No. 22-

IN THE

Supreme Court of the United States

TEMPLE UNIVERSITY HOSPITAL, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the D.C. Circuit lawfully affirmed the National Labor Relations Board's new rule—categorically barring the application of judicial estoppel to prevent the Board from exercising jurisdiction over a labor union even where, as here, the union's misconduct is evident and the agency's credibility is at stake—despite the fact that the rule lacks any basis in precedent, logic or sound labor policy.

PARTIES TO THE PROCEEDING

Petitioner Temple University Hospital, Inc. was the petitioner/cross-respondent in the court below. Respondent National Labor Relations Board was the respondent/cross-petitioner in the court below.

RULE 29.6 STATEMENT

Petitioner Temple University Hospital, Inc. is a nonprofit corporation whose sole member is Temple University Health System, Inc. Temple University is the sole member of Temple University Health System, Inc. Petitioner has no parent corporation, and no publicly held corporation has 10 percent or greater ownership of Petitioner's stock.

RELATED PROCEEDINGS

Temple Univ. Hosp., Inc. v. *NLRB*, No. 18-1150 (D.C. Cir. July 9, 2019).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES

RULE

ADMINISTRATIVE DECISIONS

TABLE OF AUTHORITIES—continued

OTHER AUTHORITY

PETITION FOR WRIT OF CERTIORARI

Temple University Hospital, Inc. ("Temple Hospital") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

DECISIONS BELOW

The first decision of the National Labor Relations Board in this matter is reported at 366 N.L.R.B. No. 88 (May 11, 2018), and reproduced at Pet. App. 50a. The D.C. Circuit's opinion reversing and remanding that decision is reported at 929 F.3d 729, and reproduced at Pet. App. 20a. The NLRB's decision on remand is reported at 370 N.L.R.B. No. 106 (Apr. 12, 2021), and reproduced at Pet App. 34a. The D.C. Circuit's opinion affirming that decision is reported at 39 F.4th 743, and reproduced at Pet. App. 1a.

JURISDICTION

The D.C. Circuit entered judgment on July 8, 2022, Pet. App. 1a, and denied Temple Hospital's petition for rehearing and rehearing *en banc* on September 6, 2022, Pet. App. 81a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 160(a): **Powers of Board generally**

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the

> Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

INTRODUCTION

In this case, the D.C. Circuit upheld an unprecedented and unreasonable National Labor Relations Board ("NLRB" or the "Board") rule that allowed a union to reverse its decade-long position that it was a public-employee union subject to the jurisdiction of the state labor board, solely to avoid this Court's decision in *Janus* v. *American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2486 (2018). The Board adopted this rule despite the disadvantage the employer suffered under the union's original position, and despite the damage inflicted on the credibility of the agency's adjudicatory processes. And, the D.C. Circuit affirmed the Board's new rule—categorically barring the application of judicial estoppel to prevent the Board from exercising jurisdiction even where, as here, the party's misconduct is evident and the agency's credibility is at stake—without any basis in precedent, logic or sound labor policy. The petition should be granted and the decision should be reversed.

For decades, professional and technical employees of Temple Hospital have been represented by unions, in-

cluding intervenor Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals ("the Union"). During that time, labor relations at the Hospital have been governed under the Pennsylvania Employe Relations Act ("PERA"), administered by the Pennsylvania Labor Relations Board ("PLRB"). In 2005, when the Union displaced the employees' former union, it successfully argued that the PLRB, not the NLRB, had jurisdiction over the bargaining unit. From 2005 until 2015, the Union represented the bargaining unit at Temple Hospital under the PERA regime.

