ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1076
(Consolidated Case No. 20-1153)

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ST. JAMES MEDICAL GROUP,

Petitioner / Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent / Cross-Petitioner.

PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
N.L.R.B. CASE NO. 19-CA-242468

PETITIONER'S REPLY BRIEF

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
Act	National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*.
AB	Answering Brief
APP	Advanced-Practice Practitioner, including NPs and Pas
BHS	Behavior Health Specialist
Board	National Labor Relations Board
Complaint	General Counsel's Complaint
Decision	The Regional Director's January 22, 2019 Decision and Direction of Election
Director	Regional Director Ronald K. Hooks, N.L.R.B. Region 19
General Counsel	The Board's General Counsel, including the Counsel for the General Counsel
Group	St. James Medical Group
NP	Nurse Practitioner
OB	Opening Brief
Order	The Board's February 12, 2020 Decision and Order
PA	Physician Assistant
RN	Registered Nurse
SW	Social Worker
Union	Montana Nurses Association

PRELIMINARY STATEMENT

The Group filed its Opening Brief ("OB") on August 11, 2020. The Opening Brief asked the Court to set aside and deny enforcement of the February 12, 2020 Order of the Board ("Order") finding that the Group violated Section 8(a)(5) of the NLRA, as well as the July 26, 2019 Order Denying Request for Review of the Regional Director's January 22, 2019 Decision and Direction of Election ("Decision"). The Board filed its Answering Brief ("AB") on October 1, 2020. The Group now files this Reply Brief in Support of its Opening Brief.

The Board's Answering Brief does exceedingly little answering. The Decision on which the Order was based still fails to provide sufficient explanation for its conclusions, fails to apply the appropriate standards, fails to explain its reliance on precedent, and fails to find basis in substantial evidence. The Order should therefore be set aside, and enforcement thereof should be denied.[1]

[1] The Group further preserves its right to seek relief against the Board for having to file this Petition to challenge the clearly deficient Decision and consequently baseless Order. *See, e.g.*, *Heartland Plymouth Ct. MI, LLC v. N.L.R.B.*, 838 F.3d 16, 27-29 (D.C. Cir. 2016).

SUMMARY OF THE ARGUMENT

The first basis on which the Group petitions for review in this Court is simple: the Director (and Board), by concluding that RNs held interests sufficiently distinct from certain other Group-employed professionals, failed to sufficiently explain themselves. *See* OB Pt. III.A. The Board's approach in its Answering Brief is to try to explain itself. It cannot do that now, nor can the Court fill in the blanks left in the Decision's reasoning.

The Group's second basis for review is that the Board failed to appropriately apply the governing standard for unit-appropriateness determinations and misstated facts in the effort. *See id.* Pt. III.B. Though the explanation is missing, the conclusion reached in the Decision must necessarily have given controlling weight to factors the Board considers "meager" or "relatively insignificant" at "Step Two" of the unit-appropriateness analysis. The Board's argument (now, for the first time) is that the differences between RNs and excluded professionals identified by the Director didn't ***need*** to be expressly weighed against the shared interests. That is apparently because the Decision should have been understood to incorporate broad swaths of Board rulemaking or

adjudicative history about RN units that supply all the reasoning the Court needs to affirm here. But there are significant problems with that position: first, it overstates the Decision and its reasoning, and second, it contradicts the repeated directive of this Court and others that anemic community-of-interests analyses will not do. The Decision's glossy, single-sentence wave to a handful of highly detailed adjudications of materially different facts is the type of drive-by reasoning the Board has been continually admonished for.

The Group's third basis for review involves "Step Three" of the interests analysis—applying industry-specific guidelines—because the Director and Board failed to meaningfully address them. *Id.* Pt. IV. On appeal, the Board tries to counter by reference to arguments and citations that appeared nowhere in the Director's Decision itself and, even so, fail to address the points raised by the Group here.

The Board cannot offer *post hoc* arguments and justifications to prop up appropriateness determinations that lacked sufficient analysis when handed down. And the Answering Brief's arguments to not cure the substantive deficiencies raised in the Opening Brief anyway. The Court should set aside and refuse enforcement of the Board's Order.

