

Case No: 19-73322

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

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review from the National Labor Relations Board

368 NLRB No. 139 (Dec. 16, 2019)

PETITION FOR PANEL REHEARING

Kimberley C. Weber
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201
E-mail: kweber@msh.law

*Attorneys for Petitioner
Local Joint Executive Board of Las Vegas*

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Conserv. Council v. U.S. Army Corps of Eng’rs,
486 F.3d 638 (9th Cir. 2007) 1

Humane Soc’y of U.S. v. Locke,
626 F.3d 1040 (9th Cir. 2010) 1

Service Employees International Union, Local 1107 v. NLRB,
Case No. 20-70312 (9th Cir. Feb. 10, 2021) 2

W. Oil and Gas Ass’n v. EPA,
633 F.2d 803 (9th Cir. 1980) 1

Other Authorities

Ninth Circuit Rule 40-1 1

Federal Rule of Appellate Procedure 40 1

Petitioner Local Joint Executive Board respectfully petitions the Court for a panel rehearing pursuant to Federal Rule of Appellate Procedure 40 and Ninth Circuit Rule 40-1.

In its decision on December 30, 2020, the Court concluded that the National Labor Relations Board (“Board”) failed to support its ruling in *Valley Hospital Medical Center*, 368 N.L.R.B. No. 139 (Dec. 16, 2019), with adequate reasoning. See Attachment A. Rather than vacating the Board’s decision as requested by Petitioner, the Court decided to remand the decision without vacating the decision. Petitioner asks the Court for a rehearing on the decision to remand without vacatur for two reasons.

First, no party requested the result in prior briefing to the Court and did not have adequate time to address the unusual procedure. As a result, the Court was not able to fully grapple with the “difficult question” of leaving the decision in place pending remand. *W. Oil and Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

Second, remand without vacatur is inappropriate in this case. It is not the “normal” remedy for arbitrary agency decisions. *See Alaska Conserv. Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638, 654 (9th Cir. 2007); *Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010). This case is distinguishable from cases where the Court has remanded without vacatur.

In requesting a rehearing, Petitioner Local Joint Executive Board adopts the legal arguments in Parts I and II of the Petition for Rehearing submitted by Service Employees International Union, Local 1107. *See Service Employees International Union, Local 1107 v. NLRB*, Case No. 20-70312 (9th Cir. Feb. 10, 2021) (Pet. for Rehearing). That Petition for Rehearing is attached hereto as Attachment B.

Dated: February 10, 2021

Respectfully submitted,

By: /s/ Kimberley C. Weber

Kimberley C. Weber
McCRACKEN, STEMERMAN &
HOLSBERRY, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201

*Attorneys for Petitioner Local Joint Executive
Board of Las Vegas*

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 285 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.

Dated: February 10, 2021

By: /s/ Kimberley C. Weber

Kimberley C. Weber
McCRACKEN, STEMERMAN &
HOLSBERRY, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201

*Attorneys for Petitioner Local Joint Executive
Board of Las Vegas*

Attachment A

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

DEC 30 2020

FOR THE NINTH CIRCUIT

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

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

No. 19-73322

NLRB No. 28-CA-213783

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.

Local Joint Executive Board of Las Vegas (“the Union”) petitions for review of a final decision and order of the National Labor Relations Board (“NLRB” or “the Board”). As the facts are known to the parties, we do not repeat them here

* 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.

except as necessary to explain our decision.