In 2015, however, the Union recognized that this Court was on the verge of overruling *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and holding that it was unconstitutional for public-employee unions to collect agency fees from employees who objected to paying them, a significant financial loss for public-employee unions. The Union's chief executive officer thus informed Temple Hospital that the Union intended to disavow its previous successful assertion that Temple Hospital is a public employer subject to PLRB jurisdiction, and assert instead that Temple Hospital is a private employer under the NLRB's jurisdiction, in order to evade this Court's anticipated decision:

> A key part of the context of this move by the union is the coming politically motivated US Supreme Court *Freiderichs* decision [referring to *Friederichs* v. *California Teachers Ass'n*, 578 U.S. 1 (2016)], which will deem unconstitutional agency fee (fair share) provisions for those employers considered "state actors" under the 1st and 14th amendments.

JA1652.

If ever there were an archetypal illustration of circumstances where judicial estoppel should have applied to prevent a party from changing positions under this Court's decision in *New Hampshire* v. *Maine*, 532 U.S. 742 (2001), this is it. The Union had "assume[d] a certain position in a legal proceeding, and succeed[ed] in maintaining that position." *Id.* at 749. The Union's interests thereafter "change[d]" and the Union "assume[d] a contrary position" to "the prejudice of the [Hospital]" which for a decade had bargained and litigated unfair labor practice charges under the PERA regime. *Id.* at 749, 750. The Union's positions were "clearly inconsistent," *id.* at 750, and the Union's about-face creates the perception that either the PLRB or the NLRB was "misled." *Id*. Moreover, the Union abandoned its long-held position solely to avoid this Court's decision overruling *Abood* and for no other purpose. The Board nonetheless allowed the Union's about-face, establishing an unprecedented categorical rule that it would *never* apply judicial estoppel to deny jurisdiction, no matter how egregious the misconduct or how damaging allowing the manipulative change would be to the integrity of the adjudicative process. On review, the D.C. Circuit upheld the Board's adoption of this rule.

The D.C. Circuit's decision to do so raises a critically important question. Contrary to the D.C. Circuit and the NLRB, the NLRB's absolute rule does *not* follow a majority rule in federal courts. Where applying judicial estoppel would *expand* their jurisdiction, federal courts do not do so. But courts and agencies do exercise their discretion to *decline* jurisdiction, for example, in cases where parties have waived their rights to federal jurisdiction or are collaterally estopped from asserting jurisdiction. See *Sexual Minorities Uganda* v. *Lively*, 899 F.3d 24, 34 (1st Cir. 2018) ("[e]ven though federal subject-matter jurisdiction cannot be established

through waiver or estoppel, *it may be defeated by waiver or estoppel*.") (emphasis added).

It is arbitrary and capricious for the NLRB to assert that its jurisdiction—and its need to exercise that jurisdiction no matter what—is more important and worthy of protection than federal court jurisdiction, and therefore that actions that undermine the integrity of its adjudicative processes should go undeterred. The NLRB invented this unprecedented categorical rule to allow the Union to dodge this Court's decision in *Janus* without consideration of the rule's logic or the consequences. Perhaps that is why we have found no other federal agency with a categorical rule against the application of judicial estoppel to deny jurisdiction.

Equally arbitrary and illogical is the Board's decision to invent a categorical rule about a discretionary doctrine. This Court has made clear that the doctrine is equitable and requires a balancing of numerous facts and circumstances. Imposing an unconditional rule on an equitable balancing doctrine makes no sense.

Finally, the consequences of the Board's rule are predictable and damaging. Parties before the Board are free to take whatever position best suits their needs in a particular matter, secure in the knowledge that if circumstances change such that Board jurisdiction becomes more desirable or the Board's composition is altered, the parties are free to change position about the Board's jurisdiction without consequence. Allowing parties opportunistically to change position will also enhance the perception that the Board's decision-making is political, undermining the integrity of the tribunal—precisely the consequence the doctrine of judicial estoppel is intended to avert. This case illustrates the point: The NLRB adopted its rule to avoid an otherwise clear application of judicial estoppel that

would have subjected a union to this Court's decision overruling *Abood*. And, because the Board's rule was affirmed by the D.C. Circuit, this injurious rule could spread to other administrative agencies.