ARGUMENT

I. THE DECISION LACKED SUFFICIENT ANALYSIS, AND THE BOARD'S BELATED ATTEMPT TO INJECT REASONING INTO THE DECISION DOES NOT SAVE IT

A. The Board and Courts Require Thorough Analysis to Appear in Adjudications Themselves

It is difficult to overstate the thoroughness of the explanation required of the Board or its regional directors in making unit-appropriateness determinations. The Board itself imposes it. As it explained last year, in evaluating the community-of-interests factors in light of the facts in front of it, the Board cannot just "record[] similarities and differences" followed by a conclusion; it must describe "***how and why*** these collective-bargaining interests are relevant" to its ultimate determination, and if the "distinct interests do not outweigh the similarities, then the unit is inappropriate." *The Boeing Co. & Int'l Ass'n of Machinists & Aerospace Workers*, 368 N.L.R.B. No. 67, slip op. at 4 (2019).

Courts enforce those requirements. The Board must assert "clearly how the facts of the case, analyzed in light of the policies underlying the community of interest test, support its appraisal of the significance of each factor." *N.L.R.B. v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156-57

(5th Cir. 1980); *accord Constellation Brands, U.S. Ops., Inc. v. N.L.R.B.*, 842 F.3d 784, 794-95 (2d Cir. 2016) ("***Explaining why*** the excluded employees have distinct interests in the context of collective bargaining is necessary." (emphasis added)). It is not enough to "recite the legal standard and summarize the factual record without any intervening explanation to demonstrate that [the Board] has performed the analysis demanded by its own caselaw." *Constellation Brands*, 842 F.3d at 794 n.41. In other words, the Board can't just do the math in its head—it has to show its work. *See id.* Where it fails to "***articulate*** any rational connection between the facts found and the choice made," the decision cannot be upheld. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (emphasis added).

Courts require the analysis because they cannot become the Board's "rubber stamp." *Erie Brush & Mfg. Corp. v. N.L.R.B.*, 700 F.3d 17, 21 (D.C. Cir. 2012) (quoting *Avecor, Inc. v. N.L.R.B.*, 931 F.2d 924, 928 (D.C. Cir. 1991)); *Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439, 445-46 (D.C. Cir. 2004). Administrative law fundamentals demand that courts confine agencies to the boundaries of their discretion—an effort that is confounded by insufficiently explained conclusions. "[Courts] cannot

guess at what the Board means to say for to do so would result in the court improperly filling critical gaps in the Board's reasoning and perhaps sustaining the Board's action on a ground that the Board did not intend—something which is prohibited." *NBCUniversal Media, LLC v. N.L.R.B.*, 815 F.3d 821, 829 (D.C. Cir. 2016); *accord Burlington Truck Lines*, 371 U.S. at 167 (where there is "no analysis … to justify the choice made" and "no indication of the basis on which the [Board] exercised its expert discretion," "[w]e are not prepared to and the Administrative Procedure Act 15 will not permit us to accept such adjudicatory practice"). "Without a clear presentation of the Board's reasoning, it is not possible for [the Court] to perform [its] assigned reviewing function and to discern the path taken by the Board in reaching its decision." *Point Park Univ. v. N.L.R.B.*, 457 F.3d 42, 50 (D.C. Cir. 2006) (quoting *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

"The need for an explanation is particularly acute whe[re]," like here, "an agency is applying a multi-factor test through case-by-case adjudication." *LeMoyne-Owen Coll. v. N.L.R.B.*, 357 F.3d 55, 61 (D.C. Cir. 2004). In the context of nonacute-care facilities, of course, the Court is required to evaluate the interests of employees included in and

excluded from proposed bargaining units by a per-case application of the community-of-interests factors. OB Pt. II.B; *Park Manor Care Ctr., Inc.*, 305 N.L.R.B. 872, 875 (1991); *see also Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998) (noting that the Board "uniquely" promulgates its rules almost entirely through case-by-case adjudication rather than rulemaking).

But this approach "can lead to predictability and intelligibility ***only*** to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why." *LeMoyne-Owen Coll.*, 357 F.3d at 61 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)). The "'thorough, careful, and consistent application' of a multi-factor test is important to allow 'relevant distinctions between different factual configurations [to] emerge.'" *Id.* (quoting *Arrow Fastener Co., Inc. v. Stanley Works*, 59 F.3d 384, 400 (2d Cir. 1995)). And that "thorough" and "careful" application must fairly adjudge the facts. The Board "may not find substantial evidence merely on the basis of evidence which in and of itself justified" its decision "without taking into account contradictory evidence"—"[t]he substantiality of evidence must take into account

whatever in the record fairly detracts from its weight." *N.L.R.B. v. Tito Contractors, Inc.*, 847 F.3d 724, 732-33 (D.C. Cir. 2017).

