) Among other things, PIAA's regulations direct officials to remain knowledgeable of "current rules" and proper "officiating techniques," to keep themselves "physically fit and mentally alert," to control their tempers during games, to remain impartial, and to clearly communicate "interpretations and announcements." (JA67, 447.) Officials must wear identical uniforms with a PIAA-branded emblem or patch displayed on the left sleeve, they must carry a PIAA-issued identification card, and they must provide their own equipment consistent with PIAA-specified details such as the correct color of whistle. (JA662-63, 685, 792-93; JA18, 29, 44, 67, 434-38, 496-97.) PIAA requires officials to arrive and begin work at least 30 minutes before the start of each game, and officials have no ability to shorten or lengthen the duration of the assignment. (JA792; JA67, 447, 506.) Officials may not hire assistants or replacements to perform the assigned work. (JA793; JA52.)

PIAA requires its officials to remove themselves from a game if they have some connection that would call their impartiality into question, to file mandatory reports within 24 hours if they disqualify a coach or player for misconduct, and to cooperate with PIAA in any investigation. (JA663-64, 793-94 & nn.5-6; JA30, 40, 48-49, 429-31, 438, 449, 508.) Along with the Officials' Manual and PIAA's other regulations, described in part above, PIAA provides each official with a rule book for the relevant sport. (JA793-94 & n.5; JA48.) PIAA plays an active role in continually issuing rule-interpretation bulletins regarding the current rules for each sport, and officials are required to follow PIAA's rule interpretations while officiating. (JA792-93; JA16-17, 35, 40, 96, 264, 422, 426-30, 439, 455, 506-37.)

PIAA's member schools may request the discipline or removal of a particular official, and the schools are encouraged to submit PIAA-provided evaluations throughout the regular season based on the officials' performance. (JA792, 794 & n.6; JA58, 67, 156, 458-65.) PIAA uses the evaluations to select officials for postseason assignments and to determine their eligibility for future work. (JA792, 794 n.6; JA156-58, 430.) PIAA directly evaluates officials during postseason games to select officials for work and to help them improve their performance in future years. (JA796 n.10; JA33, 149, 156, 459.) PIAA also reserves the right to suspend or remove officials, in its discretion, for failing to comply with PIAA's regulations or for making calls during games that are "biased

and/or consistently incompetent or unfair." (JA667-68, 793-94 & nn.5-6; JA58, 67, 143-48, 427-31, 453-55.)

II. THE BOARD PROCEEDINGS

A. The Representation Case

In May 2015, the Union petitioned to represent a unit consisting of all boys' and girls' lacrosse officials in two of PIAA's geographic districts, Districts VII and VIII, covering Pittsburgh and surrounding areas. (JA639-40.) On July 30, 2015, following a two-day evidentiary hearing, the Board's Regional Director issued a Decision and Direction of Election rejecting PIAA's arguments that the officials are non-employee independent contractors outside the coverage of the Act and that PIAA is an exempt political subdivision. (JA639-712.) The Regional Director relied, in part, on the Board's discussion of the common-law test for independent-contractor status in *FedEx Home Delivery*, 361 NLRB 610 (2014) ("*FedEx II*"). In the September 2015 mail-ballot election, the officials voted in favor of union representation, and the Board thereafter certified the Union as bargaining representative. (JA791 n.1.)

PIAA filed a request for review of the Regional Director's decision; the Board granted review in March 2016 of the independent-contractor issue but not the political-subdivision issue. (JA791 & n.2; JA745.) In its request for review, and again in its brief on review, PIAA argued that its officials are independent

contractors under *FedEx II* and other Board precedent. (*E.g.*, JA729 n.9, 735-36 n.13, 779 n.24, 786-87, 789 n.29.) In March 2017, while the Board was still reviewing the Regional Director's decision in the present case, this Court denied enforcement of the Board's order in the factually unrelated *FedEx II* case on narrow law-of-the-circuit grounds. 849 F.3d 1123, 1128 (D.C. Cir. 2017). PIAA submitted no supplemental filings raising the Court's denial of enforcement to the Board or arguing that it should affect the Board's analysis.

Four months later, on July 11, 2017, the Board (Members Pearce and McFerran; Chairman Miscimarra, dissenting) issued a Decision on Review and Order affirming the Regional Director's finding that PIAA did not carry its burden of establishing that the officials are independent contractors and therefore excluded from the Act's protections. (JA791-802.) The Board examined all of the traditional common-law factors, and determined that, on balance, they favor a finding of employee status. (JA791-802.) In doing so, the Board adhered to its discussion of the common-law test in *FedEx II*, and noted that this Court denied enforcement of its order in that case based on the law-of-the-circuit doctrine due to a factually indistinguishable prior holding. (JA791 n.3.) PIAA did not file a timely motion for reconsideration of the Board's decision.

B. The Unfair-Labor-Practice Case

Following the Union's certification as bargaining representative and the Board's decision affirming the Regional Director, PIAA admittedly refused to recognize or bargain with the Union. (JA822.) The Board's General Counsel issued an unfair-labor-practice complaint alleging that PIAA's refusal violated Section 8(a)(5) and (1) of the Act, and subsequently filed a motion for summary judgment with the Board. (JA822.) PIAA filed a response renewing its earlier objections to the validity of the Union's certification. (JA822.) PIAA did not attempt to raise any new objections based on the Court's denial of enforcement of the Board's order in *FedEx II*. (JA820.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On January 26, 2018, the Board (Chairman Kaplan, and Members Pearce and McFerran) granted the General Counsel's motion for summary judgment and found that PIAA violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with the Union. (JA822-23.) The Board found that all representation issues raised by PIAA were or could have been litigated in the underlying representation proceeding. (JA822.)

The Board's Order requires PIAA to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the

Act. (JA823-24.) Affirmatively, the Board's Order requires PIAA to, on request, recognize and bargain with the Union as the exclusive representative of employees in the certified unit, and to post a remedial notice. (JA823-24.)

SUMMARY OF ARGUMENT

This case involves PIAA's attempt to invoke two exceptions to the broad definitions of "employee" and "employer" contained in the Act in order to avoid bargaining with the union chosen by a unit of its employees. The Board first found that PIAA failed to satisfy its burden of proof in demonstrating that its lacrosse officials are independent contractors rather than employees covered by the Act. Consistent with precedent from both the Supreme Court and this Court—including, most recently, this Court's opinion in the analogous case of *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016)—the Board thoroughly examined all of the traditional common-law factors and related considerations pertaining to agency status, and determined that the record supports a finding of employee status. Judicial review of such determinations is limited, and the Board's decision is entitled to deference as long as it was one of two fairly conflicting views.

In its analysis, the Board relied in part on its discussion of the common-law test in *FedEx Home Delivery*, 361 NLRB 610 (2014) ("*FedEx II*"), *enforcement denied on other grounds*, 849 F.3d 1123 (D.C. Cir. 2017). However, contrary to

PIAA's jurisdictionally barred arguments regarding the Board's citation to its decision in that case, the discussion of the common-law test in that decision is entirely consistent with this Court's recent precedent, and the Court denied enforcement based on narrow law-of-the-circuit grounds due to a factually indistinguishable prior holding. As a separate matter, the Board here also explained at length why a thirty-year-old decision involving a unit of college basketball officials is factually distinguishable and not controlling.

The Board next reasonably found that PIAA is not an exempt political subdivision or an arm of the Commonwealth of Pennsylvania. The two-pronged legal standard for the political-subdivision exception is well established, and it asks whether an entity was "directly created" by the state, or whether a majority of the individuals who administer it are responsible to the public insofar as they are appointed by and removable by public officials. PIAA was created more than a century ago with no governmental involvement, and the Board properly rejected PIAA's illogical and unprecedented legal theory that it was "re-created" by the state in 2000 when it was merely subjected to additional regulatory obligations. Likewise, the Board rejected PIAA's argument that the members of its Board of Directors are appointed by public officials, when in fact only *one* of thirty-one board members is either appointed by or subject to removal by a governmental

actor. As a result, the Court should affirm the Board's rejection of PIAA's arguments, and enforce the Board's Order in full.