Temple Hospital acknowledges that the courts of appeals are not in conflict about whether the NLRB can adopt a categorical rule barring use of judicial estoppel where it would result in a loss of jurisdiction. This is a new Board rule that has no basis in past Board decisions and no analogue in the decisions of other federal agencies. But, the NLRB is an important agency that administers national labor policy. And, the D.C. Circuit is deemed the most expert court of appeals on administrative law questions. Without this Court's review, the NLRB's rule will stand. The Board's new rule is both unprecedented and in tension with this Court's delineation of the doctrine of judicial estoppel, with the equitable and discretionary nature and purposes of the doctrine, and with any other adjudicatory body's treatment of the doctrine. The petition should be granted or the decision below should be summarily reversed, and the case remanded for the Board to apply equitable standards in deciding whether to apply judicial estoppel.

STATEMENT OF THE CASE

Background. Temple Hospital is an acute-care hospital in Philadelphia, Pennsylvania. Temple University is an "instrumentality" of the Commonwealth of Pennsylvania and, as such, a public employer under Pennsylvania law. 43 Pa. Cons. Stat. § 1101.301(1). Temple University acquired Temple Hospital in 1910. The Hospital was initially an unincorporated division of the University. In 1995, Temple University created a holding company, Temple University Health System,

Inc.; that holding company became the sole shareholder of Temple Hospital, a nonprofit corporation. Temple University Hospital and Temple University "retain a number of close operational and budgetary ties," Pet. App. 5a.

In 1975, the PLRB certified the Professional and Technical Employees Association, National Union of Hospital and Health care Employees AFSCME District 1199C ("Local 1199C") to represent Temple Hospital's professional and technical employees. Local 1199C represented this bargaining unit for 30 years. Pet. App. 5a; *In re Emps. Of Temple Univ. Health Sys.*, No. PERA-R-05-498-E, 39 PPER ¶ 49, 2006 WL 6824746 (Pa. Lab. Rels. Bd. Apr. 21, 2006).

In 2005, a rival union, the Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (the "Union") petitioned the PLRB for an election in the union represented by Local 1199C. Pet. App. 5a; 39 PPER ¶ 49. In response, Local 1199C argued that the PLRB lacked jurisdiction over the unit, maintaining instead that the NLRB should assert jurisdiction over the bargaining unit and its relationship with the Hospital. Pet. App. 5a–6a.

The PLRB invited briefing on the jurisdictional issue, and the Union asserted that the PLRB—not the NLRB—had jurisdiction over Temple Hospital. JA 1319–20. Local 1199C opposed the Union's petition. The PLRB, however, agreed with the Union that it had jurisdiction, rejecting 1199C's contrary arguments. See Pet. App. 5a; *Temple Univ. Health Sys.*, 39 PPER ¶ 49. The Union then prevailed in the representation election against Local 1199C, and the PLRB certified it in 2006. Pet. App. 5a; JA74, 1315–18. The Union has represented that Temple Hospital bargaining unit since that date.

During the course of its representation, the Union has negotiated a series of collective bargaining agreements with the Hospital, and has expanded the bargaining unit. The Union also filed at least 26 unfair labor practice complaints, all under the auspices of the PERA, and continued to pursue them even as it brought the underlying action in this matter before the NLRB. JA272–74.

Changes in the Law Governing Public Employee Unions and the Union's Response. In 1977, in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, this Court upheld the constitutionality of an agency-shop for public employee unions, under which "public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities." *Janus*, 138 S. Ct. at 2459–60. In 2012, however, in *Knox* v. *Service Employees International Union*, 567 U.S. 298 (2012), this Court gave its first indication that *Abood* might be overturned, when it stated that its holding in *Abood* was "something of an anomaly." *Id.* at 311.

Shortly thereafter, in 2014, in *Harris* v. *Quinn*, 573 U.S. 616 (2014), the Court stated that *Abood*'s "analysis [was] questionable on several grounds," expressly leaving for another day whether it should be overruled. *Id.* at 617. In 2016, after the death of Justice Scalia, this Court divided 4-4 on the question whether to overrule *Abood*. See *Friedrichs*, 578 U.S. at 1. These statements sent a strong signal to public-employee unions that the future of *Abood* was in serious doubt along with the unions' authority to collect agency fees from objecting members. And, as this Court is fully aware, in 2018, the Court in *Janus* overruled *Abood*. See *Janus*, 138 S. Ct. at 2460.