B. The Decision Failed to Meet Standards, and Counsel's *Post Hac* "Analysis" Must Be Rejected

The Board argues now that the Decision met this bar. It is difficult to see how. The Decision spends three and a half pages describing various factual findings (in and of themselves problematic). [JA211-214]; *see also* OB Pt. II.B.2. It then spends half a page on "analysis," in which it merely repeats the points of distinction (as though doing so explains "how and why" these points outweighed similarities), invokes the "Board's rules" without explaining why they apply or even which one(s), and cites five unit-appropriateness cases with a single sentence to rope them all into apparent relevance for its result. [JA216]. This is precisely the conclusory result, preceded by a "tally" of similarities and differences, considered insufficient not only by Courts, but by the Board itself. *See Constellation Brands*, 842 F.3d at 794-95 & n.41; *Boeing*, 368 N.L.R.B. No. 67, slip. op. at 4; *see also* OB Pt. III.A.

Tellingly, the Answering Brief tries to do the work for the first time now. The Board's counsel spends nearly 20 pages explaining why the differences between RNs and other professionals that the Director

identified matter and reasons they could outweigh the similarities, as though it were obvious from the Decision itself. AB at 22-40. The Answering Brief's explanation is substantively flawed, and this Brief addresses that later. *See infra* Pt. II. But the first problem with the Board's defense of the Decision is that none of it appeared where it should have: the Decision.

For example, the Answering Brief observes that the Decision mentioned RNs' supposedly separate job functions and lack of overlap or interchange due to differences in licensing between RNs and other professionals. AB at 31-33. The Decision also found that RNs attend their own meetings in addition to joint ones, were hourly employees, had separate immediate supervision, and had their own roles in otherwise-integrated teams. *Id.* at 34-37. The Decision, however, stopped there. [JA216]. It did not offer the *so-what* the Answering Brief ***now*** attempts, with references to prior adjudications and rulemaking in hopes of supporting or explaining those factors' relevance.

That is an insurmountable problem for the Board. "The courts may not accept appellate counsel's *post h[o]c* rationalization for agency action; Chenery requires that an agency's discretionary order be upheld, if at all,

on the same basis articulated in the order by the agency itself." *Erie Brush & Mfg.*, 700 F.3d at 23 (quoting *Burlington Truck Lines*, 371 U.S. at 168-69); *accord N.L.R.B. v. Frederick Mem. Hosp., Inc.*, 691 F.2d 191, 194 (4th Cir. 1982) ("The Board cannot leave its explanation [supporting its unit-appropriateness determination] to implication or the argument of its counsel."). "Nor can [this] Court fill in critical gaps in the Board's reasoning," lest the Court usurp the discretion delegated to the Board. *Point Park Univ.*, 457 F.3d at 50; *see also NBCUniversal Media*, 815 F.3d at 829. Where the Board provides an insufficient explanation, a court is

> left to attempt to discern for itself which factual differences might have been determinative, … and to assess whether making such distinctions controlling is rational or arbitrary, again without any agency explanation of why particular factors make a difference.

Davidson Hotel Co. v. N.L.R.B., 977 F.3d 1289 (D.C. Cir. 2020) (quoting *LeMoyne-Owen Coll.*, 357 F.3d at 61). That is precisely the problem here.

For several of the Decision's findings, moreover, the Answering Brief commits the ***same error*** as the Director did: observing a purported difference between RNs and other professionals without explaining its relevance to collective bargaining. For example, neither the Director in the Decision, nor the Board in the Answering Brief, explain the collective-

bargaining relevance of (or weigh) RNs' performance of certain tasks "at the direction" of other professionals, RNs' separate meetings in addition to combined ones, and separate immediate supervision for RNs. AB at 31, 34, 36.[2] The Answering Brief also repeats the Decision's *ipse dixit* brush-aside of the employees' common terms and conditions of employment, arguing that because these are common to ***all*** professionals, they are somehow meaningless to the analysis for ***these*** professionals. *Id.* at 34-35. The Decision offered no support or explanation for this, and the Board here declines to elaborate.

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[2] One of the Answering Brief's own cases bolsters the point made in many of the Group's proffered case law that different immediate supervision means little (or at least must be articulately addressed) where, like here, overall supervision is the same. *See Transerv Sys.*, 311 N.L.R.B. 766, 766 (1993) (rejecting separate unit between two classifications of employees in part because they shared an ultimate supervisor, even though they had "separate immediate supervision"); *see also* OB at 56-67. And the Answering Brief's citation to *Virginia Mason* is ineffective. Differences between included and excluded employees was only one of several bases for its conclusion; and even then, the Board there considered a proposed unit of ***all non-physician professionals*** (RNs and a pharmacist), which it found reasonable because the ***physicians*** directed "all other patient care employees" and "earn[ed] substantially more" than others (both likely true for any clinic). *Va. Mason Med. Ctr. v. N.L.R.B.*, 35 F. App'x 4, 5 (D.C. Cir. 2002). The Group argues that the Union's proposed unit is inappropriate precisely because it does ***not*** include all non-physician professionals.

