ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1118
[Consolidated with No. 19-1131]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

DILLON COMPANIES, INC., d/b/a KING SOOPERS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 7

Intervenor

PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB CASE NO. 27-CA-237098

PETITIONER'S REPLY BRIEF

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GLOSSARY

Petitioner relies on, and incorporates herein, the Glossary used in its Opening Brief.

PRELIMINARY STATEMENT

Petitioner, Dillon Company, Inc. d/b/a King Soopers ("King Soopers" or "Petitioner") filed its Opening Brief ("OB") on September 16, 2019 asking the Court to set aside the National Labor Relations Board's ("Board" or "NLRB") May 23, 2019 Decision and Order. On November 1, 2019, the Board's General Counsel ("GC") filed its Answering Brief ("AB"). On November 8, 2019, the Intervenor ("Intervenor") filed its Intervening Brief. King Soopers files this Reply in Support of its Opening Brief ("Reply"). The Board's Order approving the Regional Director's Decision is not supported by substantial evidence and departs from established precedent without reasoned justification.

STATUTES AND REGULATIONS

All applicable statutes and regulations were reproduced in Petitioner's Opening Brief.

SUMMARY OF ARGUMENT

The GC's Answering Brief attempts to distract and misdirect the Court by characterizing the issues in this case as mere factual disputes. However, the two primary questions presented here are 1) whether the Board may abdicate its statutory obligation by holding that it need not consider whether the resulting unit in an *Armour-Globe* Petition is appropriate for collective bargaining and 2) whether the Board can ignore the Parties' bargaining history and Collective Bargaining Agreements ("CBAs") express language because the Union opted for an *Armour-Globe* Petition. If the Court answers either of these questions in the negative, then the Board did not engage in reasoned decisionmaking when it rubber-stamped the Regional Director's Decision.

The Board certified the bargaining unit based on a standard that is directly contrary to Section 9(b) of the Act and violates the guidelines the Board prescribed for unit determinations in *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 (2017). Indeed, the decisionmaking on unit determinations at the Board and among its Regions is fraught with inconsistency, confusion, and disobedience. Without any real standard to govern its determinations, the Board is able to pick and choose any basis that will justify its decisions. In this case, that was rubber-stamping the Union's organizing strategy designed to avoid a true community of interest

analysis. Such a result-driven approach contravenes Sections 9(b) and 9(c) of the Act. The Board's Decision must be set aside in its entirety.

ARGUMENT

I. The Board Abdicated Its Duty To Determine An Appropriate Unit For Bargaining.

In an attempt to avoid a discussion of the dispositive legal issues, the GC asserts that King Soopers is simply quibbling over the facts in the Regional Director's Decision. By attempting to change the focus from a legal inquiry into a factual dispute, the Board endeavors to increase its reliance on the deference granted to it by the Courts. However, such deference is contingent upon the existence of reasoned decisionmaking and a reliable standard to which regulated parties can conform. The issues in this case do not amount to a mere disagreement as to how the record evidence should have been considered by the Regional Director. Rather, the principal issue is the Board's complete abdication of its statutory duty to determine an appropriate unit for bargaining under Section 9(b) of the Act. The Board cannot be held to have engaged in any reasoned decisionmaking if it failed to analyze the Petition in accordance with the very statute that grants it the power to do so.

A. The Board's Fundamental Disregard for Section 9(b) of the Act.

Section 9(b) of the Act provides that "[t]he Board shall decide ***in each case*** whether, in order to assure to employees the fullest freedom in exercising the rights

guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof…" 29 U.S.C. 159(b) (emphasis added). As this Court has recognized, Section 9(b) does not provide great detail in how to accomplish this mandate. *See Local 1325, Retail Clerks International Association v. NLRB*, 414 F.2d 1194, 1199 (D.C. Cir. 1969) (noting that "Section 9(b) provides remarkably little help as to how the Board is to decide whether a unit is 'appropriate'"). Although Section 9(b) is not detailed, it cannot be disputed that it creates a duty for the Board to determine "in each case" that the unit is appropriate for bargaining. In other words, Congress requires the Board to determine the resulting unit's appropriateness irrespective of any party's request or petition for a specific unit configuration. *See Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978) ("It is likewise well established that there may be more than one appropriate bargaining unit within the confines of a single employment unit and that the Board is free to select any one of these appropriate units as the bargaining unit.") (citing *Atlas Hotels, Inc., v. N.L.R.B.*, 519 F.2d 1330, 1334 (9th Cir. 1975); *N.L.R.B. v. Stone & Thomas*, 502 F.2d 957, 959 (4th Cir. 1974)).