In 2015, anticipating this change in the law, the Union changed its position on the question of whether the PLRB or the NLRB had jurisdiction over Temple Hospital. Its chief executive officer informed the Hospital that the Union would "soon take the position that Temple University Hospital is, in fact, subject to the jurisdiction of the NLRB." JA1652. Notably, he explained the reason for the Union's change in position:

> A key part of the context of this move by the union is the coming politically motivated US Supreme Court *Friederichs* decision [referring to *Friedrichs*, 578 U.S. at 1], which will deem unconstitutional agency fee (fair share) provisions for those employers considered "state actors" under the 1st and 14th amendments.

Id.

Consistent with this representation, on October 2015, the Union filed with the NLRB a petition for representation, seeking to add 11 previously unrepresented employees to the existing unit of approximately 665 professional and technical employees. JA69. It did so solely in order to ask the Board to assert jurisdiction, because Temple Hospital had already informed the Union that it would *consent* to inclusion of these employees in the bargaining unit. JA191, 154. Temple Hospital opposed the Union's request for NLRB jurisdiction on several grounds, including that judicial estoppel precluded the Union from asserting that the NLRB rather than the PLRB had jurisdiction over the bargaining unit and the parties' labor relations. JA69–70.

Proceedings Before the NLRB and the D.C. Circuit. On January 26, 2015, the NLRB's Regional Director for Region 4 concluded that the NLRB had jurisdiction over the bargaining unit and ordered an election.

JA69–89. Relevant here, he decided that the Union was not judicially estopped from seeking NLRB jurisdiction, despite its successful assertion of PLRB jurisdiction in obtaining representational rights in the bargaining unit in 2006, and its subsequent invocations of that jurisdiction on numerous occasions thereafter, including in a matter pending before the PLRB at the time that the Union filed its petition, which it continued to pursue and in which it maintained that Temple Hospital was a public employer under PERA. JA79–81. The Union prevailed in the election, and the NLRB certified it as the exclusive representative. JA166, 95–99.

Temple Hospital petitioned the NLRB for review of the Regional Director's decision. JA146. Over a dissent, the Board denied the petition. JA148–52. In so doing, the NLRB also concluded that, assuming judicial estoppel is available in NLRB proceedings, the Union was not estopped from filing its petition in this case. Pet. App. 79a–80a n.2; JA146–47 n.2.

In order to obtain judicial review of the Board's decision, Temple Hospital refused to bargain with the Union. JA165 n.2. The Union filed an unfair labor practice charge, and the Board found that the Hospital had violated the NLRA. Pet. App. 50a–62a; JA165–68.

Temple Hospital then filed a petition for review in the court of appeals; and the NLRB filed a cross-application for enforcement. The court of appeals addressed only the issue of judicial estoppel. It held that the Board had failed to correctly understand and apply this Court's decision in *New Hampshire* v. *Maine*, 532 U.S. 742 (2001). Pet. App. 21a. In doing so, the court of appeals noted that that Board had failed adequately to explain its determination that the Union derived no unfair advantage from its prior position, and that Temple Hospital suffered no harm from the Union's

switch in position.[1] The court also concluded that the Union's position on NLRB jurisdiction was "clearly inconsistent" with its position in 2006, and that the Union had succeeded in persuading the PLRB to adopt its position. Pet. App. 30a. The court remanded the case to the Board, directing it to decide whether judicial estoppel is available in NLRB proceedings and, if so, whether to invoke it. *Id.* at 33a.