ARGUMENT

PIAA VIOLATED THE ACT BY REFUSING TO RECOGNIZE OR BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), when it refuses to recognize or bargain with the duly certified bargaining representative of its employees. *Beverly Enters.-Mass., Inc. v. NLRB,* 165 F.3d 960, 961-62 (D.C. Cir. 1999). In the present case, PIAA has admittedly refused to recognize and bargain with the Union in order to challenge the Board's certification of the Union as the exclusive bargaining representative of a unit of lacrosse officials. Thus, assuming the Court upholds the Board's certification of the Union—and, specifically, the Board's rejection of PIAA's objections to the employee status of the officials and to its own status as a non-exempt employer—then PIAA has violated the Act. *Id.*

A. The Board Reasonably Found That PIAA Failed To Carry Its Burden in Proving That the Officials Are Independent Contractors

1. Applicable Principles and Standard of Review

Section 2(3) of the Act, as amended by Congress in 1947, contains a broad definition of "employee" that excludes "any individual having the status of independent contractor." 29 U.S.C. § 152(3). In *NLRB v. United Insurance Co.,*

the Supreme Court held that the "obvious purpose" of the independent-contractor exception was to have the Board and the courts apply "general agency principles" in distinguishing between the two types of workers. 390 U.S. 254, 256 (1968). The Supreme Court has endorsed the nonexhaustive list of factors contained in the Restatement (Second) of Agency, and has emphasized that under the common-law test "there is no shorthand formula"—instead, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 258; *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 & n.31 (1989). While not enumerated in the Restatement itself, the Board and this Court consider "entrepreneurial opportunity" and related considerations as an additional relevant factor. *Lancaster Symphony Orchestra*, 822 F.3d at 566, 569; *FedEx II*, 361 NLRB at 612, 620-21. In accordance with *United Insurance*, the Board has recognized for several decades that the common-law test requires a "careful examination of all factors," and that no particular factor is categorically "more or less indicative of employee status" in every case. *Roadway Package Sys., Inc.*, 326 NLRB 842, 850 (1998).

In reviewing the Board's application of the common-law factors to a particular case, courts "may not displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *United Ins.*, 390 U.S. at 260;

Lancaster Symphony Orchestra, 822 F.3d at 570; *see City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261, 265 (D.C. Cir. 1980) (holding that judicial review of the Board's conclusions is "limited"). The party alleging independent-contractor status, which strips workers of all rights under federal labor law, has the burden of proof in establishing that claim. *E.g.*, *BKN, Inc.*, 333 NLRB 143, 144 (2001); *cf. NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001) (requiring deference to the Board's allocation of burdens in context of statutory exceptions to the definition of "employee" in Section 2(3) of the Act). In general, the Board and reviewing courts must exercise "particular caution" before concluding that workers fall into one of the exceptions to employee status contained in the Act, in order to avoid unnecessarily denying workers their statutory rights. *See Beverly Enters.-Mass.*, 165 F.3d at 963.

2. The Balance of the Common-Law Factors Favors a Finding of Employee Status

Relying on the Restatement (Second) of Agency and existing precedent, the Board reasonably found that the balance of the common-law factors supports the conclusion that the lacrosse officials are employees. (JA791-802.) The nonexhaustive list of traditional common-law factors includes:

> (1) the extent of control over the details, means, and manner of the work; (2) whether the putative contractor is engaged in a distinct occupation or business; (3) whether the work is done under the direction of the principal, or by a specialist without supervision; (4) the skill required; (5) who supplies the tools and place of work; (6) the

> length of time for which the person is employed/contracted; (7) the method of payment, whether by time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an employment or contract relationship; and (10) whether the principal is in the same business.

(JA793 (citing Restatement (Second) of Agency § 220(2) (1958)).) Consistent with the Court, the Board also considers whether a worker is rendering services as part of an independent business by examining the presence or absence of actual opportunities for entrepreneurial gain or loss, and related considerations. (JA793.) *See Lancaster Symphony Orchestra*, 822 F.3d at 566, 569.

a. PIAA controls the means and manner of the officials' on-field performance and related duties

The Board first considered PIAA's "far-reaching control over the means and manner of the officials' work," and found that the extent-of-control factor weighs heavily in favor of employee status. (JA678-80, 793-95.) Indeed, PIAA controls or reserves the right to control virtually all aspects of the officials' ability to engage in lacrosse officiating, from holding the officials accountable for their on-field performance to restricting their access to work.

Most notably, PIAA maintains extensive work rules regulating the officials' on-field performance once they are tasked with officiating games. PIAA enforces these rules by threatening officials with various levels of discipline or the loss of future work. (JA679, 794 & n.6.) For example, PIAA instructs officials to keep themselves in good physical shape, and to exhibit satisfactory "officiating

mechanics" on the field. (JA794 n.6.) Officials are required to wear identical uniforms while displaying a PIAA-branded emblem or patch on the left sleeve, to carry a PIAA-issued identification card, and to comply with other regulations such as carrying the correct color of whistle and not wearing jewelry. (JA662, 679, 685, 793.) *See Lancaster Symphony Orchestra*, 822 F.3d at 566-67 (affirming employee status where employer dictated posture, playing techniques, and attire of musicians); *City Cab*, 628 F.2d at 265 (emphasizing detailed dress code and appearance rules). PIAA holds officials accountable for displaying complete command of their chosen sport's rules, including PIAA's own rule-interpretation bulletins, and for making accurate and unbiased calls during the games. (JA794 & nn.5-6.)

The officials must review and comply with detailed standards of conduct for their on-field performance as set forth by PIAA in its Officials' Manual (JA417-65), its Officials' Code of Ethics (JA490-91), its constitution and by-laws (JA58-103), and any other policies and procedures that PIAA might promulgate (JA105-08, 256-57). *See Lancaster Symphony Orchestra*, 822 F.3d at 568 (noting that employer issued instructions and established its own "etiquette standards"). PIAA's regulations also include additional job requirements beyond the direct on-field officiating of games, such as filing certain mandatory reports, cooperating with inquiries by PIAA's executive staff, and accepting PIAA-dictated procedures

for receiving assignments and compensation from individual schools. (JA679, 794 n.5.)

In addition, PIAA mandates unconditional acceptance of the dictated game schedules, including time and place, and thereby controls when, where, and for how long the officials work. (JA679.) Officials are required to arrive at the designated location and to begin work 30 minutes before the start of each game, and they have no ability to shorten or lengthen the assignments. (JA792.) *See Slay Transp. Co.*, 331 NLRB 1292, 1293-94 (2000) (finding control over means and manner of work where employer determined in detail where and when job must be performed). In the context of part-time workers with some discretion over when and how often they request assignments, such as the officials here, the relevant inquiry is whether the employer retains the right to control the means and manner of the work once it is assigned. *See Lancaster Symphony Orchestra*, 822 F.3d at 566-70 (affirming finding of control over orchestra musicians' schedules and conduct once they accepted particular performances); *Sisters' Camelot*, 363 NLRB No. 13, 2015 WL 5678168, at *2 (Sept. 25, 2015) (finding employee status where canvassers were not required to report to work every day, but were "subject to significant control by [the employer] when they [did] work"); *cf. Seattle Opera v. NLRB*, 292 F.3d 757, 760, 765 (D.C. Cir. 2002) (affirming employee status of auxiliary choristers who were free to accept or decline roles in individual

productions, because once they accepted work the employer had the right to control "material details of their performance," including scheduling).

