

**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 OPENING BRIEF**

---

TERRY L. POTTER  
A. JAMES SPUNG (*ADMISSION PENDING*)  
HUSCH BLACKWELL LLP  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105  
Telephone (314) 480-1500  
Facsimile (314) 480-1505  
Terry.Potter@huschblackwell.com

COOPER PAGE  
HUSCH BLACKWELL LLP  
1900 N. Pearl Street, Suite 1800  
Dallas, TX 75201  
Telephone (214) 999-6100  
Facsimile (214) 999-6170

*Attorneys for Petitioner / Cross-  
Respondent*

December 3, 2020

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED  
CASES**

**A. Parties and Amici**

Petitioner/Cross-Respondent is St. James Medical Group (“the Group”). Respondent/Cross-Petitioner is the National Labor Relations Board (“Board”). There were no intervenors or amici in proceedings before the Board, and none are anticipated here.

**B. Rulings Under Review**

The rulings under review are the Decision and Order of the Board entered on February 12, 2020 (“Order”), finding that the Group violated Section 8(a)(5) of the National Labor Relations Act, as well as the Board’s July 26, 2019 Order Denying Request for Review of the Regional Director’s January 22, 2019 Decision and Direction of Election (“Decision”). A true and correct copy of the Order was attached to the Group’ Petition for Review, filed March 13, 2020. A true and correct copy of the Decision, as well as the Board’s Order Denying Request for Review, will be provided in the Appendix when filed.

**C. Related Cases**

This appeal has been consolidated with appeal number 20-1153.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Petitioner St. James Medical Group hereby submits this Disclosure Statement and states as follows:

SCL Health Medical Group - Butte, LLC d/b/a St. James Medical Group is a Montana Limited Liability Company. Its sole member is SCL Health Medical Group - Montana, LLC. The sole member of SCL Health Medical Group - Montana, LLC, and parent corporation of both entities is Sisters of Charity of Leavenworth Health System, Inc. No publicly held corporation owns 10% or more of Sisters of Charity of Leavenworth Health System, Inc.

## TABLE OF CONTENTS

	<u>Page</u>
Certificate as to Parties, Rulings, and Related Cases .....	i
Corporate Disclosure Statement.....	ii
Table of Contents.....	iii
Table of Authorities .....	vi
Glossary of Abbreviations .....	xi
Statement of Jurisdiction.....	1
Statement of Issues Presented.....	2
Statement of the Case .....	4
Statement of Facts.....	6
<b>I. THE GROUP’S INTEGRATED APPROACH TO PATIENT CARE .....</b>	<b>6</b>
A. RNs, NPs, and PAs.....	7
B. Behavior Health Specialist and Social Workers.....	10
C. Montana Tech Clinic .....	11
<b>II. UNION’S EFFORTS TO FORM A GERRYMANDERED BARGAINING UNIT OF ONLY REGISTERED NURSES .....</b>	<b>12</b>
A. Director Finds Proposed Unit Appropriate and Directs Election .....	13
B. An Election is Held and the Board Denies Review .....	17

C.	The Director Files Complaint, the Board Grants Summary Judgment, and The Group Petitions to This Court .....	18
	Summary of the Argument .....	21
	Standing.....	24
	Argument .....	25
I.	STANDARD OF REVIEW .....	25
II.	THE BOARD’S COMMUNITY-OF-INTERESTS STANDARD FOR APPROPRIATE-UNIT DETERMINATIONS.....	28
A.	The Historical Community-of-Interests Test’s Emphasis on Included and Excluded Employees’ Interests.....	29
B.	The Community-of-Interests Test Historically Applied in Health Care Facilities .....	31
C.	<i>Specialty Healthcare</i> (2011) Changes the Traditional Standards .....	33
D.	<i>PCC Structurals</i> (2017) and <i>Boeing</i> (2019) Restore the Status Quo Ante.....	37
III.	THE REGIONAL DIRECTOR HERE ERRED AT “STEP TWO” BY FAILING TO PROPERLY CONDUCT THE REQUIRED ANALYSIS FOR DETERMINING WHETHER EXCLUDED EMPLOYEES HAVE SUFFICIENTLY DISTINCT INTERESTS THAT OUTWEIGH SIMILARITIES .....	42
A.	The Board Failed to Provide Sufficient Rationale for Its Conclusion of Unit Appropriateness .....	44

B.	The Board Improperly Applied the Traditional Standard Required by PCC Structurals and Failed to Support Its Determination With Substantial Evidence.....	48
1.	<i>The Decision Improperly Applied the PCC Structurals Community-of-Interests Standard</i> .....	49
2.	<i>The Director and Board Made Critical Erroneous or Misplaced Findings</i> .....	54
IV.	THE BOARD ERRED AT “STEP THREE” BY FAILING TO PROPERLY APPLY STANDARDS SPECIFIC TO NONACUTE-CARE FACILITIES .....	59
A.	The Decision Fails to Meaningfully Address the Admonition Against Proliferation of Bargaining Units in Nonacute-Care Facilities .....	60
B.	The Prior Board Decisions Cited by the Director Are Irrelevant and Fail to Demonstrate Proper Application of the Relevant Standard.....	63
C.	The Director’s Unit-Appropriateness Determination Failed to Adhere to Board Guidance Against Permitting Inappropriate Residual Units .....	68
	Conclusion.....	70
	Certificate of Compliance .....	71
	Certificate of Service .....	72

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b><u>Cases</u></b>	
<i>Allentown Mack Sales &amp; Serv., Inc. v. N.L.R.B.</i> , 522 U.S. 359 (1998) .....	25
<i>Am. Hosp. Ass’n v. N.L.R.B.</i> , 499 U.S. 606 (1991) .....	32, 60
<i>BB&amp;L v. N.L.R.B.</i> , 52 F.3d 366 (D.C. Cir. 1995) .....	4, 69
<i>Constellation Brands, U.S. Ops., Inc. v. N.L.R.B.</i> , 842 F.3d 784 (2d Cir. 2016)..	4, 27, 28, 36, 39, 43, 44, 45, 46, 47, 53, 54
<i>FedEx Freight, Inc. v. N.L.R.B.</i> , 816 F.3d 515 (8th Cir. 2016) .....	36
<i>Lakeland Bus Lines, Inc. v. N.L.R.B.</i> , 347 F.3d 955 (D.C. Cir. 2003) .....	26
<i>Long Island Head Start Child Dev. Servs. v. N.L.R.B.</i> , 460 F.3d 254 (2d Cir. 2006).....	47
<i>NBCUniversal Media, LLC v. N.L.R.B.</i> , 815 F.3d 821 (D.C. Cir. 2016) .....	25, 26, 27, 28, 44, 48, 62, 63, 69
<i>Nestle Dreyer’s Ice Cream Co. v. N.L.R.B.</i> , 821 F.3d 489 (4th Cir 2016) .....	4, 26, 27, 29, 36, 47, 52
<i>N.L.R.B. v. FedEx Freight, Inc.</i> , 832 F.3d 432 (3d Cir. 2016).....	36
<i>N.L.R.B. v. Frederick Mem. Hosp., Inc.</i> , 691 F.2d 191 (4th Cir. 1982) .....	62, 63
<i>N.L.R.B. v. Ky. River Cmty. Care, Inc.</i> , 532 U.S. 706 (2001) .....	4

<i>N.L.R.B. v. Lundy Packing Co.</i> , 68 F.3d 1577 (4th Cir. 1995) .....	26, 27, 36, 52
<i>N.L.R.B. v. McClatchy Newspapers, Inc.</i> , 964 F.2d 1153 (D.C. Cir. 1992) .....	25
<i>N.L.R.B. v. Purnell's Pride, Inc.</i> , 609 F.2d 1153 (5th Cir. 1980) .....	27, 28, 29, 44, 45, 47
<i>N.L.R.B. v. Tito Contractors, Inc.</i> , 847 F.3d 724 (D.C. Cir. 2017) .....	25, 26, 27, 28, 45, 54, 55
<i>Point Park Univ. v. N.L.R.B.</i> , 457 F.3d 42 (D.C. Cir. 2006) .....	27
<i>Rush Univ. Med. Ctr. v. N.L.R.B.</i> , 833 F.3d 202 (D.C. Cir. 2016) .....	26, 32, 61
<i>Titanium Metals Corp. v. N.L.R.B.</i> , 392 F.3d 439 (D.C. Cir. 2004) .....	25, 26, 59
<i>Willamette Industries, Inc. v. N.L.R.B.</i> , 144 F.3d 877 (D.C. Cir. 1998).....	27, 69

### **Statutory Authorities**

29 U.S.C. § 152(12) .....	6, 7, 58
29 U.S.C. § 159(a) .....	28
29 U.S.C. § 159(b) .....	28
29 U.S.C. § 159(c)(5) .....	28, 29
29 U.S.C. § 160(e) .....	1
29 U.S.C. § 160(f) .....	1

### **Rules and Regulations**

29 C.F.R. § 103.30 .....	32
52 Fed. Reg. 25.....	33

**Legislative Materials**

H.R. Rep. No. 93-1051 (1974).....	31
S. Rep. No. 93-766 (1974) .....	31

**Additional Authorities**

<i>Airco, Inc.</i> , 273 N.L.R.B. 348 (1984) .....	68
<i>Am. Cyanamid Co.</i> , 131 N.L.R.B. 909 (1961).....	29
<i>Charter Hospital of St. Louis, Inc.</i> , 313 N.L.R.B. 951 (1994) .....	65
<i>Damon Med. Ctr.</i> , 234 N.L.R.B. 387 (1978).....	32
<i>Harrah’s Ill. Corp.</i> , 319 N.L.R.B. 749 (1995).....	30, 57
<i>Holliswood Hosp.</i> , 312 N.L.R.B. 1185 (1993) .....	66
<i>Huckleberry Youth Progs.</i> , 326 N.L.R.B. 1272 (1998).....	57
<i>In re Boeing Co.</i> , 337 N.L.R.B. 152 (2001).....	30
<i>In re Marian Manor for the Aged and Infirm, Inc.</i> , 333 N.L.R.B. 1084 (2001).....	65
<i>In re Specialty Healthcare and Rehabilitation Center of Mobile</i> , 357 N.L.R.B. 934 (2011) .....	33, 34, 35, 36, 38, 39, 40, 41, 42, 60, 61, 62
<i>In re United Ops, Inc.</i> , 338 N.L.R.B. 123 (2002) .....	30, 31
<i>Int’l Bedding Co.</i> , 356 N.L.R.B. 1336 (2011) .....	68
<i>Jefferson Health Systems</i> , 330 N.L.R.B. 653 (2000).....	63, 64, 65
<i>Klochko Equip. Rental, Co., Inc.</i> , 361 N.L.R.B. No. 49 (2014).....	68
<i>McLean Hosp. Corp.</i> , 311 N.L.R.B. 1100 (1993).....	66, 67
<i>Midway Hosp. Med. Ctr., Inc.</i> , 330 N.L.R.B. 1420 (2000).....	63
<i>Monsanto Co.</i> , 183 N.L.R.B. 415 (1970).....	30

