

Case No. 20-70312

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

*Respondent.*

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Appeal from Final Decision and Order  
National Labor Relations Board  
369 NLRB No. 16 (Jan. 30, 2020)

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**PETITION FOR PANEL REHEARING**

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## INTRODUCTION

Petitioner Service Employees International Union, Local 1107 (“Local 1107”) respectfully petitions for panel rehearing pursuant to Federal Rule of Appellate Procedure 40 and Ninth Circuit Rule 40-1.

There are two reasons for granting this petition for rehearing. First, despite concluding that the National Labor Relations Board (“NLRB” or “Board”) failed to support its ruling in *Valley Hospital Medical Center*, 368 N.L.R.B. No. 139 (Dec. 16, 2019) (“*Valley Hospital I*”) with adequate reasoning, the Court remanded the matter to the Board for further proceedings without vacating the decision. Panel rehearing is appropriate to allow Local 1107 to address that unusual procedural outcome, which no party requested in prior briefing to the Court.

Put simply, the Court should have vacated *Valley Hospital I*, the ordinary remedy where an agency fails to engage in reasoned decisionmaking. Continuing to saddle the parties and the public with an unreasoned NLRB decision would not foster stable labor relations. Rather, it would sow further instability and confusion. Nor is there any promise the Board will offer adequate reasoning on remand, given that it has repeatedly failed to provide a reasoned basis for excepting dues deduction from the unilateral change doctrine in right-to-work states. The Court should therefore vacate *Valley Hospital I* while the Board considers the matter on remand.

Second, the Court should have determined whether the Board's retroactive application of *Valley Hospital I* to this case was error. For the reasons described in its earlier briefing, Local 1107 was entitled to the remedy defined by Board precedent at the time of the underlying events, *i.e.*, make whole relief for the employer's unilateral cessation of dues deduction. It is entitled to that relief regardless of what transpires on remand, and thus should not have to endure the cost and delay of additional Board proceedings and/or another petition for review before such make-whole relief is provided.

### **PROCEDURAL BACKGROUND**

The Court's disposition of the instant case is briefly summarized as follows. In *Local Joint Executive Board of Las Vegas v. NLRB*, Case No. 19-73322, a companion case to this one, this Court held that *Valley Hospital I* failed to explain its departure from precedent and thus lacked a reasoned basis. *See* Case No. 19-73322, Dkt. 35-1 at 6 ("For the Board's decision to be a reasoned one, the Board must recognize and explain any departure from precedent."). The Court therefore remanded the matter "to the Board so that it may address this gap in its decisionmaking process." *Id.*

Despite that holding, the Court did not vacate the NLRB's decision. *See id.* at 6–8. It applied the two factors identified in *California Communities Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012), to examine whether vacatur was

warranted: (1) the seriousness of the errors in the agency’s decision; and (2) the disruptive consequences of vacatur. The Court determined the NLRB “will likely be able to cure the identified flaw in its decisionmaking process,” and that “another judicial intervention in the Board’s policymaking process with respect to dues check off in ‘right to work’ jurisdictions may be needlessly disruptive.” *Id.* at 7.

Because this case presents the same question regarding the reasonableness of *Valley Hospital I*, the Court “reach[ed] the same result here for the reasons stated in *Local Joint Executive Board of Las Vegas*.” Dkt. 38-1, at 2. As in *Local Joint Executive Board of Las Vegas*, the Court remanded the matter to the NLRB but did not vacate *Valley Hospital I*. *Id.*

Additionally, the Court declined to reach Local 1107’s argument that the retroactive application of *Valley Hospital I* to the instant case was impermissible. *Id.* The Court concluded that “[i]n light of this disposition, and the likelihood of further proceedings before the Board, we do not address the propriety of the Board’s retroactive application of the challenged rule at this stage.” *Id.*

## ARGUMENT

### **I. Petition for Panel Rehearing is Appropriate Because Local 1107 Did Not Have an Opportunity to Address Remand Without Vacatur.**

Ninth Circuit General Order 4.2 provides that “[i]f a panel determines to decide a case upon the basis of a significant point not raised by the parties in their

briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon the particular point.” The “order protects the integrity of the adversary process by ensuring that each party has a full and fair opportunity to address the relevant issues.” *United Ass’n Local 38 Pension Tr. Fund v. Aetna Cas. & Sur. Co.*, 790 F.2d 1428, 1432 n.3 (9th Cir. 1986) (Concurring Op. Norris, J.), *amended*, 811 F.2d 500 (9th Cir. 1987).