The Representation Petition at issue here seeks an *Armour-Globe*, self-determination election. App. 1048. Self-determination elections were first erected not by statute, but in two Board Decisions, *Armour & Co.*, 40 NLRB 1333 (1942)

and *Globe Mach. & Stamping Co.*, 3 NLRB 294 (1937). In *Globe Machine & Stamping Co.*, the petitioning union requested three separate bargaining units in the plant, whereas an intervening union argued for treating the plant as one overall unit. The Board gave each of the three separate units the opportunity to vote for representation as separate units, representation as an overall unit, or vote for no union. *Globe Mach. & Stamping Co.*, 3 NLRB 294 (1937). "The *Globe* procedure thereby allows employees 'to determine the scope of a unit by allowing them to cast a vote for each of several potential units which the Board has determined are appropriate.'" *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990) (citing *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294, 1301 (9th Cir. 1985)).

Five years later, *Armour & Co.* extended the *Globe* self-determination doctrine. In *Armour*, an existing union representative petitioned to represent three units located in the same facility, which had previously been represented by three separate craft unions. *Armour & Co.*, 40 NLRB 1333 (1942). The Board concluded that if the employees desired, each of the three separate units could be added to the broad production and maintenance unit. *Id.* Thus, *Armour-Globe* elections were born out of a need to integrate *craft* units into larger, facility-wide production and maintenance units.

Nearly a half-century later, the Board in *Warner-Lambert Co.*, 298 NLRB 993 (1990) provided a framework for the Board to evaluate whether an *Armour-*

Globe election was appropriate. Specifically, *Warner-Lambert* announced that "it is necessary to determine the extent to which the employees to be included ***share a community of interest with unit employees***, as well as whether the employees to be added constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Id.* at 995 (emphasis added). *Warner-Lambert* explicitly requires the Board to analyze whether the proposed *resulting unit* has the requisite community of interest. *Id.* The Board has never defined a separate and distinct community of interest standard for *Armour-Globe* elections. Accordingly, to be appropriate, the voting group in an *Armour-Globe* election must bring the existing bargaining unit into conformity with a unit that the Board would find appropriate for collective bargaining. *See National Broadcasting Company, Inc.*, 202 NLRB 396, 397 (1973).

The community of interest test has remained a required consideration across all representation proceedings, including *Armour-Globe*. *NLRB v. J. C. Penney Co.*, 620 F.2d 718, 719 (9th Cir. 1980) ("The critical consideration in determining the appropriateness of a bargaining unit is whether the employees in the unit share a 'community of interest.'") (citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-73 (1971)); *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990). The community of interest test articulated in *United Operations, Inc.*, 338 NLRB 123, 126 (2002) has represented the "traditional"

community of interest standard for the past two decades. *See PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). In 2011, however, the Board decided *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which introduced the "overwhelming" community of interest standard. This standard required an employer who alleged additional employees were required in the union's petitioned-for unit to show that the additional employees had an "overwhelming" community of interest with the petitioned-for employees. *Id.*

In 2017, the Board abandoned the presumption of appropriateness in *Specialty Healthcare's* "overwhelming" community of interest consideration and returned to the traditional community of interest test. *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160, slip op. at 1 (2017). In doing so, the Board discussed the evolution of Section 9(b):

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

PCC Structurals, Inc., 365 N.L.R.B. No. 160 (2017). The Board went on to explain, "the legislative history demonstrates that Congress intended that the Board's review of unit appropriateness would not be perfunctory." *Id.*

Critically, the Board did not exclude *Armour-Globe* elections from its decision in *PCC Structurals*. Rather, the Board recognized that "Section 9(b) mandates that the Board determine what constitutes an appropriate unit 'in each case,' with the additional mandate that the Board only approve a unit configuration that 'assure[s]' employees their 'fullest freedom' in exercising protected rights." *Id.* The Board's recent decision in *The Boeing Company*, 368 NLRB No. 67 (Sept. 9, 2019), reaffirmed *PCC Structurals*, stating that "[w]e are, ***in each case***, considering the rights of *all employees, included and excluded, and the prospects of a stable and productive collective-bargaining relationship*." *Id.* at 7 (emphasis added).