<i>Mount Airy Psych. Ctr.</i> , 253 N.L.R.B. 1003 (1981) .....	52, 53, 57, 63
<i>Newton-Wellesley Hosp.</i> , 250 N.L.R.B. 409 (1980).....	29, 30
<i>Park Manor Care Ctr., Inc.</i> , 305 N.L.R.B. 872 (1991).....	32, 33
<i>PCC Structural</i> s, 365 N.L.R.B. No. 160 (2017) .....	2, 13, 14, 30, 36, 37, 38, 59, 62
<i>Publix Super Mkts.</i> , 343 N.L.R.B. 1023 (2004) .....	41
<i>Rockridge Med. Care Ctr.</i> , 221 N.L.R.B. 560 (1975) .....	63
<i>Schnurmacher Nursing Home</i> , 327 N.L.R.B. 253 (1998).....	63
<i>St. Francis Hosp.</i> , 271 N.L.R.B. 948 (1984) .....	32
<i>St. Mary's Duluth Clinic</i> , 332 N.L.R.B. 1419 (2000).....	60
<i>Sutter W. Bay Hosps.</i> , 357 N.L.R.B. 197 (2011) .....	68, 69
<i>The Boeing Co.</i> , 368 N.L.R.B. No. 67 (2019) .....	14, 19, 40, 41, 42, 44, 45, 51, 52, 56, 57, 58
<i>Upstate Home for Children</i> , 309 N.L.R.B. 986 (1992).....	52, 57, 63
<i>Wheeling Island Gaming, Inc.</i> , 355 N.L.R.B. 637 (2010).....	29, 30

## GLOSSARY OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Definition</u>
Act	National Labor Relations Act, 29 U.S.C. §§ 151 <i>et seq.</i>
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
Order	The Board's February 12, 2020 Decision and Order
PA	Physician Assistant
RN	Registered Nurse
SW	Social Worker
Union	Montana Nurses Association

## **STATEMENT OF JURISDICTION**

On March 13, 2020, the Group filed a Petition for Review from the Order of the Board entered on February 12, 2020, finding that the Group violated Section 8(a)(5) of the Act. [Doc. 1835253.] On May 14, 2020, the Board cross-applied for enforcement pursuant to Section 10(e) and (f) of the Act. [Doc. 1843019.] On May 15, 2020, the Court consolidated the Group' Petition with the General Counsel's cross application for enforcement. [Doc. 1843022.] The Board's Order is reported at 369 N.L.R.B. No. 29. This Court has jurisdiction under 29 U.S.C. §§ 160(e)-(f).

## **STATEMENT OF ISSUES PRESENTED**

1. Should the Order be set aside, and enforcement thereof denied, where the underlying representation Decision failed to sufficiently articulate its rationale for the purposes of judicial review?

2. Should the Order be set aside, and enforcement thereof denied, where the underlying representation Decision improperly applied the community-of-interests standard as articulated in *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 (2017), and violated Section 9(c)(5) of the Act?

3. Should the Order be set aside, and enforcement thereof denied, where the underlying representation Decision lacked support in substantial evidence (including by relying on misstatements or unfair characterizations of the record evidence)?

4. Should the Order be set aside, and enforcement thereof denied, where the underlying representation Decision failed to ensure or articulate its compliance with Board precedent requiring adherence to the congressional admonition against undue proliferation of bargaining units in the healthcare industry?

5. Should the Order be set aside, and enforcement thereof denied, where the underlying representation Decision failed to ensure or articulate its compliance with Board precedent requiring that inappropriate residual unit be avoided?

## STATEMENT OF THE CASE

The Group petitions this Court for review of the Board’s determination that a collective-bargaining unit consisting of only the Group’s registered nurses (“RNs”)—and not other, similarly situated professional employees—is an appropriate unit. That appropriateness certification was made by one of the Board’s regional directors (the “Director”), and was subsequently upheld by the Board in a one-sentence denial of the Group’s detailed request for review.

Following the “standard route to challenge a certification order” before the courts, *BB&L, Inc. v. N.L.R.B.*, 52 F.3d 366, 369 (D.C. Cir. 1995), the Group refused to bargain with the RN-only unit on the grounds that it is an inappropriate bargaining unit, leading to an unfair-labor-practices charge filed by the General Counsel for the Board.<sup>1</sup> The Board granted summary judgment as to that charge and ordered the Group to bargain. The Group now seeks relief here by filing

---

<sup>1</sup> Unit-appropriateness determinations are not subject to direct judicial review, so to challenge a determination, “the employer must refuse to bargain, triggering unfair labor practice proceedings under Section 8(a)(5) [of the NLRA.]” *Nestle Dreyer’s Ice Cream Co. v. N.L.R.B.*, 821 F.3d 489, 494 n.2 (4th Cir. 2016); accord *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001); *Constellation Brands, U.S. Ops., Inc. v. N.L.R.B.*, 842 F.3d 784, 788 & n.7 (2d Cir. 2016).

its Petition for Review to challenge the Director's unit-appropriateness determination. The Board has cross-applied to this Court for enforcement of its Order that is based on the underlying Decision.

The Group respectfully requests that the Court set aside, and deny enforcement of, the Board's Order and vacate the Director's Decision.

## STATEMENT OF FACTS

### I. THE GROUP'S INTEGRATED APPROACH TO PATIENT CARE

The Group<sup>2</sup> is a non-acute healthcare practice located in Butte, Montana. [JA211; JA31-33, 35-36.] The Group primarily operates from two buildings on the campus of Butte's central hospital (the "Butte campus"). *Id.* [JA211; JA35-36.] These buildings—the Crystal Street and Porphyry Street buildings—are less than a quarter mile away from each other. *Id.* [JA211; JA35-36.] The Group also operates a clinic on the campus of Montana Tech, about two miles away from the Butte campus (the "Montana Tech Clinic"). *Id.* [JA211; JA23-34.]<sup>3</sup>

The Group employs about 75 individuals. *Id.* [JA212; JA142.] A number of these employees are professional employees as defined by the

---

<sup>2</sup> The Board moved this Court to correct this case's caption on May 14, 2020. [Doc. 1842816.] The Board claimed the Order to bargain was directed not only to the Group but also to two other entities. However, that issue was resolved early in the representation proceeding, and only the Group—not the other two entities in the Board's proposed caption—is properly subject to the Board's Order and properly the Petitioner here. [See Doc. 1843878.]

<sup>3</sup> At the time of the initial hearing, the Group inadvertently represented that it also operated out of a facility in Boulder, Montana. The Group submitted an erratum to the Board in January 2020 to clarify that it does not own or operate the clinic located in this Boulder facility. [JA269-270.]

Act due to their specialized medical training. *See* 29 U.S.C. § 152(12).<sup>4</sup> To deliver optimum patient care, these professionals function essentially as a single, multi-focused unit, working alongside each other in close “practice groups” or “teams” organized by medical specialty. *Id.* [JA211; JA183.] The Pediatrics, Internal Medicine, Family Practice, Neurology, Cardiology, and Integrated Behavioral Health teams each operate out of the Crystal Street building, while the Urology and Obstetrics-Gynecology teams are located a five-minute walk away in the Porphyry Street building. *Id.* [JA211.] The Montana Tech Clinic, as detailed herein, operates differently.

#### **A. RNs, NPs, and PAs**

The team-oriented arrangement allows for small groups of professionals supporting physicians to work directly with a patient and each other to examine, diagnose, plan and administer care. These professionals include registered nurses (“RNs”) and advance-practice practitioners (“APPs”), consisting of nurse practitioners (“NPs”) and physician assistants (“PAs”). *Id.* [JA212.] RNs are employees who have obtained a nursing degree and license. *Id.* [JA88-90, 94; JA189-192.]

---

<sup>4</sup> The parties stipulated that these employees are professionals as defined by the Act. [JA77-79, 149.]

NPs are RNs who have received some additional education and an additional license. *Id.* [JA213; JA83, 88-90, 94; JA193-199.] PAs obtain a separate license; they can be, but are not always, RNs. *Id.* [JA89, 93, 96.] In the small, care-focused teams at the Group, these APPs largely share job descriptions, functional responsibilities, and common education and training with RNs. *Id.* [JA44-45, 49-50, 62-66, 70-71; JA189-199.]

The Group's practice teams are lean. Aside from physicians, most groups include at least one APP and one RN, ensuring close contact and intimate working relationships between team professionals. *Id.* [JA212; JA119.] The number of APPs and RNs per team follows:

Pediatrics	2 RNs, 1 APP
Internal Medicine	0 RNs, 1 APP
Family Practice	4 RNs, 1 APP (who floats)
Neurology	1 RN, 0 APPs
OB-GYN	1 RN, 1 APP
Urology	1 RN, 1 APP

*Id.* [JA212.] Normally, the Group's teams see around 18 patients per day. *Id.* [JA45.]

In this close outpatient environment, the functional roles played by RNs and APPs are often difficult to distinguish. RNs and APPs both have frequent and intimate interactions with patients and communicate with each other constantly. *Id.* [JA44-45, 49-50, 69,71.] Their work hours are essentially the same. *Id.* [JA72; JA184-186.] They have the same overall supervision under the Group's Manager of Operations. *Id.* [JA79; JA269.] They participate in the same daily "huddles" with physicians to discuss patient care. *Id.* [JA55-56.] And they share the same core functions and responsibilities, all with the same goal of diagnosing, treating, and caring for the patient. *Id.* [JA69-71; JA188-192]

RNs and APPs also use the same space and equipment. They share exam rooms, laptops for recording medical data, and desk space when not performing on-their-feet duties. *Id.* [JA72-74.] On the Pediatrics team, RNs and APPs use the same scales, blood pressure machines, exam tables, procedure kits, thermometers, and otoscope. *Id.* [JA72-73.] Professionals on the Internal Medicine team share similar equipment, along with a portable oximeter. *Id.* [JA73-74] Family Practice and OB-GYN professionals use this same equipment as well as

a fetal nonstress-test machine and a fetal doppler. *Id.* [A74.] Neurology professionals all use an electromyography machine, and Cardiology professionals all use an electrocardiogram machine. *Id.* [JA74.]