Furthermore, even before officials are eligible to request assignments, PIAA exercises control over their duties in connection with lacrosse officiating. PIAA's constitution grants it broad authority to determine the qualifications of officials, their powers and duties, and related policies. (JA793.) PIAA will designate officials as eligible to officiate games, in the sole discretion of its Executive Director, only after requiring them to complete a background check and to pass a PIAA-administered exam. (JA678-79, 793.) *Slay Transp.*, 331 NLRB at 1293 (noting that all drivers had to be "trained, tested, and approved to drive" by the employer); *Film & Dubbing Prods., Inc.*, 181 NLRB 583, 583-84 (1970) (finding employee status where employer controlled work by determining qualifications and administering tests to film translators). Officials must promptly affiliate with one of PIAA's local chapters and remain an active member in order to be eligible for officiating assignments. (JA679.) As a condition of the job, officials are also required to attend regular chapter meetings, annual rule-interpretation trainings, and, to be eligible to officiate postseason games, PIAA's statewide convention. (JA679, 793.) *Cf. United Ins.*, 390 U.S. at 257 (noting that employee-sales-agents regularly attended "staff meetings for the discussion of the latest company sales techniques, company directives, etc.").

In its brief to the Court, PIAA ignores the majority of the extent-of-control considerations cited by the Board, and wrongly claims that the Board based its analysis "almost entirely on the fact that PIAA seeks to maintain standardized rules of lacrosse." (Br.27-31.) Therefore, PIAA has waived any response to the Board's consideration of PIAA's extensive control over the registration of officials, their access to work, their schedules and job duties, their on-field officiating conduct, and all of the other specific regulations governing performance and the manner in which the officials do the assigned work. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (holding that arguments not raised in opening brief are deemed waived).

In any event, PIAA mischaracterizes the level of control it exercises over the lacrosse rules that officials are required to adhere to.[2] The Board correctly found, as noted above, that PIAA's control over the rules extends to its ongoing role in issuing rule-interpretation bulletins, in educating officials on the evolving landscape of the sport, and in promulgating the detailed conduct requirements set forth in its Officials' Manual. (JA794 n.6.) The Officials' Manual emphasizes that attending the annual rules-interpretation training is a "primary requirement" of the

[2] PIAA fails to quote any state-law provision requiring it to adopt particular "standardized lacrosse officiating rules." (Br.29-30.) The fact that PIAA has voluntarily chosen to affiliate with the National Federation of State High School Associations and to adopt its basic lacrosse rules (JA663 n.26) is irrelevant. *See City Cab*, 628 F.2d at 264 n.8.

officials' jobs. (JA659; JA426.) By analogy, in *Lancaster Symphony Orchestra*, the employee-musicians were generally tasked with performing established works of music written by third-party composers, but the employer nonetheless played a significant role in "interpret[ing]" the score and directing the employees with respect to ambiguities and contingencies that "couldn't [be written] into the score." 822 F.3d at 567. Here, as in that case, PIAA is "the ultimate authority to whom all of the [officials] must defer" whenever it revises its interpretation of the rules or clarifies their application to previously unforeseen circumstances. *Id.* at 568. The officials are required to comply with PIAA's rule interpretations, as well as its Officials' Manual, and are held accountable for their performance in a manner that can result in discipline or the loss of future work. (JA679, 794 & n.6.)[3]

b. The officials are an integral part of PIAA's operations and are not engaged in distinct businesses

Upon consideration of the second Restatement factor and two other closely related factors, the eighth and tenth factors, the Board found that PIAA's officials are not engaged in distinct occupations or businesses, that their work is a regular

[3] In addition to being inapposite here and foreclosed by established law, *e.g.*, *Seattle Opera*, 292 F.3d at 765, PIAA's suggestion that "actual" control rather than the right to control should be the appropriate inquiry (Br.31) is an argument that was never presented to the Board. Thus, the Court lacks jurisdiction to entertain it. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court . . . [absent] extraordinary circumstances."); *see, e.g.*, *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550-51 (D.C. Cir. 2016). The Board majority fully addressed a related argument which was raised for the first time in dissent, and which is also not before the Court. (JA794 n.6.)

part of PIAA's own business, and that PIAA is in the business of the work at issue—all factors favoring employee status. (JA680-81, 691-92, 795, 798.) The functions performed by PIAA's officials are not distinct from, but are instead a core part of, PIAA's operations and its business of overseeing and promoting uniform standards in interscholastic athletic competitions. Indeed, as the Board found, PIAA "would not be able to function without [the officials]." (JA680, 795.) *See Slay Transp.*, 331 NLRB at 1294 (noting that functions performed by drivers were at "the very core of [the employer's] business"). The pool of registered officials is one of the primary services that PIAA offers to its member schools, and the retention of such officials is integral to its overall business model. (JA691, 798.) Moreover, the officials are fully integrated into a system in which PIAA screens, certifies, trains, and supervises them, and in which they utilize rule books, form contracts, logos, and assignment and evaluation processes that reflect the name of PIAA rather than discrete business enterprises of the individual officials. (JA795.) When the officials take the field during games, "they do so in the name of PIAA, not in their own names." (JA795.) *See Roadway Package*, 326 NLRB at 851 (emphasizing that "the drivers' connection to and integration in [the employer's] operations is highly visible and well publicized"). For example, the officials are expressly prohibited from displaying a logo during games other than

PIAA's, and they are required to carry an identification card bearing PIAA's name. (JA494-97.)

Contrary to the arguments in PIAA's brief (Br.32-33), sports officiating is clearly part of PIAA's own regular business: PIAA certifies officials and makes them available to its dues-paying member schools; the officials are trained, regulated, and supervised by PIAA; the officials identify themselves as representatives of PIAA; and PIAA prohibits its member schools from utilizing non-PIAA-registered officials. As such, the work performed by the officials is a regular and essential part of PIAA's operations, and PIAA does not merely serve as a neutral intermediary. The Eleventh Circuit's suggestion that the performance of essential functions does not in itself "prove" an employee relationship, *Crew One Prods., Inc. v. NLRB*, 811 F.3d 1305, 1313-14 (11th Cir. 2016), and this Court's similar statements in *Local 777, Seafarers International Union v. NLRB*, 603 F.2d 862, 898-99 (D.C. Cir. 1978), should be read as merely reaffirming the principle that no individual common-law factor is dispositive. A broader reading of those opinions would conflict with the Supreme Court's holding that a factor favoring employee status is whether workers "perform functions that are an essential part of the company's normal operations." *United Ins.*, 390 U.S. at 258-59. Here, PIAA concedes that the work of the officials "facilitates" its mission.

(Br.41.) It is irrelevant whether, as PIAA further contends (Br.41-42), PIAA theoretically could have chosen an entirely different business model.

c. PIAA directs the officials' work while reviewing and supervising their performance

The Board found that the third common-law factor, the extent to which the work is done under the direction or supervision of the principal, also favors employee status. (JA683, 795-96.) The Board acknowledged that the officials are not directly supervised *during* games, and that specific calls on the field cannot be appealed. (JA795.) However, the Board found that PIAA directs the officials' work by requiring compliance with detailed rules and regulations, and that PIAA exercises a supervisory role by "continuously monitor[ing]" the officials' on-field performance. (JA683, 795-96 & n.10.) *See Sisters' Camelot*, 363 NLRB No. 13, 2015 WL 5678168, at *3 (noting that employer effectively oversaw canvassers' work by reviewing post-work reports); *see also City Cab*, 628 F.2d at 264 (emphasizing that employer required drivers to chronicle their fares and movements throughout the day). The adequacy of the officials' work is subject to review, including the regular-season evaluations that schools are encouraged to submit, and noncompliant officials risk the loss of future work by being suspended or removed from the pool of eligible officials. (JA796.) PIAA's Assistant Executive Director is specifically tasked with overseeing the officials' compliance with its regulations, and at the evidentiary hearing he described his primary

responsibility as being "the supervisor" of the officials. (JA795-96; JA34.) Thus, for example, PIAA reviews and follows-up on reports filed by the officials, and uses postseason evaluations and counseling to "improve" the officials' on-field performance in subsequent years. (JA33, 48-49.)