Armour-Globe petitions have always been subject to the Congressional mandate to analyze unit appropriateness in "each case." The Board's *own precedent* requires that the resulting unit in an *Armour-Globe* election share a sufficient community of interest to conform to a unit that the Board would find appropriate for collective bargaining. Thus, the Board must apply the same community of interest standard across all representation proceedings, with the

same underlying considerations as described in *PCC Structurals* in order to avoid "perfunctory" unit determinations.

B. The Board Misapplied its Own Precedent and Failed to Articulate *Any* Standard for Unit Appropriateness.

In direct violation of the principles established above, the Board continues to maintain that it has no duty to consider whether the resulting unit is appropriate for bargaining. The GC makes three bold and unsupported claims. First, the GC argues, "it is not the Board's task to consider all possible units in determining whether the proposed unit is appropriate." AB at 29. Second, the GC argues that *Armour-Globe* petitions are special dispositions that require different considerations than normal representation proceedings. *See* AB at 40. Finally, the GC argues that it need not consider *PCC Structurals* and *The Boeing Company* in *Armour-Globe* elections. These three arguments, however, are contrary to the statute the Board is tasked with enforcing, and have no basis in Board law or this Circuit's precedent. In circumstances like this, "where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006) (citing *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995)).

By asserting that it is not the Board's duty to consider all possible units, the GC has effectively argued that the Board only needs to consider the Union's

petitioned-for unit. This stance, however, stands in diametric opposition to Sections 9(b) and 9(c)(5) of the Act. The Board in *PCC Structurals* recognized that "[a]lthough more than one appropriate unit might exist, the statutory language plainly requires that the Board 'in each case' consider multiple potential configurations i.e., a possible 'employer unit,' 'craft unit,' 'plant unit' or 'subdivision thereof.'" *PCC Structurals, Inc.*, slip op. at 4-5; *see also Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978) ("It is likewise well established that there may be more than one appropriate bargaining unit within the confines of a single employment unit and that the Board is free to select any one of these appropriate units as the bargaining unit."). The GC provides no authority or reasoned explanation why, just two years after *PCC Structurals*, the Board does not have to consider any other possible configurations to the unit. This "argument" inherently invokes the presumption of appropriateness in *Specialty Healthcare* that was discarded by *PCC Structurals*.

The GC attempts to support the Regional Director's decision to treat *Armour-Globe* elections as special dispositions, by stating, without citation to authority, "[t]he Board views elections for new units and self-determination elections differently." AB at 40. In doing so, the GC and Regional Director completely dismantled the community of interest standard based solely on the type of election the Union seeks. Specifically, the Regional Director's Decision ignored

the differences between the Deli and Meat employees' terms and conditions of employment and the lack of interchange simply because the Broomfield Meat Agreement mandates different terms and conditions on the Meat departments. Effectively, the Board discounts any differences in employment based on the Parties' *own Agreement*, which explicitly states that these groups are, in fact, distinct. Instead of the Regional Director considering the Parties' Agreement as evidence of the differences in employment, the Regional Director used it as a shield to lower the evidentiary bar. Such a holding does not and cannot protect "the fullest freedom" of the excluded employees' right to representation.

The Board has never held that *Armour-Globe* elections are entitled to a lesser community of interest standard. That is, the community of interest standard does not change simply because *Armour-Globe* elections involve a represented unit and a non-represented unit. Instead, *Warner-Lambert* is explicit in holding that "it is necessary to determine the extent to which the employees to be included share a community of interest with unit employees … so as to constitute an appropriate voting group." *Warner-Lambert Co.*, 298 N.L.R.B. 993, 995 (1990). This standard is the same one used by the Board in all representation matters, with no alterations.