“Consequently, a petition for rehearing may be appropriate where the panel’s decision is based on an *unbriefed* issue.” Goelz, Batalden & Querio, *Rutter Group Prac. Guide: Federal Ninth Circuit Civil Appellate Practice*, ¶ 11:81 (The Rutter Group 2020) (emphasis in original).

Here, no party briefed the Court regarding the appropriateness of remanding *Valley Hospital I* to the Board without vacating the decision. And yet, whether to leave a challenged agency decision in place pending remand, as the Court did here, presents a “difficult question.” *W. Oil and Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). Consistent with General Order 4.2, panel rehearing is thus appropriate to allow Local 1107 an opportunity to address whether that procedural outcome is warranted here.<sup>1</sup> *Cf. United States v. Pridgett*, 831 F.3d 1253, 1260

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<sup>1</sup> The panel relies on *California Communities Against Toxics* in support of the proposition that vacatur of an agency rule need not necessarily follow remand. The parties in that case, however, argued the issue—first raised by the Environmental Protection Agency in its Answer—of whether vacatur should accompany a remand order. *See id.*, Case No. 11–71127. Dkt. 49 (Answer brief

n.3 (9th Cir. 2016) (Concurring Op., O’Scannlain, J.) (“General Order 4.2 is a reminder that we should not decide a case on the basis of a point that the parties have not briefed. . . .”).

**II. Remand Without Vacatur Saddles the Parties and the Public with an Unreasoned NLRB Decision That Is Inconsistent with Precedent, With No Likelihood Further NLRB Proceedings Will Fix the Error.**

**A. Remand Without Vacatur Is Appropriate Only in Rare Circumstances.**

When a court finds an agency’s decision unlawful under the Administrative Procedure Act, the default remedy is vacatur. *See* 5 U.S.C. § 706(2)(A) (“The reviewing court shall . . . set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]”); *Alaska Conserv. Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638, 654 (9th Cir. 2007) (“Under the APA, the normal remedy for an unlawful agency action is to ‘set aside’ the action. In other words, a court should vacate the agency’s action and remand to the agency to act in compliance with its statutory obligations.”) (internal quotation marks and citation omitted), *rev’d on other grounds sub nom. Coeur Alaska v. Se. Alaska Conserv. Council*, 557 U.S.

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arguing “Remand Without Vacatur Would Allow EPA to Address the Deficiencies in the Rulemaking and Avoid Potential Disruptive Effects”), Dkt. 71 (Reply brief arguing “Remand Without Vacatur Will Result in Environmental Harm”). Here, Local 1107 did not argue against remand without vacatur because, unlike the EPA in *California Communities Against Toxics*, the Board never sought that relief.

261 (2009); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (“Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.”); *accord Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (noting that relief for APA error “normally will be a vacatur of the agency’s order”).

Thus, it is only in “rare circumstances” that the Court will remand defective agency action without also vacating it. *See Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (“In rare circumstances, when we deem it advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating the agency’s action.”); *see also Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir. 2015) (“We order remand without vacatur only in limited circumstances.”) (internal quotation marks and citation omitted).

Such rare circumstances existed where vacating “the agency’s rule . . . could have wiped out a species of snail,” or “would have thwarted the operation of the Clean Air Act in the State of California during the time the deliberative process [was] reenacted.” *Cal. Communities Against Toxics*, 688 F.3d at 992 (citing *Idaho Farm Bureau Fed’n*, 58 F.3d at 1045, and *W. Oil and Gas Ass’n*, 633 F.2d at 813). Those limited circumstances likewise existed where vacatur would have halted construction of a power plant, which would have had “economically disastrous”

consequences and prompted summer blackouts necessitating “the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent.”

*Id.* at 994.

This Court evaluates two factors to determine whether those limited circumstances exist: “how serious the agency’s errors are ‘and the disruptive consequences of an interim change that may itself be changed.’” *Cal. Communities Against Toxics*, 688 F.3d at 992 (quoting *Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The Court also considers “whether the agency would likely be able to offer better reasoning . . . or whether such fundamental flaws in the agency’s decision make it unlikely that the same rule would be adopted on remand.” *Nat’l Family Farm Coal. v. U.S. EPA*, 960 F.3d 1120, 1144–45 (9th Cir. 2020) (internal quotation marks and citation omitted).

**B. The Rare Circumstances Warranting Remand of an Unreasoned Agency Decision Without Vacatur Do Not Exist Here.**

This case does not present one of those rare circumstances in which remand of an unreasoned agency decision without vacatur is appropriate.