The closeness between RNs and APPs extends outside daily patient care. RNs and APPs are subject to the same human resources policies, benefits programs, training modules, and parking facilities at the Butte campus. *Id.* [JA54, 57-58, 60, 79.] RNs and APPs have the same break room. *Id.* [JA45.] They attend the same teambuilding exercises and even potlucks and parties. *Id.* [JA60-61, 124-125.] APPs are paid a salary and RNs are paid hourly, *id.* [JA74-75, 84-86, 93]—and they have some distinct duties, but RNs and APPs are otherwise functionally integrated and their work, intertwined.

#### **B. Behavior Health Specialist and Social Workers**

The Group's remaining non-physician professionals—its behavioral health specialist (“BHS”) and two social workers (“SWs”)—have different professional focuses but remain closely interconnected with the RNs and APPs. The BHS and SWs are located on the Butte campus and fall under the same overall supervision as APPs and RNs. *Id.* [JA79, 144; JA269.] The BHS makes daily rounds on the Butte

campus and engages in direct patient care with RNs and APPs regarding specific behavioral needs. *Id.* [JA118-120.] The SWs also work with RNs daily. *Id.* [JA46-47, 108.] The BHS and SWs' mode of compensation is not meaningfully distinct. The BHS is paid a salary (like the APPs) and the SWs are paid hourly (like RNs). *Id.* [JA75-77.]

The functional and practical similarities with RNs and APPs go on. The BHS and SWs participate in the daily “huddles” with the RNs and APPs, are subject to the same HR policies and training modules, have the same benefits, use the same break room and parking facilities, hold similar hours, and attend the same outside-work teambuilding exercises and parties. *Id.* [JA44-45, 57-61, 79, 124-125.] The Group's BHS and SWs are thus parts of the integrated whole—professionals supporting physicians in communicating with, diagnosing, and treating the Group's patients.

### **C. Montana Tech Clinic**

The Montana Tech Clinic is different. A single registered nurse works there part-time, and only during the school year. *Id.* [JA33-35.] That nurse has very little contact with the other professionals at the Group, as the nurse does not attend Butte campus “huddles” and does

not share spaces, equipment, or parking facilities with the other Group professionals. *Id.* [JA33-35, 81-82.] In fact, the Montana Tech Clinic nurse has only worked at the Butte campus one time since the summer of 2018. *Id.* [JA34-35.] With respect to issues normally subject to collective bargaining, this part-time employee has little similarity with the Butte campus professionals.

## II. UNION'S EFFORTS TO FORM A GERRYMANDERED BARGAINING UNIT OF ONLY REGISTERED NURSES

The Montana Nurses Association (the “Union”), as its name suggests, represents only registered nurses in collective bargaining, and it does not (and cannot) represent other employees. *Id.* [JA10-11] In fact, the Union told the Board it would withdraw its petition if an RN-only unit were deemed inappropriate. *Id.* The Union began its effort to form a collective-bargaining unit in January 2019 by petitioning the Board to represent the Group’s RNs, *id.*, thus asking for Board approval to peel out an ungainly slice of the Group’s integrated professional staff, apparently based on title alone.

The Group objected. In its Statement of Position filed the same day, the Group explained that the Union had ignored the Group’s other non-physician professionals, despite a clear “community of interests”

shared by all. *Id.* [JA12-19.] The Group also cited Congress’s warning to the Board to avoid proliferation of bargaining units in nonacute-healthcare facilities. *Id.* The Group accordingly proposed a bargaining unit consisting of all non-physician professionals to more closely align with the realities of the Group’s closely connected teams. *Id.*

**A. Director Finds Proposed Unit Appropriate and Directs Election**

The Board’s regional body held a hearing three weeks after the Union filed its Petition. After a supplemental round of briefing, the Director issued his Decision finding the Union’s proposed unit appropriate.

In making his determination, the Director cited to the Board’s 2017 opinion, *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 (2017), which (as detailed *infra*) overruled a prior Board opinion and returned to the traditional “community-of-interests” test for appropriate-unit determinations. [JA215.] Applied properly, the “community-of-interests” test directs the Board to perform both an internal and an external evaluation—that is, employees in an appropriate unit must share collective-bargaining interests among themselves and, more importantly here, must have *sufficiently distinct* collective-

bargaining interests from excluded employees. *PCC Structurals*, 365 N.L.R.B. No. 160, slip op. at 7. This inquiry must be thoughtful and complete. The analysis must explain “*how and why* these collective-bargaining interests are relevant” to the determination; a regional director cannot simply “record[] similarities or differences between employees.” *E.g., The Boeing Co.*, 368 N.L.R.B. No. 67, slip op. at 4 (2019) (emphasis added).

The Decision, however, did just that. It tallied up the purported similarities between RNs and purported differences with other professionals and—assuming but not explaining their weights or relevance—concluded an RN-only unit is appropriate. To summarize the Director’s “analysis”:

- Physically separate clinics do not result in organizational separation; all employees operate in the same department.
- APPs share “some” skills and training with RNs but have an additional degree; and other professionals have different training and licensure from RNs.
- RNs and APPs provide direct care and share many of the same functions; SWs provide secondary care or additional support.

- No evidence existed of “job overlap” between APPs and RNs, though they “may use some of the same medical instruments.”
- The professionals are functionally integrated and work “heavily” together, though each employee performs a “discrete and well-defined role.”
- RNs and APPs have regular contact within practice groups, and staff attend a daily “huddle,” but otherwise contact is incidental, and RNs and APPs are not interchangeable.
- All professionals are subject to the same HR policies, benefits, parking facilities, and receive training in the same manner, though RNs are paid hourly while APPs have salaries.
- RNs and APPs have different supervision.

[JA211-220.] After listing these job traits, the Director spent less than half a page determining that APPs “have important and significant distinguishing features that weigh against requiring that they be included in” the proposed bargaining unit. *Id.* [JA216.] The purported differences: different training, licensing, supervision, and compensation, as well as different job-independence levels and lack of interchange with RNs. *Id.* The Director did not explain why these differences were relevant, or how they outweighed the admitted points of alignment—particularly the functional integration, constant contact, usage of

facilities and spaces, and identical benefits programs, HR policies, and training—between RNs and the Group’s other professionals.

Beyond this improperly shallow analysis, the Decision contained an additional deficiency: it misstated the record, or relied on unsupported conclusion, for nearly every point used to mitigate the facts unhelpful to the Director’s conclusion. For example, despite acknowledging the deep functional integration of the Group’s professional teams, the Director waved off this finding by concluding, without citation to (or basis in) the record, that each employee had a “discrete and well-defined role.” *Id.* [JA214.] The Director also somehow found no evidence of “job overlap” and minimized teams’ equipment-sharing by saying professionals merely “may use some of the same medical instruments,” *id.* [JA213]—a mystifying characterization in the face of the evidence of the integrated practice groups and constant usage of the same equipment by professionals. The Director’s findings that RNs are separately supervised and that APPs’ “specialized training” separates them from RNs, *id.* [JA216], are equally puzzling, as discussed *infra*.

Finally, despite finding that these differences justified separating RNs from other professionals for collective bargaining, the Director somehow determined that the part-time RN at the Montana Tech Clinic—who did not receive benefits, had almost no contact with other professionals, and shared no facilities, equipment, or parking—had sufficient interests in common with the other RNs to be included for collective-bargaining purposes. *Id.* [JA215.]

**B. An Election is Held and the Board Denies Review**

Following the Decision, an election was held and the RNs voted to unionize. *Id.* [JA221-224, 227-230.] Shortly thereafter, in March 2019, the Group requested that the Board review the Decision. *Id.* [JA230-242.] In its Request, the Group pointed out that the Director had mouthed the words of the traditional “community-of-interest” standard but failed to apply it and, in fact, appeared to give significant *deference* to the proposed bargaining unit, directly contrary to *PCC Structurals*’ admonition. *Id.* For this reason, the Group asserted, the Director had run afoul of Section 9(c)(5), 29 U.S.C. § 159(c)(5), which prohibits the Board from making unit-appropriateness determinations by giving controlling weight to the extent of union organizing—that is, without

regard to whether other employees properly should be included. *Id.* [JA218-219.] Relatedly, the Group argued that the Decision improperly encouraged proliferation of bargaining units, long recognized by the Board as inappropriate in the healthcare setting. *Id.* [JA217.] Finally, the Group argued that the Director had relied on inapposite case law and made errant, unsupported findings to support his result. *Id.* [JA218-220.]

The Board denied the Request. With no elaboration, it ruled that the Group' Request "raises no substantive issues warranting review." *Id.* [JA243]

**C. The Director Files Complaint, the Board Grants Summary Judgment, and The Group Petitions to This Court**

In August 2019, the Director filed the Complaint with the Board against the Group for failure to bargain with the Union. *Id.* [JA244-248.] The Group quickly filed an Answer, admitting to its refusal to bargain but asserting that the Decision "was issued without basis, is inconsistent with the law, and is not valid and enforceable" because the certified bargaining unit was not appropriate. *Id.* [JA249-251.] The Board's General Counsel filed a Motion for Summary Judgment on

August 26, 2019, and three days later, the Board issued a Notice to Show Cause why the motion should not be granted. *Id.* [JA252.]

The Group responded to the Notice by raising many of the arguments it had before that the Board tersely rejected. *Id.* [JA253-268.] In addition, the Group directed the Board's attention to its own recent opinion, *Boeing*, which not only affirmed *PCC Structurals* but also illustratively applied it to demonstrate the required comparative detail (and point out certain factors the Board finds "relatively insignificant") for unit-appropriateness determinations. *Id.* [JA261] (citing *Boeing*, 368 N.L.R.B. No. 67).