In its brief to the Court (Br.33-36), PIAA relies on an inapposite distinction applicable to employers that seek to monitor "results" without reserving the right to supervise or review how the results are achieved. Here, for the reasons previously discussed, *supra* pp. 20-25, PIAA exercises control over the actual means and manner of the officials' work. Likewise in the context of direction and supervision, the officials here are not evaluated based on the quality of some final product that can be reached by any means in their discretion, but rather based on *how* the officials perform their jobs on the field, and whether the officials remain at all times in compliance with the standards of conduct and rule interpretations dictated by PIAA. (JA683.) *Cf. Collegiate Basketball Officials Ass'n, Inc. v. NLRB*, 836 F.2d 143, 149 (3d Cir. 1987) (noting that, in context of sports officiating, supervision of the "job" is supervision of "how it gets done").

PIAA's implication that immediate "in-game supervision" is necessary for a finding of employee status (Br.34-35) is incorrect. Here, as in other cases involving statutory employees, PIAA supervises the officials and directs their work by requiring them to comply with detailed instructions under threat of later

discipline, and by evaluating the manner by which they perform the work. For example, in *United Insurance*, the sales agents at issue performed most of their work alone without any day-to-day supervision, but their work was reviewed after-the-fact and complaints by customers were investigated with the possibility of counseling or discipline. 390 U.S. at 257-58. The Supreme Court considered those facts, among others, in concluding that the sales agents "[did] not have the independence . . . normally associated with an independent contractor." *Id.* at 258-60.

PIAA also misrepresents the facts by suggesting that its chosen evaluation system was "mandated" by Pennsylvania state law. (Br.35.) As the Board explained, state law only required PIAA to adopt some form of an evaluation system for certain postseason games, but PIAA "goes beyond that requirement" by encouraging schools to submit evaluations for officials' performance throughout the regular season. (JA796 n.10.) PIAA then uses those evaluations to select officials for future work and to potentially discipline officials for failing to comply with PIAA's regulations. In addition, state law only required PIAA to adopt "*an* evaluation system" for postseason games, 24 P.S. § 16-1604-A(b)(7) (2000) (emphasis added), and the particular contours of PIAA's chosen system are dictated and administered by PIAA alone.

d. PIAA certifies the officials and trains them in the required skills on an ongoing basis

The Board next found that the common-law factor regarding the skill required in the occupation slightly favors employee status, or is at least inconclusive. (JA684, 796.) Although PIAA's officials are required to have particularized skills and certain baseline knowledge of their respective sports, the Board noted that even a high level of skill does not preclude an overall finding of employee status. (JA796 & n.12.) *E.g.*, *Lancaster Symphony Orchestra*, 822 F.3d at 566-70 (affirming employee status despite orchestra musicians' high skill level weighing in favor of independent-contractor status). Indeed, the Board has asserted jurisdiction over athletes and officials, even at the professional level, for many decades. *E.g.*, *Am. League of Prof'l Baseball Clubs*, 180 NLRB 190 (1969) (baseball umpires). Furthermore, under the common law there is an "inference" of employee status if a skilled worker performs an occupation that is "an incident of the business establishment of the employer." Restatement (Second) of Agency § 220(2) cmt. i. PIAA's operations are entirely dependent on its ability to retain a pool of skilled officials that can be offered to schools to officiate games, and the very fact that the officials are certified as skilled is what is critical, rather than their ability to skillfully contribute to some end product such as a concert.

More significantly, the Board emphasized that PIAA actively maintains its pool of officials by providing in-house certification and training. (JA684, 796.)

The officials are required to pass an exam before being eligible to officiate, for which PIAA's districts and local chapters may host preparatory clinics, and PIAA then requires officials to receive ongoing training as new interpretations of the basic rules are issued or modified. According to the introduction and foreword to the Officials' Manual, "[m]ere book knowledge" of the rules is insufficient, and the officials must instead learn from and adhere to the policies and directives issued by PIAA, which includes PIAA's active role in informing officials of "proper and current rules interpretations." (JA419.) Thus, the knowledge and skills that are necessary for the officials to remain capable of actively officiating in an evolving sports landscape are provided, at least in part, directly by PIAA. *See United Ins.*, 390 U.S. at 259 (noting that sales agents received training from employer); *cf. Pa. Acad. of the Fine Arts*, 343 NLRB 846, 847 (2004) (finding skill factor favored independent-contractor status where professional models did not receive any on-the-job training or instruction from employer); *Big East Conference*, 282 NLRB 335, 343 (1986) (noting that employer did not "unilaterally undertake a training program of its own"), *affirmed sub nom. Collegiate Basketball Officials Ass'n*, 836 F.2d at 149. In its brief to the Court (Br.36-37), PIAA selectively ignores and has waived any response to the Board's discussion of the in-house certification and continuing training considerations. *Corson & Gruman*, 899 F.2d at 50 n.4.

e. PIAA regulates the system of compensation for the officials and dictates their postseason pay

The Board found that, on balance, the method of compensation and payment is another common-law factor favoring employee status. (JA687-89, 797-98.) The Board again acknowledged that certain considerations point toward independent-contractor status, including the fact that officials are paid per game, that individual schools and officials are nominally free to negotiate the amount of compensation for regular season games, that withholdings are not deducted from the officials' pay, and that officials do not receive regular medical insurance or certain other fringe benefits. (JA797.) However, the Board found that those aspects of the payment and compensation scheme are outweighed by other evidence favoring employee status. Among the Board's considerations was the fact that PIAA unilaterally dictates the amount of compensation for postseason games. (JA689, 797.) *See Sisters' Camelot*, 363 NLRB No. 13, 2015 WL 5678168, at *5 (finding indication of employee status where employer dictated nonnegotiable commission rate). In addition, the lack of some fringe benefits is less significant in the present case, where, unlike in a typical independent-contractor relationship, PIAA does provide the officials with certain liability and accident insurance. (JA797.) *Cf. Big East*, 282 NLRB at 343 (noting that employer did not provide liability insurance).

Moreover, the Board emphasized that the overall "compensation system" that binds officials and schools is controlled by PIAA, directly and indirectly, in a

manner that is inconsistent with any claim that the officials are truly independent. (JA689, 797-98.) PIAA requires its member schools to comply with its own regulations for payment, such as requiring checks to be issued prior to each game, or requiring a school to pay an official for an improper cancellation. (JA689, 792, 797-98 & n.16.) PIAA also disapproves of officials negotiating fees on a collective basis. (JA798.) In response to these considerations, PIAA ignores certain facts relied upon by the Board. For example, PIAA makes no mention (Br.41) of the fact that it unilaterally dictates the fees for postseason games, or that during the regular season it restricts the officials' ability to freely negotiate the amount of compensation or the method of payment.

f. The officials lack significant opportunities for entrepreneurial gain or loss, and are not rendering services in connection with independent businesses

In concluding that the officials are statutory employees, the Board also found that they are not rendering services in connection with independent businesses involving "entrepreneurial opportunity for gain or loss." (JA681-83, 799-800.) Despite not being enumerated in the Restatement (Second) of Agency, both the Board and this Court have traditionally considered workers' entrepreneurial opportunity as an additional relevant consideration. *Lancaster Symphony Orchestra*, 822 F.3d at 566; *cf. Reid*, 490 U.S. at 752 & n.31 (noting that enumerated Restatement factors are nonexhaustive). In *FedEx II*, the Board

clarified *existing* precedent by explaining that entrepreneurial opportunity, along with other related considerations, is part of a broader consideration as to whether an individual is rendering services as part of an independent business. 361 NLRB at 620-21; *see Lancaster Symphony Orchestra*, 822 F.3d at 569 (affirming that entrepreneurial opportunity is one relevant factor, and that related considerations include "whether purported contractors have the ability to work for other companies, can hire their own employees, [or] have a proprietary interest in their work").[4]

In the present case, the officials perform their jobs as representatives of PIAA, with PIAA-issued identification cards and uniforms displaying a PIAA-branded emblem or patch, thus indicating that they are not operating independent enterprises which schools or lacrosse teams could contact to request officiating services. (JA679, 682, 793, 799.) *Cf. City Cab*, 628 F.2d at 265 (noting that "the 'goodwill' from the enterprise" inured to the employer and not the drivers).