The Board re-established the community of interest standard in *PCC Structurals* and *The Boeing Company*. While the Regional Director, the Board, and the GC continue to denounce the use of *PCC Structurals* in *Armour-Globe*

elections, Regional Directors from across the nation have been citing it as the community of interest standard in *Armour-Globe* elections. *See Leisure Knoll at Manchester*, 04-RC-249476, Regional Director's Decision and Direction of Election, 2019 BL 418548 (Oct. 31, 2019); *see also St. Charles Health System Inc., ABN St. Charles Cancer Center*, 19-RC-249953, Decision and Direction of Election, 2019 BL 428841 (Nov. 7, 2019); *Pacific Northwest Ballet Association*, Case 19-RC-250115, Decision and Direction of Election, 2019 BL 428841 (Nov. 13, 2019) ("In determining that the petitioned-for group should not be included in Petitioner's existing unit, I have carefully weighed the community-of-interest factors cited in *PCC Structurals*, 365 NLRB No. 160."). The Regional Director for Region 16, Timothy L. Watson, applied both *PCC Structurals* and *The Boeing Company* to an *Armour-Globe*, self-determination election. *See CenterPoint Energy Houston Electric, LLC*, 16-RC-250097, Decision and Order, 2019 BL 420893 (Nov. 1, 2019). Specifically, Regional Director Watson stated in his Decision that,

> In *The Boeing Company*, a 2019 case, the Board clarified that *PCC* contemplates a three-step process to determine an appropriate bargaining unit under the traditional community of interest test. *The Boeing Company*, 368 NLRB slip op. at 1. The Board held that after determining whether a proposed unit shares an internal community of interest by examining the traditional factors, "the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and

> weighed." *Id.* Finally, "consideration must be given to the Board's decisions on appropriate units in the particular industry involved." *Id.*

Id. These Regional Director decisions undeniably show that the Board in this case has failed to apply any consistent standard in which an employer (or union) can confidently rely. *See generally Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). It is utterly preposterous for the GC to contend on one hand that King Soopers "errs in contending that *PCC Structurals* is applicable," while the Board's own Regional Directors have repeatedly found that it is applicable. AB at 37. The GC's position defines administrative caprice. By approving the Regional Director's Decision, the Board has misapplied its own precedent and completely ignored the direction from *PCC Structurals* and *The Boeing Company* without even attempting a reasoned explanation. Thus, the Board's position fails absent reasoned decisionmaking.

C. The Board Dismantled the Community Of Interest Test.

The Board failed to apply the traditional community of interest test and by doing so, the Board stripped the excluded employees of the right to representation. Indeed, this is the exact flaw under the Act by micro-unit determinations because it balkanizes employees who should be included in the decision of union representation. While the GC attempts to re-litigate the facts in the record in defense of the Regional Director's Decision and the Board's Order, it bears

repeating exactly what the Regional Director relied upon in finding that the resulting unit had a sufficient community of interest to support an appropriate unit.

The Regional Director found the Petitioned-for Unit appropriate because "the record establishe[d] that the meat and deli employees have regular contact, are in close proximity, have the same hours, require additional food handling training than other employees, and perform some similar functions...." App. 1107. Regardless of whether this Court finds the GC's *post-hoc* argument persuasive, it cannot be reasonably disputed that the Board's Order and Regional Director's *actual* Decision was not supported by substantial evidence. *See City of Kan. City v. HUD*, 923 F.2d 188, 192, 287 U.S. App. D.C. 365, 369 (D.C. Cir. 1991) ("'Arbitrary and capricious' review… demands evidence of reasoned decisionmaking *at the agency level;* agency rationales developed for the first time during litigation do not serve as adequate substitutes.") (internal citations omitted) (emphasis in original). Indeed, the most glaring factual deficiency in the Regional Director's Decision is her refusal to address the two other stores in the resulting unit (Stores 118 and 86). *See NLRB v. Tito Contractors, Inc.*, 847 F.3d 724, 726 (D.C. Cir. 2017) (in which this Court denied enforcement of the Board's order because "the Board order is not supported by substantial evidence" because the Board did not discuss the portions of the Employer's evidence that showed no community of interest); *see also Fred Meyer Stores, Inc.*, 865 F.3d at 638 (A

Board decision is arbitrary if it "'entirely fail[s] to consider an important aspect of the problem' or 'offer[s] an explanation for its decision that runs counter to the evidence before the agency.'"). Contrary to the Regional Director's ultimate findings, there is no record evidence that the Meat bargaining in three stores, including, Stores 89, 118, and 86 have "regular contact," "are in close proximity," or "have the same hours" as the Store 89 Deli employees. *See* OB at 38-40. The Board is required to ensure that the resulting unit conforms to a unit that the Board would find appropriate for collective bargaining. *See National Broadcasting Company, Inc.*, 202 NLRB 396, 397 (1973). By not analyzing the community of interest of the *entire* resulting unit, the Board has abdicated its duty under Section 9(b).