In February 2020, the Board granted summary judgment. Despite its prior unadorned denial of review of the Director's threadbare Decision, the Board held that the "representation issues" raised by the Group "were or could have been litigated in the prior representation proceeding." *Id.* [JA259.] As to *Boeing*, the Board acknowledged the argument but observed that *Boeing* created no "new issues here" and did not justify revisiting the prior proceeding. *Id.* [JA211.] The Board ordered the Group to bargain with the Union unit. *Id.* [JA211.]

The Group timely petitioned this Court for review of the Order and, thereby, the underlying Decision as upheld by the Board. [Doc. 1835253.] Two months later, the Board filed its cross-application for enforcement of its Order. [Doc. 1843019.]

## **SUMMARY OF THE ARGUMENT**

Collective-bargaining units are intended to group employees with similar interests, but they are not intended to draw arbitrary or artificial lines between them. Accordingly, the Board's standard for unit-appropriateness determinations under the Act requires three steps. First, the Board must determine that the employees included in the proposed unit have a "community of interests." Second, the Board must determine that the "included" employees' interests are *sufficiently distinct* from employees excluded from the proposed unit—for the unit to be appropriate, different interests must *outweigh* similar ones in the collective-bargaining context. And third, the Board must apply any industry-specific rules it has developed.

The first step is not at issue here. As to the second step—whether the RNs included in the proposed unit share a "sufficiently distinct" community of interests from excluded professionals—the Director and Board fundamentally erred. As an initial matter, neither the Director nor the Board explained the rationale underpinning the Decision, as reviewing courts and the Board itself require. Further, the Decision was arbitrary, contrary to the Act, and unsupported by substantial

evidence. The Director improperly applied the community-of-interests standard by ignoring key similar interests between included and excluded professionals and apparently relying on only “meager” differences between them. Doing so departed from the governing standard with no justification, violated the Act’s prohibition against giving controlling weight to the extent of union organizing, and resulted in a decision unmoored to substantial evidence. Moreover, the Decision made several material misstatements of the record, compounding the error committed in its misapplication of the standard. These errors alone require this Court to set aside and deny enforcement of the Board’s Order. At the very least, the Court should remand to the Board to explain itself.

But the errors go on. Proceeding to the third step—application of industry-specific standards—the Board and Director failed to apply a core tenet of unit-appropriateness determinations in the healthcare setting: to prevent unduly disruptive bargaining activity, proliferation of bargaining units must be avoided. Board decisions addressing healthcare bargaining units must thoroughly address this admonition. Here, the Board and Director failed. Finally, the Board and Director

failed to address Board policy against leaving small “residual” units of unrepresented employees, as doing so effectively denies them their rights to representation under the Act. The Board’s and Director’s errors at this third step, like their errors at the second, should result in vacation of the Board’s Order and denial of the Board’s enforcement application.

## **STANDING**

The Group, as an employer engaged in interstate commerce, was subject to the Board's jurisdiction to determine whether it engaged in unfair labor practices. The Board concluded that the Group violated the Act as alleged in the Complaint and ordered the Group to bargain with the Union. The Group is therefore an aggrieved party within the meaning of Section 10(f) of the Act, 29 U.S.C. § 160(f), and accordingly has standing to seek review of the Board's final order in this Court.

## ARGUMENT

### I. STANDARD OF REVIEW

The Board's discretion to pick bargaining units is broad and entitled to deference, but that deference is "not unlimited." *N.L.R.B. v. Tito Contractors, Inc.*, 847 F.3d 724, 728-29 (D.C. Cir. 2017). Judicial review is "not so deferential that the court will merely act as a rubber stamp for the Board's conclusions." *Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439, 445-46 (D.C. Cir. 2004). Instead, courts must ensure, consistent with the Administrative Procedures Act, that the Board has engaged in "reasoned decisionmaking" in its adjudications, particularly because the Board—"uniquely among major federal administrative agencies"—promulgates rules almost entirely through its caselaw instead of rulemaking. *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

This means, first, that the Board cannot act arbitrarily. Board determinations "will not survive review ... when the Board has failed to apply the proper legal standard." *Titanium Metals*, 392 F.3d at 446 (citing *N.L.R.B. v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1156 (D.C. Cir. 1992)). Similarly, where the Board's unit-appropriateness

decision is not “rational and in accord with past precedent,” it cannot be enforced. *NBCUniversal Media, LLC v. N.L.R.B.*, 815 F.3d 821, 829 (D.C. Cir. 2016); accord *Titanium Metals*, 392 F.3d at 446 (reversal is proper where the Board “departs from established precedent without reasoned justification”).

Second, a Board determination must be supported by substantial evidence. *E.g.*, *Tito Contractors*, 847 F.3d at 732-33; *Rush Univ. Med. Ctr. v. N.L.R.B.*, 833 F.3d 202, 206 (D.C. Cir. 2016). This is not a slight burden. The Court “may not find substantial evidence merely on the basis of evidence which in and of itself justified [the Board’s decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.” *Tito Contractors*, 847 F.3d at 732-33. In other words, “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Id.* (quoting *Lakeland Bus Lines, Inc. v. N.L.R.B.*, 347 F.3d 955, 962 (D.C. Cir. 2003)). In the context of unit-appropriateness determinations, this obligation is significant. The Board cannot form bargaining units based on “meager differences” between employees, and it cannot make conclusory findings of fact or unfairly minimize record

evidence. *Nestle Dreyer's Ice Cream*, 821 F.3d at 499 (quoting *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995)); *Tito Contractors*, 847 F.3d at 732-33. To do so is to approve a bargaining unit unsupported by substantial evidence.

Third, and relatedly, the Board must explain itself. The Court cannot save Board decisions by supplying rationales the Board did not express. Doing so would be to invade the Board's rulemaking province:

When we cannot discern that [Board's] rationale, we are in no better a position than when the Board is silent. We 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*, 815 F.3d at 829 (citing *Point Park Univ. v. N.L.R.B.*, 457 F.3d 42, 49-50 (D.C. Cir. 2006)). Accordingly, in unit-appropriateness determinations, insufficient explanations by the Board or its regional directors have been a frequently picked bone in the circuit courts, including this one. *See, e.g., Tito Contractors*, 847 F.3d at 734; *Constellation Brands*, 842 F.3d at 793-95; *NBCUniversal Media*, 815 F.3d at 823; *Willamette Indus., Inc. v. N.L.R.B.*, 144 F.3d 877, 879 (D.C. Cir. 1998); *N.L.R.B. v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156-

60 (5th Cir. 1980). Where the Board does no more than recite facts and lurch to conclusion without thorough analysis, it has failed to support its conclusion with substantial evidence and courts will not enforce such determinations. *See Tito Contractors*, 847 F.3d at 734; *Constellation Brands*, 842 F.3d at 795.

The Board and Director here committed each error. As an initial matter, the Decision—unhelpfully approved without comment by the Board—failed to explain the rationale justifying its conclusion. Even if it had, the Director acted arbitrarily by departing from precedent and improperly applying the standard, and the Decision lacked a basis in substantial evidence.

## II. THE BOARD'S COMMUNITY-OF-INTERESTS STANDARD FOR APPROPRIATE-UNIT DETERMINATIONS

The National Labor Relations Act entitles employees to representation for the purpose of collective bargaining, but only in a “unit appropriate for such purposes.” 29 U.S.C. § 159(a). The Act delegates that appropriate-unit determination to the Board to make on a case-by-case basis. *NBCUniversal Media*, 815 F.3d at 828 (quoting 29 U.S.C. § 159(b)). Other than the warning that “the extent to which employees have organized shall not be controlling,” *id.* § 159(c)(5), the

Act gives little clarity to what “appropriate” means. *See Purnell’s Pride*, 609 F.2d at 1156. Accordingly, the Board has developed a standard for evaluating appropriateness over the last several decades, called the “community-of-interests” test. *See Nestle Dreyer’s Ice Cream*, 821 F.3d at 495.

**A. The Historical Community-of-Interests Test’s Emphasis on Included *and* Excluded Employees’ Interests**

Historically, the Board’s unit-appropriateness determinations have sought to determine whether the employees included in the proposed unit share interests relevant for collective bargaining. *E.g.*, *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-12 (1980). But the analysis has not stopped there; equally significant are the similarities or distinctions in interests between the in-unit employees ***and those excluded from it***. *See Wheeling Island Gaming, Inc.*, 355 N.L.R.B. 637, 637 n.2 (2010). As the Board has often put it, its unit-appropriateness inquiry “never addresses, solely and in isolation, the question of whether the employees in the [proposed unit] sought have interests in common,” but “necessarily proceeds to a further determination whether the interests of the [proposed-unit employees]

are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.” *E.g., Newton-Wellesley Hosp.*, 250 N.L.R.B. at 411-12 (emphasis added); *see also Wheeling Island Gaming*, 355 N.L.R.B. at 637 n.2 (“The Board has a long history of applying this standard in initial unit determinations.”); *In re Boeing Co.*, 337 N.L.R.B. 152, 153 (2001); *Harrah’s Ill. Corp.*, 319 N.L.R.B. 749, 750 (1995); *Monsanto Co.*, 183 N.L.R.B. 415, 417 (1970); *Am. Cyanamid Co.*, 131 N.L.R.B. 909, 910-11 (1961). The Board has referred to these joint “inward” and “outward” inquiries as the “community-of-interests” standard. *See Wheeling Island Gaming*, 355 N.L.R.B. at 637 n.2.

A set of factors aids this determination, which the Board has applied “[t]hroughout nearly all of its history.” *PCC Structurals*, 365 N.L.R.B. No. 160, slip op. at 7. Those factors, properly used to analyze interests of both included and excluded employees, are:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Id.* (quoting *United Ops., Inc.*, 338 N.L.R.B. 123, 123 (2002)).

**B. The Community-of-Interests Test Historically Applied in Health Care Facilities**

The community-of-interests test provides a baseline standard for the Board’s evaluation of unit-appropriateness petitions. But a variant of this standard—directed to a congressional concern for disruptive “proliferation” of units in medical settings—has developed for healthcare facilities. The application of this variant differs between acute-care facilities (such as trauma centers or other larger, inpatient facilities) and nonacute-care facilities (including outpatient clinics like the one operated by the Group).

During debates over certain amendments to the Act in 1974, both houses of Congress expressed a concern that too many bargaining units in a medical setting would harm the public interest. The congressional reports on these amendments stated: “Due consideration should be given by the Board to ***preventing proliferation*** of bargaining units in the health care industry.” S. Rep. No. 93-766, at 5 (1974) (emphasis added); *see also* H.R. Rep. No. 93-1051, at 7 (1974).