On remand, Temple Hospital again urged the NLRB to find that the Union was judicially estopped from asserting that the NLRB, not the PLRB, has jurisdiction over this bargaining unit. In response, the Board declined to decide whether it would generally apply the doctrine of judicial estoppel. Instead, it held that judicial estoppel is categorically "not available in proceedings … where the Board's jurisdiction is in issue." Pet. App. 35a. The Board stated that "[f]ederal labor policy weighs heavily against allowing judicial estoppel to be used as a ground to limit [its] jurisdiction," citing sec-

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[1] Temple Hospital had shown that it was harmed by the Union's change in position in four respects: (i) the bargaining parties reached impasse in negotiations in 2009; under the NLRA, Temple Hospital could have implemented its final offer to the Union; Pennsylvania law, however, does not allow employers to implement their final offer unless the employees engage in a work stoppage, JA212; (ii) the Union insisted that the law did not require it to notify Temple Hospital of an impending strike; thus, Temple Hospital had to negotiate (and thus provide a concession) to obtain the notice the NLRA requires, 29 U.S.C. § 158(g); (iii) the Union added positions to its bargaining unit without hearing or election, a procedure not available to the Union under the NLRA, *see Pa. Ass'n of Staff Nurses* v. *Temple Univ. Health Sys.*, No. PERA-C-14-259-E, 48 PPER ¶ 54, 2016 WL 7899445 (Pa. Lab. Rels. Bd. Nov. 30, 2016) (discussing addition of classifications in 2014); and (iv) the Union invoked the jurisdiction of the PLRB and Pennsylvania state courts in numerous matters based on its assertion that Temple Hospital was a public employer, JA272–74.

tion 10(a) of the NLRA. *Id.* at 42a. See *id.* at 43a (stating that it would not surrender its power to the parties and their "litigation choices over time"). On this basis, the Board reaffirmed its prior decision that Temple Hospital's failure to bargain violated the NLRA.

Temple Hospital again petitioned for review in the D.C. Circuit, and the Union intervened to support the Board's order. The D.C. Circuit recognized that "[j]udicial estoppel generally 'prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" Pet. App. 8a (quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001)). But, the court observed, judicial estoppel is a discretionary doctrine. *Id.* It held that "[t]he Board did not abuse its discretion in determining that judicial estoppel is unavailable in cases in which the Board's jurisdiction is at issue." *Id.*

The court of appeals also concluded that the Board's statutory authority to prevent unfair labor practices affecting commerce "militated against enabling judicial estoppel to prevent the Board from exercising its authority in cases in which it could otherwise act." Pet. App. 10a. The court acknowledged that the Board's jurisdiction is "discretionary and not mandatory," but stated that it was not "inconsistent" for the Board sometimes to decline jurisdiction while simultaneously refusing to apply judicial estoppel to questions of jurisdiction. *Id.* Finally, the court stated that the Hospital was correct that neither judicial nor administrative precedent compelled a different result. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

I. THE BOARD'S NEW CATEGORICAL RULE IS INCONSISTENT WITH DECADES OF LAW AND PRACTICE, ARBITRARY, AND UNREASONABLE.

What the Union did here is the paradigm case for judicial estoppel under this Court's definitive statement of the doctrine in *New Hampshire* v. *Maine*, 532 U.S. 742 (2001). In that decision, this Court set forth three factors to consider in invoking judicial estoppel: (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether acceptance of the party's later inconsistent position would create the perception that either the first or second tribunal was misled; and (3) whether the party asserting an inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750–51.

All three factors strongly support estoppel here. As the D.C. Circuit's first opinion stated, "the first factor – whether the Union's current position is 'clearly inconsistent' with its earlier position – is obviously present here." Pet. App. 30a. As to the second factor, it is undisputed that the Union succeeded in persuading the PLRB to accept its position that it—not the NLRB—had jurisdiction. *Supra* at 7. Finally, the first D.C. Circuit decision held that Temple Hospital had alleged that it had suffered an unfair detriment due to operating under PLRB instead of NLRB jurisdiction (the unavailability of certain legal remedies before the PLRB), and held that "the NLRB failed adequately to explain its determination that there was no unfair advantage or detriment here" Pet. App. 32a, where the Hospital had set forth significant disadvantages it suffered operating under the PERA regime for years. See note 1, *supra*. The Union is now attempting to avoid

the consequences of an earlier position that it freely asserted, that it persuaded the PLRB to accept, and that benefited it and disadvantaged the Hospital. Plainly, it undermines the integrity of the NLRB's processes to allow the Union to take a contradictory position now.