The Answering Brief's only other argument in defense of the Decision's analysis-lite approach is this: by string-citing five prior adjudications—all of which included far more detailed analysis and factor-weighing than the Decision did—with "identical" factual scenarios, the Board "adopted the thoughtful discussions contained therein." AB at 38, 40. The point is rather astonishing. First, the facts of these cases are not "identical," and their alleged controlling effect is not self-explanatory. *See infra* Pt. II.C. But second, the Answering Brief's argument would destroy decades of directives from courts and the Board requiring careful, case-by-case explanation ***in each adjudication***. The Board instead argues the Decision did not need to articulate its explanation for what factors mattered and how prior adjudications supported that evaluation; the parties and this Court can work out the fine points of the factual application for themselves.

The error there is plain. It is not enough to wave at case law, call it "analysis," and presume everyone understands the thinking. *Point Park Univ.*, 457 F.3d at 51 (a "passing observation, stated in the form of a conclusion, does not substitute for … fact-specific analysis" that the "Board knows how to perform"). Indeed, the prior adjudications

demonstrate the point, as each case contains a far more detailed discussion of the Board's rulemaking and certain precedents and then, in several detailed paragraphs, ***applies*** the gathered law to the community-of-interest factors and the record facts ***of those cases***.[3]

The Answering Brief provides no support for its proposition that conclusory piggybacking on precedent constitutes appropriate analysis. There is none. This Court expects more from the Board—just as the Board apparently does of itself—and it should not accept the shortcut here. *See LeMoyne-Owen Coll.*, 357 F.3d at 61; *NBCUniversal Media*, 815 F.3d at 829.

II. THE ANSWERING BRIEF'S APPEAL TO AUTHORITY IS MISGUIDED AND DOES NOT SAVE THE DECISION

A. <u>The Answering Brief Fails to Negate *Boeing*'s Applicability</u>

In the Answering Brief, the Board has no trouble conceding that *PCC Structurals* sets forth the governing three-part standard for unit-

[3] *See infra* Pt. II.C; *see also Marian Manor for the Aged & Infirm, Inc.*, 333 N.L.R.B.1084, 1095-96 (2001); *Jefferson Health Sys.*, 330 N.L.R.B. 653, 656-57 (2000); *Charter Hosp. of St. Louis, Inc. & United Nurses of Fla.*, 313 N.L.R.B. 951, 953-55 (1994); *McLean Hosp. Corp.*, 311 N.L.R.B. 1100, 1111-15 (1993); *Holliswood Hosp.*, 312 N.L.R.B. 1185, 1195-97 (1993).

appropriateness determinations. AB at 20-21. But it rejects its own recent application of that standard in *Boeing*, arguing—without support—that because *Boeing* did not deal with the healthcare industry, it has "no analytical value." AB at 41.

The wholesale dismissal of *Boeing* is puzzling. *Boeing* is one of the Board's latest detailed clarifications and applications of the community-of-interests standard, which was refurbished in *PCC Structurals* but has applied across all industries for decades. OB at 41-42. As the Board explained (and the Answering Brief acknowledges), the *PCC Structurals* standard proceeds in steps. The first and second steps require the evaluation of the familiar community-of-interests factors. The third step, then, requires the application of ***industry-specific*** rules or guidelines. *Boeing*, 368 N.L.R.B. No. 67, slip op. at 3; AB at 20-21.

The Board's highly detailed discussion of the community-of-interest factors in *Boeing* happened at "step two," not the narrower "step three," and had general application. *Boeing*, 368 N.L.R.B. No. 67, slip op. at 5-6. The Board observed that included and excluded employees there were part of the same administrative department, shared overall supervision, shared similar core skills, worked under the same terms and conditions

of employment, were subject to the same personnel policies, were offered the same benefits programs, and worked in functionally integrated units toward a single end. *Id.* at 5-6. These similarities outweighed "relatively insignificant" differences like very limited interchange, physical separation, and almost no contact between employees. *Id.* at 6.