The Board proceeded accordingly. It frequently cited this note in its unit-appropriateness determinations. *See, e.g., St. Francis Hosp.*, 271 N.L.R.B. 948, 951 (1984); *Damon Med. Ctr.*, 234 N.L.R.B. 387, 387 (1978). And after a prolonged rulemaking process, the Board determined eight specific appropriate units in **acute**-care facilities. *See Am. Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 608 (1991); *see also* 29 C.F.R. § 103.30. This acute-care-facility rule is sometimes referred to as the “Healthcare Rule.” *Rush Univ. Med. Ctr.*, 833 F.3d at 207 (“The Health Care Rule guards against undue proliferation of bargaining units in acute-care hospitals.”).

Although the same proliferation and disruption concerns apply in the **nonacute** setting, the Healthcare Rule itself does not. *Am. Hosp. Ass'n*, 499 U.S. at 618 (citing *St. Francis Hosp.*, 271 N.L.R.B. at 953 n.39). During the rulemaking process leading to the Healthcare Rule, the Board determined that acute-care facilities were homogenous and featured strict divisions of labor, high levels of specialization, and little functional integration between employee classes—characteristics that invited the assignment of pre-ordained units. That was **not** true, however, for many or even most nonacute-care facilities; the Board

found that employees at many such facilities had far more functional integration, overlap between roles, and overlapping core duties. *See Park Manor Care Ctr., Inc.*, 305 N.L.R.B. 872, 874 (1991) (“*Park Manor*”) (citing 52 Fed. Reg. 25,142-01, 25,148 (July 2, 1987)). So while Congress’ warning to avoid proliferation was “equally applicable to unit determinations in nonacute care facilities,” the Board found no one-size-fits-all rule feasible for these employers. *Id.* at 874, 876.

Instead, unit-appropriateness determinations in nonacute-care centers are made on a case-by-case basis. *Id.* at 875. And in *Park Manor*, the Board developed a variant of the traditional community-of-interest test that applied the normal factors but also considered “background information gathered during rulemaking and prior precedent”—referring in part to the anti-proliferation concerns regarding, and likely functional integration of, employees in nonacute facilities. *Id.*

**C. Specialty Healthcare (2011) Changes the Traditional Standards**

The Board changed the standard in 2011, both in nonacute-care facilities specifically and across industries generally. In *In re Specialty Healthcare and Rehabilitation Center of Mobile*, the Board considered a

nonacute-care facility's challenge to a regional director's finding that a proposed bargaining unit of only certified nursing assistants was appropriate. 357 N.L.R.B. 934, 934 (2011) ("*Specialty Healthcare*"). In its challenge, the facility proposed a unit that included other nonprofessional employees, like cooks, dietary aides, and records clerks. *Id.* at 936. The regional director rejected the challenge and found the unit appropriate.

**Majority Opinion.** The Board ultimately agreed. *Id.* at 947. But in doing so, the Board changed the course of its own jurisprudence on appropriate-unit determinations. First, the Board overruled *Park Manor*, taking issue with what it perceived as a lack of "meaningful guidance" from the decision. *Id.* at 939. Second, the Board purported to replace *Park Manor*'s "pragmatic" standard for nonacute-care facilities with the "traditional community-of-interest" standard. *Id.* at 941.

But third, under the guise of applying that "traditional" standard, the Board actually redefined it. Under the Board's revised approach, if a community of interests existed among ***included*** employees in the unit, it was presumptively appropriate. *Id.* at 941-43. Far from determining whether included employees' interests were "sufficiently

distinct” from excluded employees, the Board now explained that once it “determined that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate.” *Id.* at 943. The Board thus put into place a “heightened” standard for employers that claimed a union’s proposed unit improperly excluded employees: the employer must “demonstrate[] that employees [excluded from the proposed unit] share an **overwhelming community of interest** with those in the petitioned-for unit,” such that there “is **no legitimate basis** upon which to exclude certain employees from it.” *Id.* at 944-45 (emphasis added).

**Dissent.** The Board framed this as a mere reiteration of the “traditional” standard. But as Member Hayes pointed out in dissent, the decision “**fundamentally changes** the standard” for unit-appropriateness determinations. *Id.* at 948 (Hayes, dissenting) (emphasis added).

The majority, Hayes said, effectively created a presumption in favor of the unit as proposed, running afoul of the Act’s prohibition against giving controlling weight to the “extent of union organizing.”

*Id.* at 950-51. Quoting the Fourth Circuit’s 1995 rebuke against the Board for previously trying this approach, Hayes observed that “[b]y presuming the union-proposed unit proper unless there is ‘an overwhelming community of interest’ with excluded employees, the Board effectively accorded controlling weight to the extent of union organizing,” as the union there had excluded certain employees for no other reason than it did “not seek to represent them.” *Id.* at 951 (quoting *Lundy Packing*, 68 F.3d at 1581). He found it “obvious” that the majority’s test “encourages unions to engage in incremental organizing in the smallest units possible,” representing “extraordinary fragmentation of the work force for collective-bargaining purposes.” *Id.* at 952. In short, the new test “cannot be reconciled with the traditional appropriate-unit test” and creates a presumption at odds with the Act. *Id.*<sup>5</sup>

---

<sup>5</sup> *Specialty Healthcare* seems to have puzzled the circuit courts. Those that had the occasion to consider the decision generally presumed the Board still intended that the interests of excluded employees be thoroughly evaluated against those of included employees. *See, e.g., Constellation Brands*, 842 F.3d at 793-95; *N.L.R.B. v. FedEx Freight, Inc.*, 832 F.3d 432, 440 (3d Cir. 2016); *Nestle Dreyer’s Ice Cream*, 821 F.3d at 499-500; *FedEx Freight, Inc. v. N.L.R.B.*, 816 F.3d 515, 523 (8th Cir. 2016). Despite these efforts to mold *Specialty Healthcare* to Board precedent, however, the Board set the record straight in 2017’s *PCC*

Those observations pertained to the generally applicable standard; but Hayes also disagreed with the majority's overthrow of *Park Manor's* standard for nonacute-care facilities specifically. Unlike the majority, Hayes explained, he found "nothing wrong, and much right" with continuing to apply Congress' anti-proliferation admonition to nonacute-care facilities. *Id.* at 950. In fact, he went on, that admonition

seems particularly apt in the nonacute care branch ... where the record in the health care rulemaking proceedings suggested that broader groupings of employees in a more highly integrated and homogenous workforce would tend towards *finding fewer appropriate units* than in the larger, more highly skilled, and specialized work force of acute care facilities.

*Id.* (emphasis added). And he saw "no basis for finding that ... nonacute care facilities do not still have more functionally integrated and homogenous staffs than in acute care facilities." *Id.*

**D. PCC Structurals (2017) and Boeing (2019) Restore the Status Quo Ante**

***PCC Structurals.*** *Specialty Healthcare's* standard did not last long. The Board overruled it six years later in *PCC Structurals*.

---

*Structurals* and decided that *Specialty Healthcare* was beyond saving. See *infra* Part II.D.

Agreeing with Member Hayes' dissent, the *PCC Structurals* Board acknowledged *Specialty Healthcare's* self-description "as a mere clarification of preexisting standards," but found that the majority had actually "substantially **changed**" them. 365 N.L.R.B. No. 160, slip op. at 7.

The *PCC Structurals* Board rejected this change in standard, which it said "discounts—or eliminates altogether—any assessment of whether shared interests among employees within the petitioned-for unit are sufficiently distinct from" the interests of excluded employees. *Id.* In doing so, *Specialty Healthcare* "created a regime under which the petitioned-for unit is controlling in all but narrow and highly unusual circumstances." *Id.* This approach ran afoul of the Act's mandate in several ways, including by denying the Board discretion to carefully consider interests of "**all** employees" and by giving controlling weight to the extent of union organizing. *Id.* at 8.

In the face of arguments that proposed bargaining units must include other employees, then, the Board would "no longer be constrained by the extraordinary deference that *Specialty Healthcare* affords to the petitioned-for unit." *Id.* at 9. The proper approach, the

Board reasoned, was what it had always done: equally analyze the interests of included and excluded employees. *Id.* Notably, the Board quoted with approval recent observations by the Second Circuit, which had also criticized *Specialty Healthcare* to the extent it did not require the Board to “analyze at step one” whether excluded employees had distinct interests that outweigh similarities with included employees. *Id.* at 11 (quoting *Constellation Brands*, 842 F.3d at 794).

After overruling *Specialty Healthcare*, the Board did two things. First, for unit-appropriateness determinations in all industries, it reasserted the true “traditional community-of-interest test” that required an analysis of interests among both included and excluded employees in a proposed unit using the factors developed over the past several decades. *Id.* at 13. The standard is now what it was before: the Board must determine whether “excluded employees have ***meaningfully distinct interests*** in the context of collective bargaining that ***outweigh similarities*** with” included employees, and where industry-specific rules have been developed, they must be applied. *Id.* (emphasis added). Second, in the specific context of nonacute-care facilities, the Board “reinstat[e] the [modified] standard established in

*Park Manor*” “for the reasons stated by former Member Hayes in his dissenting opinion.” *Id.* at 1 n.3.

***Boeing.*** The Board has since reaffirmed, and demonstrated the proper application of, *PCC Structuralists* in *Boeing*. 368 N.L.R.B. No. 67, slip op. at 3. The Board distilled the *PCC Structuralists* standard into three steps:

First, the proposed unit must share an internal community of interest. Second, 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. Third, consideration must be given to the Board’s decision on appropriate units in the particular industry involved.

*Id.* This analysis, the Board explained, must be more than a tally of job duties and traits. “Merely recording similarities or differences between employees” is not enough; instead, the decisionmaker must explain “how and why these collective-bargaining interests are relevant and support the conclusion.” *Id.* at 4. And “[i]f those distinct interests do not outweigh the similarities, then the unit is inappropriate.” *Id.*

The *Boeing* Board then went on to apply the steps and overturn the regional director’s determination of appropriateness for a proposed unit of airplane technicians and inspectors. The Board explained that

the regional director's decision had missed the teaching of *PCC Structural*s by ignoring several key instances of shared interests between included and excluded employees—*Boeing's* second step—that rendered the proposed unit inappropriate. *Id.* at 5-6.