I

The Union challenges the Board’s decision to depart from its only-recently-adopted policy requiring employers in “right-to-work” jurisdictions to continue collecting voluntary union dues from employees, and remitting those dues to the union, beyond the expiration of a collective bargaining agreement giving rise to such an arrangement, which is typically known as “dues checkoff.” Although we have previously recognized that the Board is free to modify its approach to dues checkoff, *see Local Joint Exec. Bd. of Las Vegas v. NLRB (“LJEB III”)*, 657 F.3d 865, 876 (9th Cir. 2011), to withstand scrutiny, the Board’s explication of its decision may not be inadequate, irrational, or arbitrary. *See Local Joint Exec. Bd. of Las Vegas v. NLRB (“LJEB I”)*, 309 F.3d 578, 583 (9th Cir. 2002). The Board remains subject to the scheme of reasoned decisionmaking established by the Administrative Procedure Act. *See id.*; *see also Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (agency action must be the “product of reasoned decisionmaking”). “Under this standard, ‘not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.’” *LJEB I*, 309 F.3d at 583 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

For an agency’s decisionmaking to be rational, the agency must recognize and explain any departures from precedent. “[A]n agency may not depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *Altera Corp. & Subsidiaries v. Comm’r of Internal Revenue*, 926 F.3d 1061, 1085 (9th Cir. 2019) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (internal quotation marks omitted); *see also Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010) (“Courts will not assume an agency has engaged in reasoned decision making when it implicitly departs from its prior precedent and provides no explanation for doing so.” (internal quotation marks omitted)).

In the decision under review, the Board explained that the doctrine articulated by the Supreme Court in *NLRB v. Katz*, 369 U.S. 736, 743 (1962) prohibits employers from making unilateral changes to terms and conditions of employment during the collective bargaining process. Under *Katz*, terms pertaining to mandatory bargaining subjects that are contained in a collective bargaining agreement are typically continued in effect by operation of law beyond the contract’s expiration, until the parties have reached a formal impasse in negotiations toward a new agreement. This doctrine is grounded in an interpretation of § 8(a)(5) of the National Labor Relations Act (“NLRA”), which codifies an employer’s obligation to bargain in good faith with the representative

selected by its employees. 29 U.S.C. § 158(a)(5).

The Board concluded in this case, however, that dues checkoff is a term of employment that is “uniquely of a contractual nature” and therefore enforceable “only for the duration of the contractual obligation created by the parties.” The Board distinguished such terms of employment that are “rooted in the contract” and “cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound” from aspects of employment that appear in a collective bargaining agreement, but that may exist from the commencement of the bargaining relationship and prior to the contract’s formation—such as “provisions relating to wages, pension, and welfare benefits, hours, working conditions, and numerous other mandatory bargaining subjects.” The Board reasoned that dues checkoff belongs in the former category, and is therefore exempt from *Katz*’s prohibition on post-contract unilateral changes, such that an employer does not commit an unfair labor practice by suspending dues checkoff after the collective bargaining agreement imposing that obligation has expired.

The Board’s dues checkoff rule, although reflecting a change in policy, is not new, and previous iterations of the rule have been litigated before this court. Nevertheless, the Board’s “contract creation” rationale for the rule had never been explicitly adopted by a Board majority until this case.

The Union has identified several Board precedents that appear to conflict

with the “contract creation” rationale that the Board employed here. In multiple prior cases, the Board has determined that the *Katz* doctrine applies to terms and conditions of employment that are contained in a collective bargaining agreement and that indisputably could not have existed until they were “created” by such an agreement.

In particular, the Board has concluded in prior decisions that, under *Katz*, each of the following obligations contained in a collective bargaining agreement survived the expiration of that agreement: requiring an employer to process grievances short of arbitration, *Am. Gypsum Co.*, 285 N.L.R.B. 100, 100 (1987); *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1503 (1962); granting union representatives leave or time off for official union business, *Am. Gypsum*, 285 N.L.R.B. at 102; requiring an employer to hire workers through a union hiring hall, *Sage Dev. Co.*, 301 N.L.R.B. 1173, 1179 (1991); permitting union access to the employer’s property, *Frontier Hotel & Casino*, 309 N.L.R.B. 761, 766 (1992); recognizing stewards designated by a union at the employer’s workplace, *Frankline, Inc.*, 287 N.L.R.B. 263, 263–64 (1987); granting seniority rights to union officials, *id.* at 264; *Bethlehem Steel*, 136 N.L.R.B. at 1503; contributing to collectively bargained multiemployer trust funds, such as health and welfare funds, pension funds, vacation funds, and apprenticeship funds, *PRC Recording Co.*, 280 N.L.R.B. 615, 618 (1986); *KBMS, Inc.*, 278 N.L.R.B. 826, 849 (1986); *Vin James*