That is not to say that the Board's rulemaking and prior adjudications are irrelevant to the analysis for healthcare-industry units, even at "step two." They certainly could be, and perhaps the Director should have spent more than a sentence applying them if he found them so. *Point Park Univ.*, 457 F.3d at 50 ("The Board knows how to perform such an analysis, … but certainly did not do so here."). But the Board's statement in the Answering Brief that *Boeing* has "no analytical value" here is too strong, because it ignores what the *Boeing* Board was demonstrating: how to appropriately apply and weigh facts in the community-of-interests analysis as reinstated by *PCC Structurals*. If the Board's position now is that its own demonstrative applications of the community-of-interests standard outside healthcare are utterly irrelevant to healthcare cases, the Board needs to state as much in the proper channels. But the Answering Brief's terse shelving of *Boeing* does

not sweep it from the board of persuasive community-of-interests precedent.

B. The Answering Brief Misstates the Applicability of the Board's Rulemaking

In the Answering Brief, the Board unearths nuggets from the Board's evidentiary findings regarding RNs in acute-care facilities, primarily large hospitals, to defend the Decision as an in-bounds exercise of discretion. AB at 22-26, 37-39. The Board does so as though this analysis appears somewhere in the Decision. Of course, it does not. The Director does not even cite any rulemaking; it only vaguely mentions the "Board's rules" that consider RN-only units appropriate. [JA216]. Presumably, "Board's rules" means the Healthcare Rule that preordains RN-only units in ***acute-care*** facilities—but that rulemaking also expressly reserved RN-only units to case-by-case adjudication in ***nonacute-care*** centers like the one operated by the Group. OB at 32-33. And the Healthcare Rule can guide unit determinations in nonacute-care facilities (if at all) ***only*** upon careful and articulated comparison of the facts of the case to the observations in the Board's rulemaking. *See, e.g.*, *Park Manor*, 305 N.L.R.B. at 875.

The Decision offers not a word for why the Healthcare Rule has any relevance here. If the Director or the Board believed it applied, the opportunity to explain that was in the Decision, or the Board's sentence-long order blessing it. The Court cannot reason for them. *NBCUniversal Media*, 815 F.3d at 829 ("We cannot guess what the Board means to say … ."); *LeMoyne-Owen Coll.*, 357 F.3d at 61 ("The Board may have an adequate explanation for the result it reached in this case. We cannot, however, assume that such an explanation exists until we see it."). And indeed, the Answering Brief does not say the Decision directly applied the Healthcare Rule. Rather, it details some of the Board's factfinding in acute-care settings, and then it jumps to a discussion of ***other*** cases, cited by the Director, that detail how the Healthcare Rule applies to ***those*** fact patterns. AB at 37-38. The Board effectively concedes that its Healthcare-Rule application before this Court appears nowhere in the Decision itself.

The other problem with the Answering Brief's application of the Healthcare Rule is that it leans on apparent similarities and ignores important differences between the Board's rulemaking discussion and the facts here. RNs in acute-care facilities, the Board found three decades

ago, generally had different training, licensing, job duties, and supervision from, and little interchange with, other employees generally (professional or non-professional). *See McLean*, 311 N.L.R.B. at 1111-12 (citing 53 Fed. Reg. 33900, 33911-12 (Sept. 1, 1988)). Because those factors appear in some form here, the Answering Brief reasons, the Healthcare Rule clearly applies. AB at 37-38. And any argument about the RNs' functional integration with other Group professionals is meaningless because the Board's rulemaking found the "team approach" used in acute-care hospitals does not "detract" from RNs' separateness. *Id.* at 24-45.

But the Answering Brief casts aside key distinctions between the rulemaking's observations and the facts here. It has to, to make its point. The rulemaking did not rely solely on separate training, licensing (and its consequent lack of interchange), job duties, and supervision differences to deem RN-only units appropriate in acute-care settings, as the Answering Brief suggests. Other important factors included administrative segregation into RN-specific departments; unique work schedules (RNs were the only employees required to work 24-hours a day, 7 days a week, with mandatory overtime); unique responsibilities for

direct patient care, physical separation within hospitals (which reduced or eliminated contact with other professionals); and documented differences in wages and markets for labor between RNs and other professionals (primarily physicians). 53 Fed. Reg. at 33911-13. It also mattered that RNs outnumbered other professionals 4:1 in most acute-care centers, as that meant those other professionals could be steamrolled by RNs if they shared a bargaining unit. *Id.* at 33914.