Like courts, agencies have applied this test for judicial estoppel for decades.[2] We have been unable to find any other agency that has created a categorical bar to use of judicial estoppel to deny jurisdiction. There is no reasonable basis to do so: The doctrine is discretionary; it applies only where necessary to protect the integrity of the adjudicative process. Neither courts nor agencies are required to exercise jurisdiction where party waiver, preclusion, misconduct, or abuse of the process results in its forfeiture. Indeed, here the NLRA expressly preserves the NLRB's ability to deny jurisdiction and defer to state labor boards in its discretion. See *infra* at 18–20. A categorical bar on the application of judicial estoppel also incentivizes manipulation of the adjudicative process – the very abuse the judicial estoppel doctrine seeks to prevent. The NLRB administers an important statute governing labor relations nationally; its decision to bar any and all applications of this discretionary doctrine to deny jurisdiction is

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[2] *See*, *e.g.*, *Doe* v. *Dep't of Justice*, 123 M.S.P.R. 90, 94–96 (2015) (MSPB); *Time Warner Cable*, 21 FCC Rcd. 9016, 9020 (2006) (FCC); *Pyco Indus., Inc.—Feeder Line Application*, No. FD 34890, 2010 WL 2353381 (S.T.B. June 11, 2010) (STB); *Del. & Hudson Co.—Lease & Trackage Rights—Springfield Terminal Ry.*, No. FD 30965 (Sub-No. 4), 1995 WL 571836 (I.C.C. Sept. 29, 1995); *Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co.*, 3 I.C.C.2d 926, 933 (1987) (declining to reopen a decision to accommodate changes in litigation strategy); *Newman* v. *Consol. Coal Co. Emp.*, No. 2002-LHC-262, 2002 WL 35462542 (Dep't of Labor Dec. 17, 2002); *Data Gen. Corp.* v. *Johnson*, 78 F.3d 1556 (Fed. Cir. 1996) (Trademark Trial and Appeal Board).

wrong, unreasonable and should not be allowed to stand.

A. No "General" Judicial Rule Bars Application of Judicial Estoppel to Subject Matter Jurisdiction

Both the Board and the D.C. Circuit sought to justify the Board's rule by citing cases that stand for the well-established proposition that courts and agencies cannot use the parties' consent, waiver or judicial estoppel to *create* jurisdiction. But, as the First Circuit explained, "this is a one-way ratchet. Even though federal subject-matter jurisdiction cannot be established through waiver or estoppel, *it may be defeated by waiver or estoppel*." *Sexual Minorities Uganda*, 899 F.3d at 34 (emphasis added).

Specifically, the Board and D.C. Circuit relied on *Da Silva* v. *Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000); *Whiting* v. *Krassner* 391 F.3d 540 (3d Cir. 2004); and *City of Colton* v. *American Promotional Events Inc. West*, 614 F.3d 998, 1006 n.6 (9th Cir. 2010). In *DaSilva*, the court reconsidered a prior holding that it had jurisdiction; it did not decline to apply judicial estoppel to bar jurisdiction. 229 F.3d at 361.[3]

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[3] *See also Semper* v. *Gomez*, 747 F.3d 229., 246–50 (3d Cir. 2014) ("judicial estoppel cannot be used to create subject matter jurisdiction"); *Hansen* v. *Harper Excavating, Inc.*, 641 F.3d 1216, 1227 (10th Cir. 2011) (explaining that the court cannot "forge ahead on blind principle without jurisdiction to do so"). (quoting *Gray* v. *City of Valley Park*, 567 F.3d 976, 982 (8th Cir. 2009)); *Int'l Union of Operating Eng'rs* v. *Cnty. of Plumas*, 559 F.3d 1041, 1043–44 (9th Cir. 2009) (holding that "[a] party may raise jurisdictional challenges at any time during the proceedings," and that by changing position, "the County may be guilty of chutzpah, but we must consider the merits of its [jurisdictional challenge] anyway").