The GC attempts to defend the Regional Director's gross error by inexplicably citing to *Kroger Co.*, 201 NLRB 920 (1973). In *Kroger*, two unions were attempting to represent Kroger's four *new* deli departments located across four stores. The petitioning union already represented the retail employees, excluding the meat department, within the four stores, plus sixty additional stores. The intervening union represented the meat departments within the four stores and the same sixty additional stores as petitioner. At the time of the representation proceedings, the four deli departments were the only deli departments in the sixty-four store division. Both unions sought to add all four deli departments to their

existing units. The Board permitted the employees to vote on which union they wished to join in a self-determination election.

The GC argues that the Regional Director's refusal to consider the Meat employees in Stores 86 and 118 is consistent with *Kroger* because the *Kroger* Board did not consider the community of interest between the deli employees in the four stores and the employees located in the additional sixty stores. Instead, the Board considered the community of interest among the four store's retail, deli, and meat employees as a whole. *Kroger*, however, is inapplicable for the point the GC attempts to articulate. In the instant case, the petitioned-for unit includes one Deli department at Store 89 and three Meat departments across three stores. In contrast, *Kroger* had four deli departments with four accompanying retail and meat departments in each store. Unlike *Kroger*, the Regional Director here only evaluated the community of interest between the Store 89 Meat and Deli employees to the exclusion of Stores 118 and 86. In addition, the deli employees in *Kroger* were *all* hired from each store's respective meat department. Thus, *Kroger* is of no help to support this Regional Director's Decision. Rather, *Kroger* undermines the Regional Director's decision not to consider Store 118's Deli

employees within the petitioned-for unit, especially when the Deli employees were expressly excluded from the Meat bargaining unit at Stores 86, 89, and 118.[1]

Significantly, if the Regional Director was not required to analyze the community of interest among the Deli employees and the Store 86 and 118 Meat employees, there was no basis for her to consider the community of interest between the Deli and Meat employees in Store 89. The location of the Deli and Meat departments or the alleged "frequent contact" between the Store 89 employees would have no bearing on the Regional Director's Decision if it clearly did not matter for Stores 86 and 118. The Regional Director ignored or barred any substantive record evidence that did not support her pre-conceived notion that the Union's petitioned-for unit was presumptively appropriate. This is the exact prohibition mandated by Congress in Section 9(c)(5) of the Act, that the extent of a union's organizing shall not be controlling. The Board here condoned the Union's unlawful organizing strategy to pursue an *Armour-Globe* election instead of a

[1] The Board's Order seeks to disenfranchise and restrict the full freedom of rights for the Retail employees at Stores 89 and the 35 Deli Clerks in Store 118. Indeed, the Store 118 Deli Clerks outnumber the Store 89 Deli Clerks three to one. The Board in *ADT, LLC*, 368 NLRB No. 118 (Nov. 22, 2019), addressed the issue of accreting larger unrepresented units into a smaller, already represented bargaining unit. The Board reasoned that allowing accretion in such an instance "would mean that a minority of members in a workplace group have essentially compelled the majority of employees, who are unrepresented, to be included in a bargaining unit without allowing them the opportunity to express their preference through an election." *Id.*

single unit election, even though the Union first sought two single unit elections. There can be no doubt that the Union's strategy was designed to avoid the traditional community of interest test.

The Regional Director, the Board, and the GC conveniently fail to address the most glaring factually dispositive issue in this case. That is, two-thirds of the Broomfield Meat Unit (which includes Stores 89, 86, and 118) have no contact with the Deli employees in all three stores. This failure is purposefully designed to avoid the Board's obligation to engage in any reasoned analysis of an extremely odd unit composition. *See Local 1325, Retail Clerks International Association v. NLRB*, 414 F.2d 1194, 1202 (D.C. Cir. 1969) ("[a]s novel a departure from established norms as the Board's action in this instance involves does, however, justify a close examination of the reasons adduced by the Board."). This result orientated decision does not comport with record evidence and reasoned decisionmaking. It cannot be enforced.

II. The Board Unlawfully Eliminated Bargaining History From the Community of Interest Test And Unlawfully Altered The Parties' Collective Bargaining Agreement.