The facts here bear no resemblance to these findings the Answering Brief ignores. RNs work identical shifts to other professionals with no mandatory overtime, share physical space, and have frequent contacts with other professionals. OB at 9. Both RNs and APPs provide direct patient care. *Id.* There is no departmental segregation. *Id.* at 14. The record contains no evidence of wage differences here or the labor market for the Group's RNs, and the Director found nothing on that issue either, making wage differences irrelevant as a justification for the Decision's result. And RNs and other professionals are roughly equal in numbers, eliminating the Board's concern for grouping them in a single unit. [JA212]. The Healthcare Rule's application here is doubtful in light of these distinctions—in fact, the Board exempted nonacute-care facilities

from strict application of the Healthcare Rule based on many of them. *See* 53 Fed. Reg. at 33928-30. Neither the Decision nor the Answering Brief deal with this problem.

As for the purported minimization of acute-care hospitals' "team approaches," AB at 24-25, the Answering Brief misses that the rulemaking's discussion was not just about RNs' separate duties that remained separate even within teams of other professionals. Rather, the Board found that RN-only units were appropriate despite "team approaches" in part because the team concept was not prevalent in traditional acute-care hospitals—which ***differed from nonacute-care centers***—and because RNs and other professionals still had little overlapping time with patients, RNs were still uniquely tasked with direct patient care, RNs were still administratively and physically separated from other "team" employees, and they still had unique work schedules (*i.e.*, 24-hour shifts and mandatory overtime) from and little communication with other team members. 53 Fed. Reg. at 33907, 33911-13. None of those observations describe the facts here. And when various of those facts are missing, the Healthcare Rule is not relevant without

careful, case-by-case articulation. *Id.* at 33928-30; *McLean*, 311 N.L.R.B. at 1112.

The Healthcare Rule does not apply here for the reasons above. But as set forth *supra*, the Court need not reach that conclusion to grant the Petition and deny enforcement of the Board's Order. All the basis the Court needs is that the ***Decision does not explain*** why the Healthcare Rule applies. Because the Decision does not articulate the "how and why," the Court has no way of knowing for certain whether the unit certification here was a proper exercise of discretion.

C. The Answering Brief Misstates the Applicability of Prior Precedent

The same problems inhere in the Answering Brief's detailed (yet cherry-picked) discussion of the five adjudications cited in the Decision. The Answering Brief considers these cases "identical" to the facts here. AB at 38. That is wrong. The Answering Brief also considers the Decision's one-sentence summary of these cases—that they all involve RNs "constitut[ing] a sizeable homogenous grouping of professionals whose specialized training and licensure requirements clearly prevent other professions from performing their work"—as an obvious, self-explanatory application. *Id.* It is not. *See Point Park Univ.*, 457 F.3d at

51 ("This passing observation, stated in the form of a conclusion, does not substitute for … fact-specific analysis.").

The Board in *Holliswood* found an RN-only unit appropriate (as opposed to the wall-to-wall unit of all professional and nonprofessional employees urged by the employer) for several reasons, the first of which was that RNs uniquely worked 24 hours a day, 7 days a week, and were subject to mandatory overtime. 312 N.L.R.B. at 1195. Group RNs work the same shifts as other professionals. RNs in *Holliswood* were also the only professionals who were permitted to administer medication. *Id.* The Decision here does not fully address this issue; the Director says that administration of medications is one of the RNs' job duties and APPs "may be allowed to perform" RNs' tasks but do not do so regularly. [JA213]. RNs in *Holliswood* were also separated into a nursing department away from other employees, unlike Group RNs. *Holliswood*, 312 N.L.R.B. at 1196. And the *Holliswood* Board noted that the team approach used at that hospital ***did*** mean more contact between professionals, but that was negated due to RNs' unique 24-hour shifts—which is not a distinction applicable to Group RNs. *Id.* at 1197. The analysis noted lack of interchange and separate supervision too, but not

as isolated, dispositive factors as the Answering Brief suggests. *Id.* at 1196-97.

McLean was similar. Like in *Holliswood*, the first factor used to justify an RN-only unit was RNs' unique 24-hour, 7-day-per-week staffing requirements with mandatory overtime. *McLean*, 311 N.L.R.B. at 1112. And while RNs had separate roles within their teams, that was in part because only RNs were permitted to administer medications. *Id.* RNs were subject to entirely different training regimens, including three-week RN-specific orientations, and the *McLean* director "also rel[ied] on the fact that the vast majority of [RNs], like the nurses at acute care hospitals, are administratively segregated within a department of nursing and are separately supervised." *Id.* Finally, the *McLean* director likened the case to acute-care facilities due to the "sharp differences in the level and methods of compensation" for RNs versus physicians, psychologists, and social workers—without reference to any hourly-vs.-salary distinction. *Id.* at 1112-13. There is no analysis in the Decision of wage or pay-structure differences, only the meatless observation that RNs are paid hourly.