First, it is clear that the NLRB’s error here was a serious one. Reasoned decisionmaking is a necessary component of agency action. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (noting that agency action must be the “product of reasoned decisionmaking”);

*Local Joint Exec. Bd. of Las Vegas v. NLRB*, 309 F.3d 578, 583 (9th Cir. 2002) (observing that “the Board remains subject to the scheme of reasoned decisionmaking established by the Administrative Procedure Act”). By failing to explain “apparently contradictory precedents in [*Valley Hospital I*],” Case No. 19-73322, Dkt. 35-1, at 7, the Board committed a serious error—it engaged in arbitrary and unreasoned decisionmaking.

Despite that fundamental error, the Court concluded that the Board “will likely be able to cure the identified flaw in its decisionmaking process . . . as long as it provides an explanation for its apparent departure from” existing precedent. *Id.* (citing *Local Joint Exec. Bd. of Las Vegas v. NLRB* (“*LJEB III*”), 657 F.3d 865, 876 (9th Cir. 2011)). But the twenty-year history of the Board’s repeated failures to justify application of *Bethlehem Steel*, 136 N.L.R.B. 1500 (1962), in right-to-work states demonstrates otherwise.<sup>2</sup> Given the Board’s persistent inability to offer a reasoned basis for its rule, yet another bite at the apple is unlikely to result in a reasoned decision.

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<sup>2</sup> See *Hacienda Resort Hotel and Casino*, 331 N.L.R.B. 665 (2000), *vacated*, *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 309 F.3d 578, 582 (9th Cir. 2002); *Hacienda Resort Hotel and Casino*, 355 N.L.R.B. 752 (2010), *vacated*, *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011); *Valley Hospital Medical Center*, 368 N.L.R.B. No. 139 (Dec. 16, 2019), *vacated*, *Local Joint Exec. Bd. of Las Vegas v. NLRB*, Case No. 19-73322, Dkt. 35-1 (Dec. 30, 2020).

As to the disruptive consequences of a vacatur, none of the dire or irreparable harm described in *California Communities Against Toxics* exists here. *Compare* 688 F.3d at 992, 994. Rather, the Court concluded that “another judicial intervention in the Board’s policymaking process with respect to dues check off in ‘right to work’ jurisdictions may be needlessly disruptive,” and that vacatur would “gratuitously undermine the stability of collective bargaining relationships.” Case No. 19-73322, Dkt. 35-1 at 7. But vacating an unreasoned NLRB decision is not needlessly disruptive; it is the necessary consequence of the Board’s inability to offer a reasoned basis for applying *Bethlehem Steel* in a right-to-work state.<sup>3</sup>

Nor would letting *Valley Hospital I* stand despite its flawed reasoning promote stability in labor relations. Quite the opposite, the Board’s decision promotes *instability* in labor relations by calling into question, without any reasoning, whether a host of contractual terms remain subject to the unilateral change doctrine, given that they too are uniquely creatures of contract. *See* Case No. 19-73322, Dkt. 35-1 at 5 (“In multiple prior cases, the Board has determined that the [unilateral change] doctrine applies to terms and conditions of employment that are contained in a collective bargaining agreement and that indisputably could

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<sup>3</sup> In fact, counsel could not identify a single Ninth Circuit case involving a petition for review from a Board decision where the court, despite concluding that the Board’s decision was unreasoned and remanding it for further proceedings, did not also vacate the Board’s decision.

not have existed until they were ‘created’ by such an agreement.”). Worse, that instability is not limited to right-to-work states: the precedent the Board failed to distinguish applies equally in right-to-work and non-right-to-work jurisdictions. *See* Case No. 19-73322, Dkt. 35-1, at 5 (identifying numerous terms and conditions of employment that, despite their uniquely contractual nature, are subject to the unilateral change doctrine). Requiring unions and employers to collectively bargain in the face of the uncertainty created by *Valley Hospital I* does not promote stability in collective bargaining relationships.

The fact that the Board “may change direction yet again,” Case No. 19-73322, Dkt. 35-1 at 7, is not reason enough to remand without vacatur. “An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .” *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 57 (internal quotation marks and citation omitted). Until the Board supplies a reasoned basis for its rule in *Valley Hospital I*, that rule cannot stand. That remains so even if the Board later decides to abandon *Valley Hospital I* in favor of a different rule.

Finally, it is noteworthy that in its briefing to the Court the Board did not seek a remand without vacatur. *See Humane Soc. of U.S.*, 626 F.3d at 1053 n.7 (declining to remand without vacatur where agency “has not specifically requested

that [the Court] remand without vacatur, and it is not otherwise apparent that the circumstances call for doing so”).

For these reasons, the Court should vacate *Valley Hospital I*.