For instance, the Board observed above all else a “high degree of functional integration with excluded employees,” who worked alongside or in place of each other and “all work toward producing a single product.” The Board found it “particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit.” *Id.* at 5 (quoting *Publix Super Mkts.*, 343 N.L.R.B. 1023, 1027 (2004)). The included and excluded employees also worked in the same department, shared overall supervision, had meaningful similarities in job functions, shared many of the same core skills, worked under the same terms and conditions of employment, were subject to the same personnel policies, and were offered the same benefits programs. *Id.*

These similarities outweighed points of distinction between included and excluded employees that the Board considered “relatively *insignificant* in the context of collective bargaining,” including wage

differences, licensing differences, very limited interchange, and almost no contact (i.e., no shared parking, no shared break rooms or cafeterias, and very little opportunity to see one another). *Id.* at 5-6 (emphasis added). “At most, [the included employees] are a group of employees with higher wages and A&P licenses working in a physically separate area that tend to stay in their respective job classifications.” *Id.* at 6. But they “largely have the same interests” as excluded employees for collective-bargaining purposes. *Id.*

At the very least, the Board found, “the petitioned-for unit’s distinct interests certainly do not outweigh the interests shared with excluded employees.” *Id.* And that was only the Board’s “step two”—before even considering any industry-specific rules in “step three.” *Id.*

### **III. THE REGIONAL DIRECTOR HERE ERRED AT “STEP TWO” BY FAILING TO PROPERLY CONDUCT THE REQUIRED ANALYSIS FOR DETERMINING WHETHER EXCLUDED EMPLOYEES HAVE SUFFICIENTLY DISTINCT INTERESTS THAT OUTWEIGH SIMILARITIES**

*PCC Structurals*, and its illustrative application in *Boeing*, make clear the errors in the Director’s Decision to carve out an RN-only unit from the Group’s integrated departmental whole. First, the Decision is no more than a tally sheet of job traits, breezily listing points of

similarities and (purported) differences between RNs and other professionals, that then jumps to a conclusion of appropriateness with no analytical bridge between the two. That alone prohibits enforcement of the Board's Order, as the Board has failed to assure the Court that it has acted reasonably, in alignment with precedent, and with support of substantial evidence. *See Constellation Brands*, 842 F.3d at 794-95.

But second, the apparently dispositive effect of the few differences identified in the Decision is perplexing, both (1) because these differences should not have outweighed the similarities under a correct application of the community-of-interests test and (2) because the differences identified are based on misstatement or unfair minimization of the record. The Director's conclusion—however opaquely derived—thus at best demonstrates that he effectively applied the obsolete *Specialty Healthcare* standard. In doing so, the Director and Board acted arbitrarily by departing from the governing standard and precedent, violated the Act by giving controlling weight to the extent of the Union's organizing, and reached a decision unsupported by substantial evidence. For these reasons, the Court should deny enforcement of and set aside the Board's Order.

**A. The Board Failed to Provide Sufficient Rationale for Its Conclusion of Unit Appropriateness**

The first problem with the Decision is that it gives insufficient rationale for judicial review. Indeed, the Director did precisely what *Boeing* said was insufficient under the *PCC Structuralists* standard, 368 N.L.R.B. No. 67, slip op. at 3: it recited the standard, listed purported similarities and differences between RNs and other professionals at the Group, and reached a conclusion, without explaining how these factors were weighed or why they mattered in the collective-bargaining context.

That is clearly insufficient under *Boeing*, but *Boeing's* admonition is not new. Courts have held that adjudications by the Board and its subsidiaries must always articulate their reasoning in sufficient detail to allow judicial review, and those lacking “coherent explanation” must at least be remanded to require the Board to “explain the rationale supporting its judgment in a fashion that is consistent with reasoned decisionmaking.” *NBCUniversal Media*, 815 F.3d at 823. In the context of unit-appropriateness determinations, the Board must demonstrate a sufficiently thorough analysis of excluded employees’

interests. As the Second Circuit explained in a line eventually adopted by the Board in *Boeing*, “[m]erely recording similarities or differences between employees does not substitute for an explanation of how and why these collective-bargaining interests are relevant and support the conclusion. ***Explaining why*** the excluded employees have distinct interests in the context of collective bargaining is necessary.” *Constellation Brands*, 842 F.3d at 794-95 (emphasis added). The Board “must assign a relative weight to each of the competing factors it considers”—in other words, “***articulate why***” it reached its result—to “permit proper judicial review.” *Purnell’s Pride*, 609 F.2d at 1156, 1160 (emphasis added); *accord Tito Contractors*, 847 F.3d at 733-34 (Board must adequately weigh and explain similarities and differences). Without this, the Board has improperly placed the burden on the employer “to prove the absence of distinctions,” which is “inconsistent with the NLRA and the Board’s past precedent.” *Constellation Brands*, 842 F.3d at 795.

Here, it takes acrobatics to characterize the Decision as anything more than an impermissible “tally [of] the factors.” The Director cited to *PCC Structurals* and recited the traditional community of interest

factors, and then proceeded in bullet-point fashion to list a bouquet of factual findings related to each. [JA212-214] (discussed further *infra*). The Director's half-page "analysis" simply repeats the findings the Director considers to be differences between RNs and other professionals, this time without so much as a nod to the similarities he previously identified. *Id.* [JA215.] And then, without explanation, he reaches his conclusion: RNs are sufficiently distinct from other professionals. [JA217.]

What the Decision does not do is *articulate why*. There is no meaningful comparison of included and excluded professionals' interests in the context of collective bargaining. There is no explanation for why the purported differences are relevant and, if so, why they outweigh the many points of alignment. How significant is, for example, a lack of interchange or additional skills? Why does the purported degree of independence matter? Why is it relevant that RNs (and SWs) are paid hourly and not by salary? And *why do these differences outweigh* the similarities for the purposes of forming a bargaining unit? The Director offers silence, and the Board summarily rejected review with no clarification.

This failure to “explain why” is error. It is not enough to simply recite the governing legal framework. *Constellation Brands*, 842 F.3d at 794 (“Reciting the legal framework does not substitute for analysis of the differences between unit-members and other employees, as required ...”). And it is not enough to merely list factual findings and then reach a conclusion; the Board must fill the analytical gap by explaining the relevance and weight of each factor as applied to the facts. *Id.* at 794 n.41 (“The Board cannot recite the legal standard and summarize the factual record without any intervening explanation to demonstrate that it has performed the analysis demanded by its own caselaw.” (citing *Long Island Head Start Child Dev. Servs. v. N.L.R.B.*, 460 F.3d 254, 257-58 (2d Cir. 2006)); *Purnell’s Pride*, 609 F.2d at 1156-57 (“[Unit determinations] will be upheld only if the Board has indicated 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.”). Simply reciting the standard, stating facts, and declaring a conclusion does “not explain why [included] employees had interests ‘sufficiently distinct from those of other employees to warrant the

establishment of a separate unit.” *Constellation Brands*, 842 F.3d at 793 (quoting *Nestle Dreyer’s Ice Cream*, 821 F.3d at 500).

That is all the Board did here. And this Court cannot fill the analytical blank or allow its counsel to now try. *NBCUniversal Media*, 815 F.3d at 829. The Board’s error prohibits enforcement of the Order based on this rail-thin unit determination and requires, at the very least, remand to the Board to explain itself. *See id.*

**B. The Board Improperly Applied the Traditional Standard Required by *PCC Structurals* and Failed to Support Its Determination With Substantial Evidence**

The Director’s and Board’s silence on the “how and why” of its determination is particularly troubling when attempting to deduce their reasoning based on the factual findings made. Held up against *Boeing’s* demonstrative application of *PCC Structurals*, the result should have been the opposite—even ignoring the Director’s misstatements or unfair characterizations of the record. By maximizing the points of distinction and minimizing similarities, the Director appears to have applied the disavowed *Specialty Healthcare* standard. The Director violated the Act by giving controlling weight to the extent of the Union’s organizing, acted arbitrarily by departing from precedent and the governing

standard, and failed to support his conclusion with substantial evidence. In light of these errors, the Court cannot enforce the Board's Order.

**1. *The Decision Improperly Applied the PCC Structural Community-of-Interests Standard***

The Director found the following similarities between RNs and other professionals at the Group: they are organized into a single department that, while consisting of separate practice groups in three locations, is a united whole; neither “physical separation [n]or practice areas result in organizational separation” and “the outpatient clinics at issue operate as a single department.” [JA212-213.] All professionals within this department work in functionally integrated teams with “regular contact,” including jointly seeing patients, working near-identical shift hours, attending huddles, sharing break rooms, and attending extracurricular events together. *Id.* [JA214.] APPs share the same “underlying skills and training” as RNs, though they have obtained an additional degree. *Id.* [JA213.] RNs are not the only employees permitted to perform tasks like administering medications, performing diagnostic tests, monitoring medical equipment and tracking and charting test results, as APPs “may be allowed” to do so.

*Id.* [JA213.] RNs and APPs “may” use the same medical instruments.

*Id.* [JA213.] All employees “are subject to the same [HR] policies, benefits, and parking facilities” and receive mostly the same training in the same manner. *Id.* [JA214.]

The Director then pitted the following purported differences against those similarities: RNs and other professionals had different and non-overlapping job duties, though all work close together to treat patients and APPs are permitted to perform several of the same duties and use at least “some” of the same equipment; and RNs had their “own” meetings in addition to the all-staff “huddles,” had no interchange between job classifications, had different pay structures (hourly vs. salary), and had different immediate supervisors. *Id.* [JA214.] The Decision then repeats (without analyzing) a handful of those purported differences again in its subsequent “analysis,” with no acknowledgement of the similarities. The Director reiterated that APPs have additional training and a different license than RNs (without noting that they shared the same underlying skills and could perform several of each other’s duties) and are “primary care providers” with greater independence than RNs (though RNs, too, “provide direct care

to patients”). *Id.* [JA213.] Next, the Decision simply reiterated that RNs have separate immediate supervision, no interchange, and are paid hourly. *Id.* [JA214.] The Director’s conclusion, apparently based on this handful of findings: RNs were sufficiently distinct from other professionals. *Id.* [JA216.]