In *Whiting*, the Third Circuit held that the test for judicial estoppel was not satisfied by a party's prior argument that a case was moot, and went on to consider whether it had jurisdiction. 391 F.3d at 544. *City of Colton* states in a footnote and without analysis that the court will not judicially estop the City from arguing that there is subject-matter jurisdiction, claiming that "[i]t is well established that subject matter jurisdiction cannot be expanded or contracted 'by prior action or consent of the parties.'" 614 F.3d at 1006 n.6 (quoting *Am. Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17–18 (1951)). But this Court's decision in *American Fire & Casualty* does *not* support the Ninth Circuit's statement: It holds only that subject-matter jurisdiction cannot be *expanded* by "prior action or consent of the parties." 341 U.S. at 17–18 ("The jurisdiction of the federal courts is carefully guarded *against expansion* by judicial interpretation or by prior action or consent of the parties.") (emphasis added).

In contrast, in *Sexual Minorities Uganda*, 899 F.3d 24, the First Circuit correctly held that jurisdiction "may be defeated by waiver or estoppel [, which] may be applied to prevent a party from basing … jurisdiction on facts that directly contradict his previous representations to anther tribunal." *Id.* at 34. The defendant had argued "that principles of estoppel are inappropriate in the context of subject-matter jurisdiction." *Id.* at 33–34. But in doing so, the First Circuit explained, Lively, like the Board and D.C. Circuit here, relied on "cases holding that "a federal court may not employ equitable doctrines in a manner that would gratuitously enlarge federal judicial authority." *Id.* at 34. (citing cases). As the court stated: "Even though federal subject-matter jurisdiction cannot be established through waiver or estoppel," it may be displaced by these doctrines. *Id.* (citing, *inter alia*, *Merrell Dow Pharms., Inc.* v. *Thompson*, 478 U.S. 804, 809 n.6

(1986)). Thus, the court concluded, "there is no principled way in which we can now permit [Defendants] to embrace a directly contradictory position 'simply because his interests have changed.'" *Id.* (quoting *New Hampshire*, 532 U.S. at 749). See also *In re Teva Sec. Litig.*, 512 F. Supp. 3d 321, 351 (D. Conn. 2021) (same).

The attempt of the Board and the Court of Appeals to justify the categorical bar on the use of judicial estoppel to deny jurisdiction by citing a "general[]" judicial rule, Pet. App. 11a, is simply wrong.[4] Jurisdiction cannot be expanded by consent, waiver or estoppel; but it may be contracted.

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[4] The Board and D.C. Circuit recognized that the Board's precedent did not bind them, but suggested that it "generally reinforced" the Board's decision. Pet. App. 11a. It does not. The Board precedent cited is either neutral or supports Temple Hospital. In *We Transport, Inc.*, the Board decided to exercise its jurisdiction despite a prior petition to a state board, because the state labor board had never held a hearing or conducted an election and both parties requested the Board to accept jurisdiction. 215 N.L.R.B. 497, 498 (1974). In *Wyndham West at Garden City*, the Board exercised jurisdiction over a second request for jurisdiction, despite declining the first request, because at the time of the initial request, the employer's income did not meet the jurisdictional amount while at the time of the second request, it did. 307 N.L.R.B. 136, 136–37 & nn. 7 & 8 (1992). And, relevant here, in *Elmsford Transport Corp.*, 213 N.L.R.B. 257 (1974), the Board *dismissed* an employer's petition when an election had already been conducted by a state board, finding that the employer had engaged in forum shopping by "having originally asserted that it was not … subject to the jurisdiction of the … Board," and failing to contest the state board's jurisdiction until just prior to the state board election. *Id.* at 257–58. This analysis closely resembles estoppel.