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[4] Although the *FedEx II* Board expressly disagreed with this Court's opinion in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) ("*FedEx I*"), such disagreement was based primarily on the Board's understanding that the Court intended to "treat[] the existence of 'significant entrepreneurial opportunity' as the overriding consideration in all but the clearest cases posing the independent-contractor issue under the Act." *FedEx II*, 361 NLRB at 617. The Court has since demonstrated that was not the case. *See Lancaster Symphony Orchestra*, 822 F.3d at 565-70 (citing *FedEx I* while evaluating entrepreneurial opportunity as "one factor among the others," and examining all common-law factors with no stated emphasis). In any event, as discussed further below, *infra* pp. 45-48, any potential conflict between the Board and the Court regarding the entrepreneurial-opportunity factor is not at issue in this case.

Likewise, PIAA requires the officials and individual schools to utilize PIAA-issued forms and contracts, which PIAA helps enforce. (JA683, 799.) The officials are precluded from selling their assignments and from hiring assistants or replacements to perform the assigned work—considerations strongly favoring employee status under this Court's precedent. (JA682, 799.) *Lancaster Symphony Orchestra*, 822 F.3d at 569 (emphasizing inability of musicians to sell their assignments or hire replacements); *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (affirming lack of entrepreneurial opportunity where drivers could not hire assistants); *cf. FedEx I*, 563 F.3d at 499 (describing ability to hire others to perform assigned work as "no small thing").

PIAA regulates the assignment process, and effectively limits the number of game assignments the officials can receive; thus, for example, PIAA prohibits officials from working in more than one of PIAA's geographic chapters. (JA799.) Along the same lines, the Board explained that, while the officials are paid on a per-game basis, they have no entrepreneurial ability to change the lengths of the games, or to increase their earnings by performing work faster or more efficiently. (JA799-800.) *See Lancaster Symphony Orchestra*, 822 F.3d at 569 (describing relevant consideration as whether workers have ability to profit by "working smarter, not just harder"); *see also FedEx I*, 563 F.3d at 500 (relying on suggestion that drivers could increase profits by "using more efficient methods"). Although

the officials retain the theoretical ability to officiate lacrosse games for other employers, the Board found insufficient evidence that the officials enjoy actual opportunities to officiate non-PIAA-sponsored games, such as out-of-state games. (JA799.)

PIAA has effectively conceded that the officials have no significant opportunities for entrepreneurial gain or loss. While it is true that the officials are part-time workers who are free to work for other employers and to "[devote] more or less time to their independent careers" (Br.44), the Court held in *Lancaster Symphony Orchestra* that those exact considerations provide "only miniscule support for independent contractor status," and that if such "quite minor" entrepreneurial opportunities were given much weight, it could lead to "almost automatic classification of many part-time workers as contractors," 822 F.3d at 570. As a result, the Court held that the entrepreneurial-opportunity factor as a whole supports a finding of employee status under such circumstances. *Id.*

Moreover, unlike the orchestra musicians at issue in that case, and contrary to PIAA's contention (Br.44), here there is insufficient evidence that the officials even have real opportunities to engage in boys' and girls' lacrosse officiating for other employers. As sanctioned by state law, PIAA has a virtual monopoly over interscholastic sports at private and public schools inside Pennsylvania. (JA682.) Even assuming, in the absence of concrete evidence, that officials would be

eligible to officiate games in other states, PIAA has failed to demonstrate that officials would realistically travel out of state to accept jobs that generally pay less than $100 each. *See N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596,602 (D.C. Cir. 1989) (discounting theoretical ability to exercise entrepreneurial discretion where workers would bear a "heavy burden" or would "have little incentive in practice" for doing so); *City Cab*, 628 F.2d at 264-65 (holding that entrepreneurial freedom to select passengers was "illusory" where "in practice" drivers "probably would not" select their own passengers due to a variety of practical considerations). PIAA has not provided a single concrete example of one of its workers officiating games for another employer or in another state. *See BKN*, 333 NLRB at 144 (placing burden of proof on party alleging independent-contractor status); *cf. FedEx I*, 563 F.3d at 500-02 (relying on concrete examples of entrepreneurial opportunity in record); *Slay Transp.*, 331 NLRB at 1294 n.6 (noting lack of record evidence that drivers had worked for other employers).[5]

g. The remaining common-law factors do not outweigh the factors favoring a finding of employee status

The Board found that the three remaining common-law factors either are inconclusive or only slightly favor independent-contractor status. (JA684-87, 689-

[5] PIAA's erroneous claim that the Board "created out of whole cloth" the factor concerning whether employees are operating independent businesses involving entrepreneurial opportunity for gain or loss (Br.27, 44-45) was never presented to the Board. As a result, the Court lacks jurisdiction to entertain it. 29 U.S.C. § 160(e); *Enter. Leasing*, 831 F.3d at 550-51.

90, 797, 799.) As to the fifth Restatement factor, concerning the instrumentalities, tools, and place of work, the Board noted that the location of each game and the playing fields themselves are provided by PIAA, through its agreements with individual schools, rather than by the officials—a consideration favoring employee status. (JA684-85, 797.) However, the Board also acknowledged that the officials are required to provide their own "tools" and equipment, including whistles, pencils, uniforms, penalty markers, timing devices, and scorecards. (JA797.) Although PIAA regulates certain aspects of the equipment used by officials, such as the appearance of the uniforms and even the color of the whistles (JA685), the Board concluded that on balance the instrumentalities-and-tools factor favors independent-contractor status. (JA797.) Nonetheless, given the conflicting evidence at issue, the factor is not "particularly weighty" (JA797), and it does not outweigh the factors favoring employee status discussed above. *Cf. Lancaster Symphony Orchestra*, 822 F.3d at 568-69 (finding instrumentalities-and-tools factor to be inconclusive where musicians provided instruments, but employer provided concert hall).

The Board found that two additional factors are inconclusive. Regarding the sixth factor, the length of time for which the officials are employed, the Board contrasted the relatively short-term duration of the officials' assignments with the fact that there is an expectation of a continuing relationship between the officials

and PIAA. (JA685-87, 797.) As long as officials pay their annual dues and comply with PIAA's regulations, they can continue to officiate games for PIAA from year to year. *Cf. Big East*, 282 NLRB at 343 (noting that employer annually dropped lower-ranked officials from its pool). Indeed, PIAA's regulations specifically contemplate a long-term relationship, such as the requirement that officials attend the statewide conference once every five years to be eligible to officiate postseason games. *Cf. Lancaster Symphony Orchestra*, 822 F.3d at 564, 568 (discussing musicians who were invited to participate in yearly programs but who did not exhibit indicia of a long-term continuing employment relationship, such as a one-time certification process or quinquennial job duties).