Charter Hospital, *Jefferson Health*, and *Marian Manor* each had distinguishing factors that associated those cases with acute-care facilities in ways not available to the Director here. In *Charter*, RNs were numerous compared to other professionals, the only employees who worked 24-hour shifts, the only employees who oversaw certain clinical employees, and the only employees with continuous patient contact—unlike here, the "excluded" professionals in *Charter* were a mix of medical and non-medical employees, including counselors, records managers and a teacher. 313 N.L.R.B. at 954-55. In *Jefferson*, once again, only RNs worked 24-hour shifts, and again, "excluded" professionals included medical and non-medical employees. 330 N.L.R.B. at 656-57. Only RNs assessed patients, made referrals, or developed care plans, *id.* at 657—here, of course, Group APPs perform those duties. And unlike Group RNs, RNs in *Jefferson* had little face-to-face and no overlapping patient time with other professionals. *Id.* Finally, in *Marian*, only RNs worked 24-hour shifts and they were administratively segregated into a nursing department. 333 N.L.R.B. at 1095.

The Group made these points in the Opening Brief. OB at 64-67. The Answering Brief has no answer other than accusing the Group of

"simply walk[ing] through each of the cases … , identif[ying] factors that differ from the present case while ignoring the commonalities, and then summarily assert[ing] that these differences render the case inapposite." AB at 48. The term the Answering Brief may be searching for is *distinguishing*, because that is what the Group did. The Group did not "ignor[e] the commonalities," but pointed out that the Director and Board must have taken them hand-in-hand with the differences and actually performed an analysis. OB at 64-67. The Group did not "summarily assert" that these differences mattered; it pointed out that the cases themselves, in analyzing their different facts in the context of the Board's rulemaking findings, apparently thought they did. *Id.*

More to the point, however, the Decision itself does not grapple with them. Simply saying that similarities of unit size (which is vague but not considered in every case), homogeneity (which is not disputed by the Group), and separate licensure requirements that prevent interchange, [JA216], does not tell the Court why the Decision sits comfortably with these otherwise-distinct precedents. The Board is not allowed to justify a conclusion based solely on the facts or reasons that support it. *Tito Contractors*, 847 F.3d at 732-33. It must address both sides of the coin.

Id. In other words, the Director and Board needed to do far more work to demonstrate that the Decision aligns with precedent. *Point Park Univ.*, 457 F.3d at 50 (admonishing a director for failing to explain what factors he relied on and his "reasoning for doing so," noting that the Board requires an explanation of "which factors were 'significant and which less so, and why'" (quoting *LeMoyne-Owen Coll.*, 357 F.3d at 61)). Not having done so, there is nothing here to affirm. *See Burlington Truck Lines*, 371 U.S. at 169 (courts are "powerless to affirm" where an agency's explanation for an action are "inadequate or improper").

III. THE BOARD FAILS TO ADDRESS THE GROUP'S "STEP THREE" ARGUMENTS

"Step Three" of the *PCC Structurals* test requires an application of relevant industry-specific standards or guidance. In nonacute-care facilities, that standard is set by *Park Manor*, which requires a reviewing regional director to expressly analyze and weigh the community-of-interest factors in light of the findings of the Board's rulemaking and prior precedent. *Park Manor*, 305 N.L.R.B. at 875. *Park Manor*'s required procedure at Step Three of the *PCC Structurals* approach may color the community-of-interests analysis required at Steps One and Two, as Board rulemaking and prior precedent certainly may be relevant

to how a director must evaluate the interests. Here, of course, the Director's vague call to the "Board's rules" and single-sentence gloss over prior cases provide nowhere close to a meaningful *Park Manor* analysis. *Supra* Pt. I.B. And the Answering Brief's improper attempt to backfill the missing pieces is unpersuasive anyway. *Supra* Pt. II.B-C.

The Group in its Opening Brief made two other arguments that the Answering Brief disputes, addressed below.

A. The Answering Brief Fails to Explain How the Decision Sufficiently Addresses the Anti-Proliferation Admonition

The Opening Brief asserts that the Decision fails to expressly or meaningfully address the longtime admonition by Congress to the Board that it avoid the proliferation of bargaining units in the healthcare industry. OB Pt. IV.A.