As King Soopers discussed in its Opening Brief, the NLRB recently affirmed that "[i]n determining appropriate units, the Board has long given ***substantial weight*** to prior bargaining history." *The Boeing Company*, slip op. at 2 (emphasis added). The Regional Director's Decision, however, rebuffed any

reasonable consideration of the Parties' bargaining history in this case. Indeed, the only semblance of consideration by the Regional Director of bargaining history was a half-hearted argument in the alternative, shelved in a footnote and unsupported in the record, that a Deli department joining a Meat department "does not run counter to the Employer's practice." App. 1105. In its Answering Brief, the GC doubled down on the Regional Director's refusal to consider the Parties' undisputed bargaining history. AB at 29-30.

The GC argues, "[b]argaining history will not foreclose a self-determination election because such an election necessarily involves a change to the existing bargaining relationship. The fact that the employer has a bargaining history with the existing unit without the voting group is inherent and thus does not serve as an obstacle to an election." *Id.* The GC again adheres to its unsupported theory that *Armour-Globe* elections are special dispositions, contained outside the Board's Section 9(b) duty to determine appropriate units. *See supra* Argument Section I(b). This theory is a blatant misapplication of the law. Bargaining history in which the bargaining Parties specifically exclude Deli from Meat is a controlling *factor* against a community of interest finding. The record evidence shows the Parties never treated Deli and Meat employees as a single unit in Broomfield. OB at 50-51. This is the exact bargaining history that the Board mandates the Region must

give "substantial weight to" in determining whether a unit is appropriate for bargaining. *See The Boeing Company*, slip op. at 2.

In a fatuous attempt to shield the Regional Director's refusal to consider bargaining history, the GC argues that she "explained" that the Parties' historical practice in Broomfield is to "treat[] each store's deli employees independently." *Id.* at 29. It is undisputed that the bargaining parties in the Broomfield Meat unit stores 86, 89, and 188 explicitly excluded Deli from Meat. The record evidence directly contradicts the Regional Director's conclusion that Deli and Retail Clerks are subject to the same terms and conditions of employment and engage in consistent interchange. OB at 38-40. There is no record evidence that King Soopers treated Deli employees as "independent" from Retail employees. Critically, Store 86's Deli and Retail employees are configured in a *single unit* and its Deli employees are specifically excluded from the Meat bargaining unit by agreement between the Parties.

The Board ignores the historical importance of the Parties' bargaining in Broomfield and throughout Colorado, and explicitly ignores the undisputed fact that the Parties' CBAs in Broomfield have always excluded Deli from Meat. Indeed, at every stage of this litigation, the Regional Director and the Board have ignored, minimized, or misrepresented the Parties' bargaining history in direct contravention of their own precedent to give "substantial weight" to the actual

history. *See The Boeing Company*, slip op. at 2. In doing so, the Regional Director's Decision, and the Board's approval of her Decision, do not just change the Parties' forty-plus year bargaining relationship, but illegally alters the Broomfield Meat unit and CBA. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970).

Neither the Board nor Intervenor have refuted that during years of negotiations between the Union and King Soopers, the Parties have agreed that Deli employees would not be included in a Meat Unit in Broomfield, Colorado. App. 264:5-265:7. Throughout the Parties' bargaining history, they agreed to appropriate unit configurations that met the community of interest test, as evidenced by the specific exclusion language.[2] *See generally* App. 540, 656-657. As the Parties did here, the Board permits parties to bargain enforceable agreements that a Union will not represent certain groups of employees. *See Briggs Indiana*, 63 NLRB 1270 (1945); *Cessna Aircraft*, 123 NLRB 855 (1959). Indeed, contrary to the Board's implication that the promise must be written, the Board in *Lexington Health Care Group, LLC*, 328 NLRB 894 (1999) explicitly stated that a promise need not be in writing; instead, "the *Briggs Indiana* promise not to seek representation… is sufficient [if] there [is] an express promise." As stated, the

[2] The Region has repeatedly approved these predetermined unit configurations. *See generally* App. 514-536, 745-764, 876-913.

evidence of such promise in this case is undisputed in the record and was not refuted by the Board, the GC, nor the Intervenor.

The Regional Director's Decision and the Board's Order impermissibly results in a material change to the Parties' substantive contractual terms. This change voids the agreement, and thus, violates the limits of the Board's jurisdiction. *H. K. Porter Co.*, 397 U.S. at 107-08; OB at 52-55. Therefore, the Board's Order is in direct contravention of its own precedent, is an illegal repudiation of the Parties' CBA, and an illegal imposition of a substantive contractual provision.