That conclusion, unexplained though it is, necessarily must have credited differences between employees that the Board in *Boeing* considered “relatively insignificant” and weighed them more heavily than several similarities that are far more meaningful in the collective-bargaining context. In rejecting the petitioned-for unit, the *Boeing* Board observed many of the same differences between included and excluded employees that the Director found (and even a few more): different licensure and distinct skill sets, extremely limited interchange, different wages, and even no contact—no shared parking, no shared break rooms or cafeterias, no shared equipment. *Boeing*, 368 N.L.R.B. No. 67, slip op. at 5-6. But considered in the proper light, the Board weighed each factor and found them “*relatively insignificant in the context of collective bargaining*” compared to the meaningful similarities, including a “high degree of functional integration” between

employees in the same department that worked alongside each other in similar job functions toward a single goal, under largely the same terms and conditions of employment and with the same benefits. *Id.* at 5 (emphasis added); accord *Nestle Dreyer's Ice Cream*, 821 F.3d at 499 (acknowledging prior holding that “the method for calculating ... earnings,” “supervision,” and “a lack of interchangeability with other positions” were “meager differences” between employees for the purposes of unit-appropriateness determinations (quoting *Lundy Packing*, 68 F.3d at 1580)).

Given these important similarities, the Board found that excluded employees “would largely have the same interests as [included employees] in the context of collective bargaining,” and the distinctions “certainly do not outweigh the interests shared with excluded employees.” *Boeing*, 368 N.L.R.B. No. 67, slip op. at 6; accord *Upstate Home for Children*, 309 N.L.R.B. 986, 987 (1992) (rejecting proposed all-RN unit in part because RNs “play[ed] an important role in interdisciplinary care and treatment plans,” “share[d] other significant terms and conditions of employment that facilitate a high degree of functional integration ... and close contact” with other employees like

“overlapping hours of work” and “substantial and frequent contact”); *Mount Airy Psych. Ctr.*, 253 N.L.R.B. 1003, 1006 (1981) (rejecting proposed all-RN unit and approving all-professional unit where, despite differing levels of education and licensing and some different job duties, included and excluded employees were functionally integrated, worked the same hours, and had the same benefits and supervision).

The facts the Director found here are not meaningfully different from those in *Boeing*, which the Board did not consider close to justifying a proposed unit. While the Board and Director do not explain themselves, the result here simply makes no sense; less meaningful factors were accorded controlling weight while facts the Board finds highly relevant were cast aside without comment. The only way to possibly reach this result would be to presume the appropriateness of the petitioned-for unit at the outset (as *Specialty Healthcare* permitted where included employees shared a community of interest) and then foist upon the Group the obsolete “overwhelming community of interest” burden—the standard *PCC Structural*s laid to rest. By doing so, the Director not only misapplied the proper standard and failed to marshal substantial evidence, but also gave controlling weight to the extent of

union organizing. *See Constellation Brands*, 842 F.3d at 794 (failure to properly analyze and weigh excluded employees' interests against included employees' interests would place the burden "exclusively on the employer to prove the absence of distinctions" in violation of the Act and precedent). These errors preclude enforcement of the Order.

**2. *The Director and Board Made Critical Erroneous or Misplaced Findings***

Those errors do not even take into account several perplexing factual findings by the Director, which misstate or unfairly characterize the record or have no support in it at all. The Decision's liberties with the record further demonstrate that the Board's determination lacked substantial basis therein. *See Tito Contractors*, 847 F.3d at 732-33.

First, while the Director conceded that a high degree of functional integration exists among the Group professionals, he negated this point by noting (without citation to, or support in, the record) that "each employee in this system ... is performing their own discrete and well-defined role." [JA214.] This generalized observation was no answer to the conceded functional integration of non-physician professionals. *See Tito Contractors*, 847 F.3d at 733 (rejecting generic or overgeneralized observations regarding community-of-interests evidence). The record

demonstrates that these employees constantly see each other, work alongside each other, have similar core skills as each other, operate under most of the same terms and conditions, and are highly functionally integrated. [JA44-45, 49-50, 69-71; JA188-192.] To say they have “discrete and defined role[s]” has no meaning against these record facts, and it is not clear what the Director meant anyway. That could be said about most employees in most companies across all industries—most have job descriptions of some kind, and job descriptions typically differ between positions. But it does not mean the Group’s professionals lack functional integration for collective-bargaining purposes, and the Decision offered nothing more specific to this “point.”

Second, the Director misstated facts by finding no “job overlap” other than that employees “*may* utilize *some* of the same medical instruments.” [JA213.] (emphasis added). The Group’s professionals are in continuous daily contact, working together toward the same goal of addressing patient needs. *Id.* [JA44-45, 49-50.] Many have the same core job functions and responsibilities, and they all have direct (and often simultaneous) contact with patients. *Id.* [JA44-45, 49-50, 69-71;

JA188-192.] These practice groups are functionally integrated units with blurred boundaries between each team member's role. To say no overlap exists ignores the record and common sense.

And far from occasionally using "some" of the same equipment, as the Director implied, the record demonstrates that the included and excluded employees here use the same equipment constantly. *See* [JA72-74.] The Director's gross understatement is important. The tools of the job can be a critical piece of collective-bargaining negotiations; faulty tools can lead to workplace injuries, misdiagnoses, or poor-quality services, or they could simply add difficulty to tasks, and all employees who use them have a shared collective-bargaining interest. The Decision's unjustified gloss of this strong record evidence minimized a key shared interest that, if given proper weight, demonstrates the inappropriateness of the petitioned-for unit.

Third, the Decision's finding regarding purported separate supervision between RNs and other professionals was off-base for the purposes of inappropriate-unit determinations. All professionals at the Group come under the overall supervision of the Manager of Operations. [JA214; JA79, 144; JA269.] That immediate supervision

may differ for certain professionals does not mean they lack common collective-bargaining interests where they nonetheless share ultimate supervision. *See, e.g., Boeing*, 368 N.L.R.B. No. 67, slip op. at 6 (finding shared “overall supervision” a common collective-bargaining interest distinct from “immediate” supervision); *Harrah’s Ill.*, 319 N.L.R.B. at 750 (same); *Huckleberry Youth Progs.*, 326 N.L.R.B. 1272, 1274 (1998) (finding excluded employees to have shared interest because, “[w]hile [included and excluded employees] do not share common immediate supervision, secondary and overall supervision is the same”); *Upstate Home for Children*, 309 N.L.R.B. at 987 (rejecting all-RN unit in part because the RNs “share overall common supervision with other professional and nonprofessional employees”); *Mount Airy Psych. Ctr.*, 253 N.L.R.B. at 1004-06 (rejecting all-RN unit despite that RNs reported to a distinct “nursing hierarchy”). The Director’s finding of separate supervision improperly ignored this ultimate hierarchical sameness that demonstrates shared interests between the included and excluded professionals.

Finally, the Director’s finding that APPs are subject to “specialized training” and licensing, making them different from RNs,

was misplaced. With respect to licensing, *Boeing* made clear that licensing differences between employees has little standalone meaning in the collective-bargaining context, *Boeing*, 368 N.L.R.B. No. 67, slip op. at 5, and the Director made no effort to explain their importance. As for “specialized training,” the Director’s characterization was circular. “Specialized” training is inherent in the very definition of “professional” in the Act, 29 U.S.C. § 152(12)—meaning that every employee in the Group’ proposed unit (from RNs to APPs to SWs) has “specialized” training. It does nothing to explain why whatever differences exist in education levels between RNs and APPs makes RNs a “sufficiently distinct” unit for collective-bargaining purposes.

The Board’s and Director’s errors at “step two”—failure to explain their rationale, departure from the appropriate standard, and failure to ground their determination in substantial evidence—should result in this Court setting aside and denying enforcement of the Board’s Order to bargain.

#### IV. THE BOARD ERRED AT “STEP THREE” BY FAILING TO PROPERLY APPLY STANDARDS SPECIFIC TO NONACUTE-CARE FACILITIES

The Director’s errors at “step two” of the *PCC Structurals* analysis—whether differences outweigh similarities with excluded employees—themselves warrant reversal. But the Director also erred at “step three.” At this final portion of the analysis, the Board must “consider guidelines that [it] has established for specific industries.” *PCC Structurals*, 365 N.L.R.B. No. 160, slip op. at 13.

For nonacute-care facilities, those “guidelines” are set by *Park Manor*: the Board must apply the traditional community-of-interests analysis as well as “background information gathered during rulemaking and prior precedent.” 805 N.L.R.B. at 875. Of course, the traditional community-of-interests analysis is addressed at “step two.” The remaining pieces of the analysis specific to nonacute-care facilities are: (A) the “background information” gathered during the Board’s rulemaking arising from Congress’s admonition to avoid proliferation of bargaining units; and (B) “prior precedent.” The Director’s analysis fails to meaningfully address either, and this failure precludes enforcement. *See Titanium Metals*, 392 F.3d at 446.

**A. The Decision Fails to Meaningfully Address the Admonition Against Proliferation of Bargaining Units in Nonacute-Care Facilities**

The key guideline that informed the Board's 1987 rulemaking and fact-finding in the healthcare industry is the congressional "admonition" to avoid proliferation of bargaining units to preserve the public's interest in unimpeded access to care. *Am. Hosp. Ass'n*, 499 U.S. at 618. And though the Supreme Court has recognized that this legislative history did not, at least as far as Congress goes, have "force of law," *id.*, the admonition endures in Board determinations. As the Board recognized in 2011, "[d]espite what the Supreme Court has now made clear ... the Board has nevertheless respected the suggestion that it seek to avoid undue proliferation" of bargaining units in healthcare. *Specialty Healthcare*, 357 N.L.R.B. at 946 (citing *St. Mary's Duluth Clinic*, 332 N.L.R.B. 1419, 1421 n.10 (2000)).

That guidance should have been respected, or at least adequately addressed, here. As the Group argued before the Director, the petitioned-for unit artificially segments RNs away from the workforce, opening way for numerous small bargaining units based merely on job classification and precise license with no regard to the on-the-ground

realities of the small, functionally integrated department to which they belong. If the petitioned-for unit is appropriate, then—despite the clear similarities in interests between them—so is a separate unit of NPs, or PAs, or SWs. This fragmentation of units is precisely what Congress cautioned the Board about and what the Board has sought to avoid ever since. *See Rush Univ. Med. Ctr.*, 833 F.3d at 204 (“An excessive number of bargaining units increases the prospect of jurisdictional disputes and work stoppages, potentially impairing the provision of health care services to the public.”).