Plastering Co., 226 N.L.R.B. 125, 132 (1976); and, abiding by seniority provisions when recalling workers from layoffs, *Am. Gypsum Co.*, 285 N.L.R.B. at 102 & n.6, *PRC Recording*, 280 N.L.R.B at 636.

The Board was required to grapple explicitly with these apparently contrary precedents in its decision, but it failed do so. *See Altera*, 926 F.3d at 1085; *Modesto*, 619 F.3d at 1034. For the Board’s decision to be a reasoned one, the Board must recognize and explain any departure from precedent. It may not simply ignore inconvenient precedents or dispense with them “*sub silentio*.” *Altera*, 926 F.3d at 1085. The Board must explicitly address the prior decisions identified by the Union and provide a coherent account of the relationship between such precedents and the “contract creation” rationale employed in this case. Accordingly, we remand this matter to the Board so that it may address this gap in its decisionmaking process.

II

Although the reasoning underlying the Board’s rule in this case was inadequate, and must be addressed by the Board upon remand, it does not necessarily follow that the Board’s rule must be vacated. *See Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (“A flawed rule need not be vacated.”). In deciding whether to remand without vacatur, we consider (1) the seriousness of the errors in the agency’s decision and (2) the disruptive

consequences of vacatur. *See id.*

Here, the Board will likely be able to cure the identified flaw in its decisionmaking process. The Board will need to grapple explicitly with the contrary precedents that have been cited, to be sure, but the Board has discretion to adopt its preferred rule regarding dues checkoff as long as it provides an explanation for its apparent departure from those precedents. *See LJEB III*, 657 F.3d at 876 (“[T]he Board may adopt a different rule [regarding dues checkoff] in the future provided, of course, that such a rule is rational and consistent with the NLRA”).

Moreover, another judicial intervention in the Board’s policymaking process with respect to dues check off in “right to work” jurisdictions may be needlessly disruptive. We vacated a previous version of this rule three times, and, since then, the Board has already changed its approach to the issue twice, based on legitimate shifts in regulatory perspective. The Board may change direction yet again. For us to insist here upon an “interim change that may itself be changed,” *see Cal. Cmty.*, 688 F.3d at 992 (internal quotation marks omitted), would, under these specific circumstances, gratuitously undermine the stability of collective bargaining relationships, which the Board has repeatedly identified as an important interest in its policymaking.

Accordingly, we remand to the Board so that it may have an opportunity to

provide an adequate explanation for its approach to dues checkoff by explicitly addressing the precedents cited by the Union that appear to contradict the “contract-creation” rationale used in this case. 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. This panel retains jurisdiction over any subsequent petition for relief.

PETITION GRANTED, and REMANDED.

Attachment B

Case No. 20-70312

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

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

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

PETITION FOR PANEL REHEARING

GLENN ROTHNER (CSB No. 67353)
JONATHAN COHEN (CSB No. 237965)
JONAH J. LALAS (CSB No. 286755)
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101
Telephone: (626) 796-7555; Facsimile: (626) 577-0124