III. The Board Did Not Engage in Reasoned Decisionmaking.

Despite the GC's attempt to distract the Court from the principle issues in this case, the Board failed to engage in reasoned decisionmaking when it rubber stamped the Regional Director's Decision finding that the Union's petitioned-for unit is appropriate for bargaining, and therefore, is entitled to no deference. *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017) ("[a]ccordingly, our deferential standard of review applies only where the process by which [the Board] reaches [a] result is logical and rational—in other words, the Agency has engaged in reasoned decisionmaking.") (internal quotations and citations omitted). There is no semblance of logical, rational, or reasoned decisionmaking in the

Regional Director's Decision. Accordingly, the Board's Order approving the Decision cannot be enforced.

The two critical components to "reasoned decisionmaking" are following statutory mandates imposed by Congress and consistently applying Board precedent. *See Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439, 446 (D.C. Cir. 2004) ("A Board's decision will [] be set aside when it departs from established precedent without reasoned justification or when the Board's factual determinations are not supported by substantial evidence.") (internal citations omitted). Without these considerations, a Board Order cannot be found to be logical, rational, or reasoned. *Id.* Prior to the Regional Director's Decision, the Board announced its landmark decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). This Board precedent changed the way the Board evaluated representation proceedings by 1) rejecting the proliferation of micro-units based largely on the extent of organizing by petitioning unions, 2) re-establishing the community of interest test *for all* representation proceedings, and 3) emphasized the requirement of analyzing not only the community of interest within the petitioned-for unit, but also analyzing the community of interest with the excluded employees. *Id.*; *see also The Boeing Company*, 368 NLRB No. 67 (Sept. 9, 2019); OB at 35-38.

The Regional Director refused to follow the Board's direction. Instead, the Regional Director relied solely on the Union's evidence and irrationally appended twelve unrepresented Deli employees at Petitioner's Store 89 to an existing three-store Meat bargaining unit. In doing so, she not only disregarded the disparity of interest in the resulting unit, but she refused to address the strong community of interest between the Deli Clerks and excluded employees in their own store. Section 9 of the Act and the Board's own decisions unequivocally reject this type of result-driven "analysis."

The Regional Director's approval of a unit based solely on the Union's extent of organizing cannot be rationalized nor explained away by the GC, who argues that even if the Regional Director rejected the Board's own precedent and applied the wrong standard, King Soopers did not show how the result would be different. AB at 40, n. 9. Thus, the GC blatantly contends that disregarding a statutory duty and ignoring existing Board law is not "evidence of legal error." *Id.* If the Board and its Regions are not required to abide by the statutory edicts and its Administrative Decisions, the Parties cannot possibly be expected to conform their conduct to the state of the law at any given time. The Board's whole existence is defined in reasoned decisionmaking and applying the correct law, not for the GC to make a *post-hoc* excuse for the Board's derogation of its own duties. As this Court has held, it is not the Court's role to substantiate the Board's findings; "the duty to

justify lies exclusively with the Board in the first instance." *United Food & Commercial Workers Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1436-37 (D.C. Cir. 1989) (remanding the case and noting the Board Members' "bare assertion that their outcome conforms to [precedent] stands naked before us, without any elaboration whatsoever.").

The gravamen of the GC's unfounded justification is that it does not matter what the underlying facts are in an *Armour-Globe* petition, as long as there is a previously excluded group of employees that want to join an already represented group from which they have been excluded by the Parties' collective bargaining history. Indeed, without the Board performing any type of oversight on its Regions' decisions, this philosophy for *Armour-Globe* elections provides no limit to what a union can seek and have approved. *See* App. 1553; *see also* App. 1622-1624. This Court cannot uphold the Board's blatant abuse of power and disregard for the statutory mandates in approving the Regional Director's unreasoned, arbitrary, and capricious Decision.

CONCLUSION

Based on the Petitioner's Opening Brief and the foregoing, the Court must set aside the Board's Decision in its entirety.

Dated: December 2, 2019.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 6,500-word type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 5,685 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 31(a)(5) and the type style requirements of Fed. R. App. P. 31(a)(6) because the brief has been prepared proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2019, I electronically filed the foregoing **PETITIONER'S REPLY BRIEF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I further certify that on this 2nd day of December, 2019, I sent the required copies of the Petitioner's Reply Brief to the Clerk of the Court via overnight delivery.

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