As to the ninth Restatement factor, the expectations of the parties regarding their relationship, the Board noted that the various documents labeling the officials as "independent contractors" are created and imposed unilaterally by PIAA, and are not subject to negotiation by the officials. (JA689-90, 799.) *Cf. Big East*, 282 NLRB at 344-45 (finding that contractual provision describing officials as independent contractors was significant only because officials' association actively represented officials in negotiations with employer). Unlike in the cases cited by PIAA (Br.42-43), the officials do not perform their work pursuant to negotiated "independent-contractor agreements," and instead the documents in the record denoting independent-contractor status are limited to internal regulations,

identification cards, and the availability forms that officials must submit to receive postseason assignments. In any event, the language used in employer-imposed contracts is not determinative. *See City Cab*, 628 F.2d at 263 (affirming employee status despite contracts disclaiming employment relationship). Thus, the Board did not err in finding this factor, and the previous factor, inconclusive.

* * *

For the foregoing reasons, the Board reasonably concluded, upon "[w]eighing all of the incidents of the officials' relationship with PIAA," that PIAA failed to meet its burden in proving that the officials are independent contractors rather than employees. (JA801-02.) The Board's conclusion is, at the very least, one of two fairly conflicting views, and thus is entitled to deference. *United Ins.*, 390 U.S. at 260.

3. The Board Reasonably Distinguished Its *Big East* Decision

Both PIAA and Amicus place a great deal of emphasis on their contention that the Board "departed from its own controlling precedent" (Br.8, 25, 33-34, 44-46, Amicus Br.8-10) in connection with a Board decision finding that certain Division I college basketball officials were independent contractors. *Big East*, 282 NLRB at 345. However, in the present case the Board thoroughly explained why its thirty-year-old *Big East* decision is distinguishable, and why it is in some ways inconsistent with the required common-law test. (JA684, 692, 695, 800-01.)

It is well established that the Board must carefully examine "all of the incidents" of the employment relationship in a given case based on the unique set of facts at issue. *United Ins.*, 390 U.S. at 258; *see Roadway Package*, 326 NLRB at 850. As this Court has explained, it is in "the very nature of the adjudicatory, 'case law' process" for "elements recited as determinative in an earlier case to be found nondeterminative in a later case where additional and perhaps unforeseen elements must be considered." *Drukker Commc'ns, Inc. v. NLRB*, 700 F.2d 727, 737 (D.C. Cir. 1983); *see Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982). Although *Big East* also involved a group of sports officials, the Board here discussed why that case is factually distinct, and why there cannot be categorical rules for the statuses of entire professions. (JA684, 692, 695, 800-01.)[6] Among other things, the Board stressed that the college basketball officials in *Big East* belonged to an officials' association that played a "quasi-employer" role in negotiating agreements regulating the work, training and evaluating officials, and otherwise mitigating the direct control of the putative employer. (JA800-01 &

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[6] As such, various decisions (Br.2, 34-35, Amicus Br.10) by other adjudicators involving different sports officials are inapposite. In any event, decisions by other entities do not govern the Board's findings of employee status under Section 2(3) of the Act. *City Cab*, 628 F.2d at 265 n.10. Likewise, de novo adjudications in other contexts are of limited relevance given the deferential posture of the Court's review. *Lancaster Symphony Orchestra*, 822 F.3d at 570. Moreover, the PIAA-related decisions cited involved state-law tests for employee status, and are otherwise not on point; the only judicial decision involved a PIAA official's employment relationship with a *school district*, not PIAA. *Lynch v. Workmen's Comp. Appeal Bd.*, 554 A.2d 159, 159 & n.2 (Pa. Commw. Ct. 1989).

n.25.) *See Big East*, 282 NLRB at 335-40. The central role of the officials' association in that case is a significant distinction from the facts here, and one that had implications for virtually all of the common-law factors. *Id.* at 342-45. In addition, unlike PIAA's detailed regulations in this case, *Big East* emphasized that there was "no evidence" that the putative employer there had the right to discipline officials. *Id.* at 344.

On review, the Third Circuit expressed some skepticism about the Board's findings, but affirmed the Board's order only insofar as the Board's conclusion was at least one of "two rational, conflicting views on the record." *Collegiate Basketball Officials Ass'n*, 836 F.2d at 149. The Third Circuit's opinion thus suggests that, even on the significantly different facts of that case, a finding of employee status would have been "rational" and entitled to deference. *Id.*; *see also Big East*, 282 NLRB at 345 (describing independent-contractor question as "very close" and "not entirely free from doubt," and emphasizing that status of exact same officials with respect to successor employer remained open question).

The Board here also made clear that portions of *Big East* are inconsistent with the common-law test. (JA801.) In particular, *Big East* relied on the fact that the college officials were part-time workers, who could increase or decrease the amount of officiating they did, in order to find that they "seem[ed] to operate their own independent business[es]." 282 NLRB at 343, 345. In the present case and

other intervening cases, the Board has provided reasoned explanations for why that proposition is incorrect, insofar as it would improperly classify many part-time employees as independent contractors. (JA801.) *See, e.g.*, *FedEx II*, 361 NLRB at 620-21; *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011), *enforced*, 822 F.3d at 570; *Sisters' Camelot*, 363 NLRB No. 13, 2015 WL 5678168, at *7. To the extent PIAA disagrees, such disagreement is foreclosed by this Court's holding in *Lancaster Symphony Orchestra* affirming the Board's understanding of the common law. 822 F.3d at 570. And, as the Board noted (JA801 n.26), the Third Circuit in *Big East* rejected the finding of entrepreneurship as "simply unavailing." 836 F.2d at 149. In addition, the finding that the college officials seemed to operate independent businesses was partially based on the fact, not present here, that there was affirmative evidence that "many" of the basketball officials regularly worked for other employers. *Big East*, 282 NLRB at 343.

In any event, even assuming that the Court considered *Big East* to be inconsistent with the Board's reasoned analysis here, the Board's decision in the present case was neither arbitrary nor irrational. The Board's discussion of the common-law factors as applied to PIAA's officials is supported by substantial evidence, and it is accompanied by a lengthy discussion of *Big East* and a "reconciliation" of the Board's earlier finding in that case with the facts at issue here. *See Drukker Comm'cns*, 700 F.2d at 737. In such circumstances, the

"evolution" of the Board's position over time is entitled to deference as long as it can be deemed "rational." *Constr. Drivers, Local No. 221 v. NLRB*, 899 F.2d 1238, 1241-43 (D.C. Cir. 1990).

4. The Court Lacks Jurisdiction to Entertain PIAA's Belated Argument Regarding *FedEx II*, and PIAA's Argument Lacks Merit

Finally, PIAA raises a baseless and jurisdictionally barred argument that the Court should deny enforcement of the Board's Order in this case because of the Court's denial of enforcement in the factually unrelated *FedEx II* case. (Br.22-26.) As an initial matter, the Court lacks jurisdiction to entertain PIAA's argument. 29 U.S.C. § 160(e); *Enter. Leasing*, 831 F.3d at 550-51. PIAA did not raise the argument it is now making at any stage of the Board proceedings. In its response to the notice to show cause in the unfair-labor-practice case directly on review, its request for review in the representation case, and its brief on review in that case, PIAA indicated that it did not object to the Board's discussion of the common-law test in *FedEx II* and other cases, but that it disagreed with the Regional Director's *application* of that test to the facts of this case and to the context of sports officials. (*E.g.*, JA729 n.9, 735-36 n.13, 779 n.24, 786-87, 789 n.29, 820.)[7] If PIAA