Despite the Board’s adherence to this principle, the Director failed to meaningfully grapple with it and the Board inexplicably failed to enforce it. The Director’s single-sentence, uncited response was that the Board’s Healthcare Rule recognizes RNs as an appropriate bargaining unit. [JA216.] This response blatantly misapplied the Rule—it applies to acute-care facilities, **not** nonacute-care facilities. The Board made that distinction because, unlike acute-care centers, the smaller size and functional integration between job classifications featured at many nonacute-care practices often made rigid, single-classification bargaining units inappropriate, and that distinction

remains meaningful today. *See Specialty Healthcare*, 357 N.L.R.B. at 950 (Hayes, dissenting); *PCC Structural*s, 365 N.L.R.B. No. 160, slip op. at 1 n.3 (reinstating *Park Manor* “for the reasons stated by former Member Hayes in his [*Specialty Healthcare*] dissenting opinion”). And many of the reasons the Board expressed for stopping short of applying the Healthcare Rule to nonacute-care facilities are present here. The Group’s professionals are functionally integrated and relatively few, with employees in constant contact with each other and patients, performing similar work on similar hours under similar terms and conditions of employment. *See supra* Part II.B.

This misfire in the Decision is difficult to understand. There may be situations in which the unit divisions set out in the Board’s Healthcare Rule can be applied in nonacute-care settings that are materially similar to acute-care setting. But the circumstances here do not present a close case. And, as with the “step two” analysis, the Director declines to elaborate and the Board rubber-stamps his rubber stamp. Because the Director misapplied the standard without any explanation at “step three” of the unit-appropriateness determination, the Board’s Order that seeks to enforce the Decision cannot be upheld.

*NBCUniversal Media*, 815 F.3d at 829; *see also N.L.R.B. v. Frederick Mem. Hosp., Inc.*, 691 F.2d 191, 194 (4th Cir. 1982) (“[T]he Board must give due consideration to the congressional admonition against proliferation. Furthermore, a Board decision must clearly explain ‘the manner in which its unit determination ... implement(s) or reflect(s) that admonition ... . *The Board cannot leave its explanation to implication or the argument of its counsel.*” (emphasis added)).

**B. The Prior Board Decisions Cited by the Director Are Irrelevant and Fail to Demonstrate Proper Application of the Relevant Standard**

*Park Manor*’s second offshoot of the traditional community-of-interests standard is consideration of prior precedent. Prior precedent demonstrates that approval of units including RNs and other professionals due to a uniting community of interests is typical. *See, e.g., Midway Hosp. Med. Ctr., Inc.*, 330 N.L.R.B. 1420, 1420 (2000); *Schnurmacher Nursing Home*, 327 N.L.R.B. 253, 255 (1998); *Rockridge Med. Care Ctr.*, 221 N.L.R.B. 560, 561 (1975). Several cases even reject a proposed RN-only unit in favor of one including a broader group of professionals. *E.g., Upstate Home for Children*, 309 N.L.R.B. at 987; *Mount Airy Psych. Ctr.*, 253 N.L.R.B. at 1005-06.

The Director ignored this precedent and relied on inapposite Board decisions that tend to disprove, rather than support, the appropriateness of the Union's proposed unit. The Director referenced cases cited by the Union "where registered nurses constituted a sizeable homogenous grouping of professionals, whose specialized training and licensure requirements clearly prevent other profession[al]s from performing their work." [JA216.] But the Director's application of these cases was as inapt as his application of the Healthcare Rule.

For example, the Director cited *Jefferson Health Systems*, where the Board approved an RN-only unit despite an employer's proposal of an all-professional unit. *Id.* (citing *Jefferson Health Systems*, 330 N.L.R.B. 653 (2000)). But the Director ignored key differences between RNs and other professionals in *Jefferson Health Systems* that are not present here. Those "other" professionals had very little contact with each other, did not have the same shifts as nurses, did not use the same equipment, and did not see patients together. Numerous of the excluded professionals were not involved in patient care at all. *Jefferson Health Sys.*, 330 N.L.R.B. at 657. Further, the union there stood willing to represent all professionals, providing some assurance

that the petitioned-for unit's boundaries were not drawn simply by the extent of the union's organizing. *Id.* Here, the Union stated it would ***withdraw its petition*** if other professionals were included in the unit, as it cannot represent anyone but RNs under its bylaws. [JA150.]

The other cited cases are similarly off-target. In each, the RNs were administratively, physically, and occupationally separated from the (often nonclinical) professional employees excluded from the petitioned-for unit. In *In re Marian Manor for the Aged & Infirm, Inc.*, the RNs in a large nursing home worked in an administratively separate department with separate immediate and overall supervision and were the only employees providing round-the-clock patient care. 333 N.L.R.B. 1084, 1095-96 (2001). In *Charter Hospital of St. Louis, Inc.*, the Board approved an all-RN unit in a large inpatient psychiatric hospital where RNs had many similar traits to nurses in acute-care facilities, including unique work schedules (being the only employees providing round-the-clock care), lack of regular and recurring contact with other professionals, and separate training and education. 313 N.L.R.B. 951, 954 (1994). Moreover, many of the excluded professionals were nonclinical and did not see patients. *Id.*

The facts in *Holliswood Hospital*, also cited by the Director, are similar: there, though the employer sought an *all-employee* unit (of both professionals and non-professionals), an RN-only unit was deemed appropriate because RNs were the only professionals providing 24-7 care, were the only ones with mandatory overtime policies and pay, were placed in a separate department, and were the only professionals who provided basic physical healthcare at all (others were focused on mental health). 312 N.L.R.B. 1185, 1195 (1993). Finally, in *McLean Hospital Corp.*, an all-RN unit at a large, prestigious psychiatric center was deemed appropriate where RNs had their own department, unique working conditions and benefits, and inconsistent contact with other professionals; RNs also were the only round-the-clock care providers, the only employees subject to overtime policies, the only medical-care employees (as opposed to psychiatric care), the only employees permitted to administer medications or discuss them with patients, the only employees performing rounds to give or receive medical reports. 311 N.L.R.B. 1100, 1110-11 (1993). Notably, the decision approved by the *McLean* Board expressly distinguished a prior decision where a regional director had found a unit *in*appropriate when excluded

employees were involved in patient care, had important and frequent work-related contacts with included employees, and largely had the same skills and education, training, common duties and supervision—in other words, where the “specialized staffing and lack of contact often seen in large institutions was *not* present.” *Id.* at 1115 (emphasis added).

The circumstances here diverge markedly from the cases the Union cited to the Director, which he adopted with little comment. All the Group’s professionals work in the same department; RNs do not have their own. All professionals, not just RNs, are involved in face-to-face patient care. The professionals meet with patients together, they use the same equipment, they are in constant daily contact in the same physical spaces, they have overlapping core functions and share training, and have similar shifts. *See supra* Part I. The RNs here lack the physical and administrative separation that drove the prior Board decisions the Director cites. These decisions demonstrate the Director’s departure from, rather than adherence to, Board precedent and preclude enforcement of the Board’s Order.

**C. The Director's Unit-Appropriateness Determination Failed to Adhere to Board Guidance Against Permitting Inappropriate Residual Units**

Finally, despite the Group's objections, the Director *wholly ignored* the Board's preference for avoiding the creation of residual units of unrepresented employees through unit-appropriateness determinations of selected groups of employees. Doing so, the Board has consistently found, risks leaving excluded employees stranded and without collective-bargaining representation at all, at odds with their NLRA rights. *See, e.g., Klochko Equip. Rental, Co., Inc.*, 361 N.L.R.B. No. 49, slip op. at 1 n.1 (2014) (finding exclusion of an employee inappropriate because he would constitute a "residual unit and would be foreclosed from exercising his Sec. 7 right to representation"); *Int'l Bedding Co.*, 356 N.L.R.B. 1336, 1337 (2011) (finding a broad petitioned-for unit appropriate in part because excluding certain employees would result in the creation of a 9-employee "residual unit, which the Board tries to avoid where possible"); *Airco, Inc.*, 273 N.L.R.B. 348, 349 (1984) ("[T]he Board has normally preferred to avoid [residual] units where possible."). While this policy applies across all industries, the Board has applied it in particular to healthcare

providers in light of Congress's admonition against proliferation of healthcare bargaining units. *See, e.g., Sutter W. Bay Hosps.*, 357 N.L.R.B. 197, 200 (2011) (finding broad bargaining unit appropriate).

Here, the Director failed to even engage the argument, which in and of itself subjects the Board's silent approval of the Decision to no deference and precludes this Court from enforcing the Order. *NBCUniversal Media*, 815 F.3d at 829. Despite the Group's arguments, the Decision is entirely silent on how the appropriateness determination complies with this Board guidance.

Moreover, the Director's conclusion runs directly counter to it. Despite the inappropriateness of the petitioned-for unit, the Director's and Board's approval of that unit strands the other approximately 12 professionals in a small, arbitrary grouping without collective-bargaining representation. This contradicts Board policy and precedent, and the Board's Order should be set aside and its enforcement denied. *BB&L, Inc.*, 52 F.3d at 369; *Willamette Indus., Inc.*, 144 F.3d at 880. At the very least, the Board must be required to explain how this result aligns with its consistent guidance to the contrary.

## CONCLUSION

For the reasons set forth herein, 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 or, in the alternative, remand to the Board for further proceedings consistent herewith.

December 3, 2020

Respectfully submitted,

*/s/ Terry L. Potter*

TERRY L. POTTER

A. JAMES SPUNG

*(APPLICATION PENDING)*

HUSCH BLACKWELL LLP

190 Carondelet Plaza, Suite 600

St. Louis, MO 63105

Telephone: (314) 480-1500

Facsimile: (314) 480-1505

Terry.Potter@huschblackwell.com

James.Spung@huschblackwell.com

COOPER PAGE

HUSCH BLACKWELL LLP

1900 N. Pearl Street, Suite 1800

Dallas, TX 75201

Telephone: (214) 999-6100

Facsimile: (214) 999-6170

cooper.page@huschblackwell.com

*Counsel for Petitioner / Cross-  
Respondent*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the 13,000-word type-volume limitation in amended Fed. R. App. P. 32(g)(1) because the brief contains 12,147 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*