The Answering Brief's first response is that this admonition does not have the "force of law," and it does not meaningfully restrict the Board's discretion. AB at 46. The first clause of that sentence is correct insofar as it reflects the Supreme Court's quote in *American Hospital Association* about the legal weight of legislative history, 499 U.S. 606, 618 (1991); *accord* OB at 60. But the sentence's second clause steps over

the line. Of course the congressional admonition against proliferation operates to restrict the Board's exercise of its own discretion. The Board recognized this even in *Specialty Healthcare* in 2011, noting that "[d]espite what the Supreme Court has now made clear … the Board has nevertheless respected the suggestion that it seek to avoid undue proliferation" in healthcare bargaining units. *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 934, 946 (citing *St. Mary's Duluth Clinic Health Sys.*, 332 N.L.R.B. 1419, 1421 n.10 (2000)). The Board's position that this admonition is nonbinding fluff that sets no limit on its discretion overturns many decades of the Board's own guidance requiring its consideration and application. It cannot so easily be sidestepped.

The Board's second response in the Answering Brief is that the proliferation admonition was properly addressed because the Board cited to the Healthcare Rule, which itself "discusses proliferation" and finds no evidence that RN-only units will lead to it for other job classifications. AB at 45-46. That argument is unconvincing. First, the Decision did not expressly invoke the Healthcare Rule at all, and even then, it certainly did not discuss why it applies in this nonacute-care case. *Supra* Pt. II.B. The Board's counsel's attempt to do so in the Answering Brief is without

effect. *Frederick Mem.*, 691 F.2d at 194. Second, the Answering Brief's argument that the Board's rulemaking found RN-only units would not lead to undue proliferation ignores that the Board's observations were about acute-care hospitals, and the Answering Brief assumes (but does not explain or support why) those observations are equally relevant here. Nor is it obvious. The Board provided no statistics about whether RN units fractionalized bargaining in nonacute-care facilities, which the Board explained were materially different and far less uniform than the acute-care hospitals it based its findings on. 53 Fed. Reg. at 33928-29. To transpose the Board's acute-care-focused rulemaking findings on proliferation over nonacute-care settings, as the Answering Brief does, is to expand the rulemaking beyond its stated scope without justification.

Conspicuously, the Answering Brief does ***not*** argue that the Director or the Board expressly addressed the proliferation admonition. That is because they did not. And the Board's sideswipe that the Group "cherry picks the part of the health care rule it likes" (the admonition against proliferation) and "rebuffs" the part it "dislikes" (that RNs "can constitute a separate unit notwithstanding" that admonition), AB at 47, misses the point. The Opening Brief "cherry picks" ***no*** part of the

Healthcare Rule, and that is because the Rule does not apply here; the proliferation admonition, however, does. If the Board now believes the Rule applied to the facts of this case, the Decision must have explained why. It did not.

B. The Answering Brief Fails to Explain How the Decision Addresses the Board's Residual-Unit Directive

Finally, the Opening Brief argued that the Decision failed to address the Board's directive against leaving small residual units of professionals that, presumably, will have a difficult time obtaining representation. OB Pt. IV.C. The Answering Brief's response is to challenge the credibility of the assertion given that the Group—as these professionals' employer—is the one making it. AB at 49. The Board may say what it will, but the Group's concern for its employees is not at issue here; rather, the argument was raised because ***the Board*** has consistently voiced it in its unit-appropriateness determinations, and Director made no attempt to address it in the Decision (nor did the Board when denying review thereof). OB Pt. IV.C; *see also Holliswood*, 312 N.L.R.B. at 1197 (clarifying that its unit-appropriateness determination would "not create a small residual unit of professional employees" per the

Board's directive). The Answering Brief's alternative reply to this point is that the directive "cannot circumscribe the Board's discretion in determining appropriate units." AB at 49. Of course it can. Things that the Board says in its adjudications necessarily draw the lines of its discretion for future determinations—that is how agency-level case-by-case adjudication works. *See LeMoyne-Owen Coll.*, 357 F.3d at 61. This directive is one of those concerns the Board has consistently expressed, and it applied to these facts. If the Board believes the Decision properly ignored that problem, the Board needed to explain as much. It did not.

CONCLUSION

For the reasons set forth herein and in the Group's Opening Brief, the Group respectfully requests that the Court set aside and deny enforcement of the Board's Order and find that the petitioned-for unit is inappropriate.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 6,500-word type-volume limitation in amended Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 6,257 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 in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

December 3, 2020 /s/ *Terry L. Potter*

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, the foregoing brief was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

December 3, 2020 /s/ *Terry L. Potter*