[7] The Court only has jurisdiction to review arguments that were renewed in the unfair-labor-practice proceeding. *Alois Box Co. v. NLRB*, 216 F.3d 69, 76-78 (D.C. Cir. 2000). However, PIAA did not raise its present argument in the representation proceeding either, or in a timely motion for reconsideration. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982).

believed that this Court's denial of enforcement in *FedEx II* required the Board to alter its legal analysis in some way, then "orderly procedure and good administration" required such objections to be raised while the Board still "[had an] opportunity for correction." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 & n.6 (1952).[8]

In any event, PIAA's argument is without merit. As the Board correctly noted, the Court's opinion denying enforcement of the order in *FedEx II* was based on "the 'law-of-the-circuit doctrine,'" because the factual circumstances of the drivers in *FedEx I* and *FedEx II* were "indistinguishable." (JA791 n.3.) *See FedEx II*, 849 F.3d at 1127-28. The Board stated in this case that it would adhere to its *approach* to the independent-contractor question in *FedEx II*, not its unenforced remedial order. Due to the Court's prior holding in *FedEx I*, the Court in *FedEx II* had no occasion to review the Board's discussion of the common-law test, as opposed to the Board's conclusion regarding the status of the factually indistinguishable delivery drivers. Thus, despite PIAA's claim (Br.22), the Court

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[8] The assertion (Br.26 n.10) that PIAA's repeated and deliberate failures to raise its argument to the Board should be excused by the "extraordinary circumstances" exception to Section 10(e), simply because the Board purportedly "exceeded [its] authority" by applying the wrong legal principles, is unprecedented and would lead to the obsolescence of the statutory exhaustion requirement. It is also foreclosed by precedent. *See, e.g., Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (holding that the Court was barred from reaching employer's argument that Board decision ignored and "failed to comply" with the Court's controlling precedent).

did not reject the Board's general approach. (JA791 n.3; *cf. id*. (noting, only in the alternative, principle of nonacquiescence).) To the contrary, the *FedEx II* Board's discussion of the common-law test is fully consistent with this Court's precedent, including the evaluation of entrepreneurial opportunity as one factor among others and the examination of the same "related" considerations. *See Lancaster Symphony Orchestra*, 822 F.3d at 569-70. The Court should reject PIAA's attempt to rewrite the Court's *FedEx II* opinion into a sweeping injunction preventing the Board from citing its own precedent in later adjudications involving different parties and facts. Courts have jurisdiction on review of Board cases for the limited purpose of "enforcing, modifying, or setting aside" the remedial *orders* of the Board. 29 U.S.C. §§ 159(d), 160(e). That is precisely what the Court did in *FedEx II*, by holding that it would "vacate the Board's *orders*" insofar as the Board had certified an inappropriate bargaining unit and was directing the employer to bargain with workers that the Court held were not covered by the Act. 849 F.3d at 1128 (emphasis added).

Moreover, PIAA's argument is substantively disingenuous. The perceived disagreement between the *FedEx II* Board and this Court concerned, in the Board's view, the Court's restructuring of the common-law test and its *over*emphasis of the entrepreneurial-opportunity factor in *FedEx I*. 361 NLRB at 617. Not only has the Court subsequently demonstrated that it does not give greater weight to that factor

in every case, *see Lancaster Symphony Orchestra*, 822 F.3d at 565-70, but any such disagreement would only make the Board's case for employee status in this case *more* compelling, because here that factor clearly favors employee status. As previously discussed, PIAA has effectively conceded that its officials do not have significant entrepreneurial opportunities for gain or loss under the Court's recent precedent. *See Lancaster Symphony Orchestra*, 822 F.3d at 569-70; *cf. FedEx I*, 563 F.3d at 499-502. Given the Board's finding that there is insufficient evidence of entrepreneurialism as to indicate independent-contractor status (JA681-83, 799-800), alongside its reasonable analysis of the other common-law factors, the Board's Order should be enforced.

B. The Board Reasonably Rejected PIAA's Argument That It Is an Exempt Political Subdivision

1. Applicable Principles and Standard of Review

Section 2(2) of the Act exempts "any State or political subdivision thereof" from the definition of statutory "employer[s]" that are within the Board's jurisdiction. 29 U.S.C. § 152(2). The term "political subdivision" is not defined in the Act or explained in the legislative history, and the Board's construction of that ambiguous statutory term is "entitled to great respect." *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 604-05 (1971); *see also Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 716-17 (D.C. Cir. 2000) (holding that the Court must defer to the Board's interpretation of the political-subdivision

exemption as long as it is not "unreasonable"). Under well-established law, the statutory exemption for political subdivisions is limited to entities that are either: "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Hawkins Cty.*, 402 U.S. at 604-05; *Midwest Div.-MMC, LLC v. NLRB*, 867 F.3d 1288, 1296 (D.C. Cir. 2017). Exemptions from the Act's coverage should be narrowly construed, and the Board and reviewing courts must take care to ensure that exemptions "are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

2. PIAA Was Not Directly Created by the State

The Board rejected PIAA's argument that it is a political subdivision under the first prong of *Hawkins County*, which asks whether an entity was "directly created" by the state. (JA670-75, 791 n.2.) While acknowledging that it has been in operation for many decades, PIAA contends that it was "effectively 're-created' as an arm of the Commonwealth [of Pennsylvania]" when the latter enacted a state statute, Act 91 of 2000, placing PIAA under additional regulatory obligations. (Br.48-50.) In doing so, PIAA relies on an unprecedented legal theory that the enactment of new state regulations can "re-create" entities as political subdivisions.

The Board properly rejected PIAA's argument, which has no basis in existing precedent or the well-established *Hawkins County* test.

The premise of the state statute cited by PIAA, Act 91 of 2000, was that PIAA already existed—indeed, it had existed for nearly ninety years by that point—and that it was being directed to comply with additional regulatory requirements on the expectation that it would "*continue* to oversee the operation of interscholastic athletics." 24 P.S. § 16-1603-A(g)(1) (emphasis added). The statute required PIAA to comply with additional regulations by adopting certain discrete policies on a one-time basis, and established a standing legislative committee to report on PIAA's "continued compliance" annually. 24 P.S. § 16-1605-A(c).[9] As the Board emphasized, however, virtually all corporations are subject to state and federal regulations, and such regulatory oversight does not convert private entities into political subdivisions. (JA674.)[10]

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[9] PIAA was not "re-established." (Br.50.) For example, PIAA has evidently maintained the same constitution, subject to amendment or interpretation, for at least half a century. (*See* JA58-101 (displaying interpretations dating back to the early 1950s).) PIAA's official statement of purpose has also remained unchanged since at least 1978, when PIAA was incorporated as a nonprofit. (*Compare* JA58, *with* JA635.)

[10] In any event, PIAA cites no evidence for its claim that the open-meetings requirement or other regulations "are only applicable to public agencies." (Br.49.) Act 91 required PIAA to adopt its own internal policies that "conform with" the state open-meetings law. 24 P.S. § 16-1604-A(b)(1). Meanwhile, the state court decisions cited by PIAA (Br.10-11) held that its activities could qualify as state

Moreover, PIAA's characterization of Act 91 is at times misleading. For example, the statute did not grant the temporary Pennsylvania Athletic Oversight Council the power to "dissolve" PIAA (Br.49), which is a private nonprofit corporation. Instead, the Oversight Council was merely empowered to send a report to the General Assembly with a non-binding "proposal" for the selection of a different entity to be permitted to oversee interscholastic athletics, 24 P.S. § 16-1603-A(g)(2). Furthermore, the Oversight Council disbanded many years ago by the terms of the statute, without ever sending such a proposal, and it no longer exists to play any role in overseeing PIAA's operations as of 2018. (JA674 n.40; JA19, 471-79.) The defunct Oversight Council's temporary role in reporting on PIAA's initial compliance with new regulatory requirements no more "re-created" PIAA as a political subdivision (Br.48) than does a state government's routine decision to award a contract to a successful bidder. *Cf. Pa. Virtual Charter Sch.*, 364 NLRB No. 87, 2016 WL 4524109, at *10 (Aug. 24, 2016). PIAA points to no evidence that the separate Pennsylvania Athletic Oversight Committee has continuing powers to bring enforcement actions against PIAA or otherwise meaningfully oversee its operations, other than by holding meetings and issuing yearly reports. *See* 24 P.S. § 16-1605-A(c).