### **III. The Panel Should Address Local 1107’s Retroactivity Argument, Because Remand Will Not Affect that Argument**

Apart from whether vacatur is appropriate here, Local 1107 respectfully submits that the Court should have reached Local 1107’s retroactivity argument. As discussed in Local 1107’s earlier briefs, the Board’s retroactive application of *Valley Hospital I* to this case failed to satisfy this Court’s five-part test for determining whether an agency may retroactively apply a new rule of law. *See Oil, Chemical, and Atomic Workers Int’l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1145 (9th Cir. 1988); *see* Dkt. 16, at 24–39 (opening brief); Dkt. 23, at 7–18 (reply brief).

The Court declined to reach Local 1107’s retroactivity argument because of “the likelihood of further proceedings before the Board” on remand. Dkt. 38-1, at 2. But remand proceedings will not affect the Board’s decision to apply *Valley Hospital I* retroactively to this case. The Court’s memorandum disposition does not require the Board on remand to revisit its conclusion in *Valley Hospital I* that retroactive application of its new rule to pending cases, including this one, was justified. Nor has the Board in its briefing to this Court indicated that it would

reconsider that matter in the event of a remand, or that remand proceedings would affect its decision to apply *Valley Hospital I* retroactively to all pending cases, including this one.

Thus, this case is like *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003). There, the Ninth Circuit declined to remand a retroactivity argument to the Immigration and Naturalization Service (“INS”), where the INS contended it lacked authority to address the matter on remand. *Id.* at 925. The Court thus reached the issue itself, concluding that a “remand to the agency now would simply waste judicial resources.” *Id.*

Similar considerations apply here. There is no reason to believe the Board will revisit its conclusion in *Valley Hospital I* that the new rule should be applied retroactively to all pending cases. Thus, requiring Local 1107 to raise its same retroactivity argument in another petition for review following remand proceedings—where the issue is presently before the Court and unlikely to be affected by further proceedings on remand—would not be an efficient use of the Court’s or parties’ resources. *See Chang*, 327 F.3d at 925.

For the reasons identified in its earlier briefing, Local 1107 therefore respectfully requests that the Court vacate the Board’s retroactive application of *Valley Hospital I* to this case, and order the Board to reinstate appropriate make-whole relief.

## CONCLUSION

For the foregoing reasons, Local 1107 respectfully requests that the Court grant its petition for panel rehearing, vacate *Valley Hospital I*, and order the Board order appropriate make-whole relief for the unilateral cessation of dues deductions.

DATED: February 10, 2021

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Ninth Circuit Rule 40-1(a), which permits a petition for panel rehearing of up to 4,200 words. This brief is 2,940 words. The brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5). I relied on the word count function of Microsoft Word, the word-processing system used to prepare the brief.

A copy of the panel's memorandum disposition is attached hereto as Attachment "A" as required by Ninth Circuit Rule 40-1(c).

DATED: February 10, 2021

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**ATTACHMENT A**

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 30 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SEIU LOCAL 1107,

Petitioner,

v.

NATIONAL LABOR RELATIONS  
BOARD,

Respondent.

No. 20-70312

NLRB No. 369 NLRB No. 16.

MEMORANDUM\*

On Petition for Review of an Order of the  
National Labor Relations Board

Argued and Submitted December 10, 2020  
Pasadena, California

Before: O'SCANNLAIN and OWENS, Circuit Judges, and KENNELLY,\*\*  
District Judge.

In a concurrently filed memorandum disposition in the related case, *Local Joint Executive Board of Las Vegas v. NLRB*, No. 19-73322, we remanded the case, without vacatur of the challenged decision, to the National Labor Relations

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

Board (“NLRB” or “the Board”) with instructions that it address an identified gap in the decisionmaking process by which it determined that “dues checkoff” is excepted from the doctrine articulated by the Supreme Court in *NLRB v. Katz*, 369 U.S. 736, 743 (1962). This case presents the same question regarding the reasonableness of the Board’s decisionmaking, and we reach the same result here for the reasons stated in *Local Joint Executive Board of Las Vegas*.

Accordingly, we remand to the NLRB so that it may have an opportunity to provide an adequate explanation for its approach to dues checkoff by explicitly addressing the precedents identified in our decision in *Local Joint Executive Board of Las Vegas*. We do not vacate the Board’s dues checkoff rule. The rule articulated by the Board may stand while it undertakes the process of supplementing its reasoning. In light of this disposition, and the likelihood of further proceedings before the Board, we do not address the propriety of the Board’s retroactive application of the challenged rule at this stage. This panel retains jurisdiction over any subsequent petition for relief.

**PETITION GRANTED, and REMANDED.**