*Attorneys for Petitioner
Service Employees International Union, Local 1107*

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
PROCEDURAL BACKGROUND.....	2
ARGUMENT	3
I. Petition for Panel Rehearing is Appropriate Because Local 1107 Did Not Have an Opportunity to Address Remand Without Vacatur.....	3
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.....	5
A. Remand Without Vacatur Is Appropriate Only in Rare Circumstances	5
B. The Rare Circumstances Warranting Remand of an Unreasoned Agency Decision Without Vacatur Do Not Exist Here	7
III. The Panel Should Address Local 1107’s Retroactivity Argument, Because Remand Will Not Affect that Argument	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Alaska Conserv. Council v. U.S. Army Corps of Eng’rs</i> 486 F.3d 638 (9th Cir. 2007)	5
<i>Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm’n</i> 988 F.2d 146 (D.C. Cir. 1993)	7
<i>Am. Bioscience, Inc. v. Thompson</i> 269 F.3d 1077 (D.C. Cir. 2001)	6
<i>California Communities Against Toxics v. EPA</i> 688 F.3d 989 (9th Cir. 2012)	2, passim
<i>Chang v. United States</i> 327 F.3d 911 (9th Cir. 2003)	12
<i>Coeur Alaska v. Se. Alaska Conserv. Council</i> 557 U.S. 261 (2009)	5, 6
<i>Humane Soc’y of U.S. v. Locke</i> 626 F.3d 1040 (9th Cir. 2010)	6, 10
<i>Local Joint Exec. Bd. of Las Vegas v. NLRB</i> 309 F.3d 578 (9th Cir. 2002)	8
<i>Local Joint Exec. Bd. of Las Vegas v. NLRB</i> 657 F.3d 865 (9th Cir. 2011)	8
<i>Local Joint Executive Board of Las Vegas v. NLRB</i> Case No. 19-73322 (Dec. 30, 2020)	2, 3, 8
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> 463 U.S. 29 (1983)	7, 10
<i>Idaho Farm Bureau Fed’n v. Babbitt</i> 58 F.3d 1392 (9th Cir. 1995)	6

Nat'l Family Farm Coal. v. U.S. EPA
960 F.3d 1120 (9th Cir. 2020) 7

Oil, Chemical, and Atomic Workers Int'l Union, Local 1-547 v. NLRB
842 F.2d 1141 (9th Cir. 1988) 11

Pollinator Stewardship Council v. EPA
806 F.3d 520 (9th Cir. 2015) 6

United Ass'n Local 38 Pension Tr. Fund v. Aetna Cas. & Sur. Co.
790 F.2d 1428 (9th Cir. 1986) (Concurring Op. Norris, J.), *amended*, 811
F.2d 500 (9th Cir. 1987) 4

United States v. Pridgette
831 F.3d 1253 (9th Cir. 2016) 4, 5

W. Oil and Gas Ass'n v. EPA
633 F.2d 803 (9th Cir. 1980) 4, 6

NLRB Cases

Bethlehem Steel
136 N.L.R.B. 1500 (1962) 8, 9

Hacienda Resort Hotel and Casino
331 N.L.R.B. 665 (2000) 8

Hacienda Resort Hotel and Casino
355 N.L.R.B. 752 (2010) 8

Valley Hospital Medical Center
368 N.L.R.B. No. 139 (Dec. 16, 2019) 1, passim

Statutes and Regulations

5 U.S.C. § 706(2)(A) 5, 8

Other Authorities

Goelz, Batalden & Querio, Rutter Group Prac. Guide: Federal Ninth Circuit Civil
Appellate Practice, ¶ 11:81 (The Rutter Group 2020) 4

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.¹ *Cf. United States v. Pridgett*, 831 F.3d 1253, 1260

¹ 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.

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.² 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.

² 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.³

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

³ 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

GLENN ROTHNER
JONATHAN COHEN
JONAH J. LALAS
ROTHNER, SEGALL & GREENSTONE

/s/ Jonathan Cohen

JONATHAN COHEN
Attorneys for Petitioner
SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1107

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

GLENN ROTHNER
JONATHAN COHEN
JONAH J. LALAS
ROTHNER, SEGALL & GREENSTONE

/s/ Jonathan Cohen
JONATHAN COHEN
Attorneys for Petitioner
SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1107

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,

No. 20-70312

Petitioner,

NLRB No. 369 NLRB No. 16.

v.

MEMORANDUM*

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

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

* 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.