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action for constitutional purposes, but that PIAA itself was a "private association." *Sch. Dist. of Harrisburg v. PIAA*, 309 A.2d 353, 357 (Pa. 1973).

The facts of the present case are instead remarkably similar to those at issue in *Midwest Division-MMC*, in which the Court affirmed the Board's finding that a nursing peer review committee was not a political subdivision under the first prong of *Hawkins County*, even though the committee was regulated and its existence was contemplated by state law. *Midwest Div.-MMC*, 867 F.3d at 1296-97. Here, as in that case, PIAA is administered without input from the state and with only superficial review, the specific policies required by Act 91 were implemented and are maintained by PIAA alone, and PIAA is patently not an "administrative arm" of the government. *Id.* at 1297. Even assuming, as PIAA contends, that its argument instead raises a "question of first impression in this Circuit" (Br.50), PIAA has failed to establish why the Court should not defer to the Board's permissible interpretation of the political-subdivision exemption, and to the Board's reasonable conclusion that PIAA was not "re-created" as an arm of the government when it was directed to comply with additional regulations. *See Yukon-Kuskokwim Health*, 234 F.3d at 717; *see also Holly Farms*, 517 U.S. at 399 (holding that courts "must respect the judgment of the agency empowered to apply [statutory terms] 'to varying fact patterns'").

3. The Overwhelming Majority of the Members on PIAA's Board of Directors Are Not Responsible to Public Officials

The Board also properly rejected PIAA's argument that it is a political subdivision under the second prong of *Hawkins County*. (JA672-75, 791 n.2.) An

entity is a "political subdivision" under the second prong only if it is "administered by individuals who are responsible to public officials or to the general electorate." *Hawkins Cty.*, 402 U.S. at 604-05. As this Court has held, the pertinent question in determining whether such responsibility exists is "whether a majority of the individuals who administer the entity are appointed by and subject to removal by public officials." *Midwest Div.-MMC*, 867 F.3d at 1297; *Reg'l Med. Ctr. at Memphis*, 343 NLRB 346, 358-59 (2004).

In the present case, the Board found that none of PIAA's administrators and only *one* of the thirty-one members on its Board of Directors is appointed to the board by a public official. (JA644-47, 672-74.) PIAA's constitution specifies the composition of its Board of Directors: eighteen members are elected directly by PIAA's district committees; twelve members are selected as representatives of various non-governmental interest groups, including PIAA's male and female officials; and one member is appointed by the Pennsylvania Secretary of Education. (JA644-46.) There is no evidence that any of the interest groups with representatives on the Board of Directors was established or is controlled by a governmental entity, or that the school-based representatives are strictly confined to public schools as opposed to private schools. (JA645-46, 673.) Each of the thirty-one members, including the Secretary of Education's appointee, has an equal vote. (JA646, 672-73.)

Although Act 91 required PIAA to ensure that at least ten representatives of various groups were on the board, it did not specify how those members were to be appointed or whether they would constitute a majority. 24 P.S. § 16-1604-A(b)(5). By the terms of PIAA's constitution, the "various associations" (Br.52) that appoint the school-related interest group representatives on the board appear to be non-governmental actors, such as the private nonprofit Pennsylvania School Boards Association (JA60).[11] Indeed, in its request for review to the Board, PIAA conceded that the state "is not involved with the actual appointment of members of PIAA's Board of Directors," except for the one Department of Education representative. (JA736.) PIAA cites no evidence for its new and jurisdictionally barred claim, *see* 29 U.S.C. § 160(e), that public "school boards" or individual public schools are involved in the Board of Directors selection process (Br.54). The mere fact that some or many of the board members may also be public employees is irrelevant, because those individuals are not appointed by, removable by, or responsible to public officials or the general electorate while serving on PIAA's Board of Directors. *See Research Found. of City Univ. of N.Y.*, 337 NLRB

[11] There is no evidence or claim that these non-governmental organizations, or PIAA's own district committees, are themselves controlled by public officials—thus making the Fourth Circuit's opinion in *NLRB v. Princeton Memorial Hospital*, 939 F.2d 174, 177-79 (4th Cir. 1991), inapposite. In any event, a broad reading of that case would conflict with the Board's and this Court's precedent. *See Midwest Div.-MMC*, 867 F.3d at 1297 (holding that appointment and removal "by public officials" is required); *Yukon-Kuskokwim Health*, 234 F.3d at 716 (endorsing Board precedent requiring "direct responsibility").

965, 969-70 (2002) (noting that board members employed by public university were not appointed by public officials, and that presence of such members was determined by internal by-laws rather than statute).[12] Moreover, once they are appointed, board members can only be removed by a vote of two-thirds of the Board of Directors itself (JA60)—thus further precluding a finding of public responsibility under *Hawkins County* and established law. *Midwest Div.-MMC*, 867 F.3d at 1297.

* * *

As a result, the Board reasonably rejected PIAA's contention that it is a political subdivision exempt from the Act. (JA668-75, 791 n.2.)

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[12] Neither PIAA's constitution nor Act 91 requires any of the thirty-one board members to be public school employees, as opposed to private school employees, although one member is required to be "an elected member of a School Board at the time of appointment." (JA60.) PIAA's constitution also provides that, if a school faculty member loses his or her employment, he or she may continue to serve on the Board of Directors. (JA60.) The testimony by PIAA's Executive Director that it cites (Br.9, 52) regarding the public employment of certain board members is not entirely reliable, as he defined all charter schools as "public schools" (JA15)—however, the governmental status of charter schools is a case-by-case inquiry that is frequently litigated, *e.g.*, *Pa. Virtual Charter Sch.*, 364 NLRB No. 87, 2016 WL 4524109.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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October 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 18-1037, 18-1043
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 06-CA-175817
and	)	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12,890 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 3rd day of October, 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.	)	
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Respondent/Cross-Petitioner	)	Board Case No. 06-CA-175817
and	)	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 3rd day of October, 2018

STATUTORY ADDENDUM

Except for the following, all pertinent statutes are contained in PIAA's opening brief to the Court. (Br.2A-11A.)

Federal Statutes **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. §§ 151 *et seq.*)

Section 2(2) (29 U.S.C. § 152(2)) i
Section 2(3) (29 U.S.C. § 152(3)) i
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) ii
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) ii
Section 9(c) (29 U.S.C. § 159(c)) ii
Section 9(d) (29 U.S.C. § 159(d)) iii
Section 10(a) (29 U.S.C. § 160(a)) iii
Section 10(e) (29 U.S.C. § 160(e)) iv

29 U.S.C. § 152(2)

[Sec. 2. When used in this Act-] (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(3)

[Sec. 2. When used in this Act-] (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual

employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 158(a)(1)

[Sec. 8. (a) It shall be an unfair labor practice for an employer-] (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

29 U.S.C. § 158(a)(5)

[Sec. 8. (a) It shall be an unfair labor practice for an employer-] (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

29 U.S.C. § 159(c)

[Sec. 9.] (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board-

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

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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

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

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

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

29 U.S.C. § 159(d)

[Sec. 9.] (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

29 U.S.C. § 160(a)

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

29 U.S.C. § 160(e)

[Sec. 10.] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.