B. The NLRA's "Federal Labor Policy" Does Not Support the Board's Categorical Bar on Judicial Estoppel

The Board and the Court also relied on "federal labor policy" to support the Board's new rule that it would not use "estoppel to prevent the Board from entertaining a matter that would otherwise fall within its statutory authority." Pet. App. 8a. In support of this assertion, the Board cited section 10(a) of the NLRA, which "empower[s]" the Board to prevent unfair labor practices, and states that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." *Id.* at 9a. "The Board reasoned that, if judicial estoppel were to apply here, the PLRB would have jurisdiction over all representation petitions and unfair-labor-practice charges … and could issue rulings the Board would have no power to review." *Id.*

This "reason[ing]" is unsound. Initially, whenever a party waives or forfeits federal jurisdiction (*e.g.*, through preclusion), the consequence is that a court loses its power to adjudicate a claimed violation of federal law that Congress empowered the courts to enforce. The Board's enforcement authority cannot reasonably be accorded more weight than that of the federal courts.

Equally to the point, it has long been established both that the Board's exercise of its jurisdiction is discretionary *and* that the Board can defer to state labor boards' jurisdiction. As the D.C. Circuit noted, even where an employer falls within the NLRB's statutory jurisdiction, the Board may decide not to assert jurisdiction. Pet. App. 24a n.* (citing, *inter alia*, *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675,

684 (1951)).[5] And section 10(a) of the Act expressly authorizes the Board to defer to state labor boards.[6] Thus, a decision to bar the use of judicial estoppel cannot reasonably be based on the fact that doing so would allow state labor boards to address representation and unfair labor practice claims; section 10(a)'s proviso specifically *endorses* that outcome. "Congress was not concerned about the Board itself deferring the exercise of its own jurisdiction," *Hammontree* v. *NLRB*, 925 F.2d 1486, 1492 (D.C. Cir. 1991) (en banc), particularly where the Board is deferring to the jurisdiction of state boards. The Board's contrary decision is arbitrary and unreasonable.

The Board's general obligation to exercise its jurisdiction—like the courts'—can be discretionarily declined or forfeited. The fact that judicial estoppel might prevent the Board from exercising jurisdiction in the occasional case is not a reasonable basis for a categorical Board rule banning use of estoppel to deny jurisdiction even in the face of grave abuses of process, particularly where the result of enforcing estoppel is merely that a state board will retain jurisdiction, which it has been exercising for more than a decade.

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[5] The NLRA also expressly authorizes the Board "to decline jurisdiction" in certain circumstances. *See* 29 U.S.C. § 164(c) (authorizing the Board to decline jurisdiction in certain cases and clarifying that when the Board does so, state courts and agencies may exercise jurisdiction).

[6] This proviso reads as follows: "*Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry … even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute application to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

C. The Other Cited Bases for the Board's Rule Are Meritless

The D.C. Circuit also seemed to believe that the Board had discretion to adopt its flat rule because judicial estoppel itself is a discretionary doctrine. Pet. App. 8a. The fact that a doctrine's *application* is discretionary does not make a *categorical rule not to apply it* reasonable. Judicial estoppel is used to protect the integrity of decision making. Making it available allows the agency to consider all legitimate factors that militate for and against its application while exercising its adjudicatory authority.

When agencies are adjudicators, the same interests that support use of judicial estoppel in courts support its use in agencies. Indeed, many courts recognize that the doctrine operates no differently when parties make the initial representations to which they are held in agency tribunals. See, *e.g.*, *Chaveriat* v. *Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) (citing *Smith* v. *Pinner*, 891 F.2d 784, 787 n. 4 (10th Cir. 1989) (per curiam); *Parisi* v. *Jenkins*, 603 N.E.2d 566, 573–74 (Ill. App. Ct. 1992); *Dep't of Transp.* v. *Coe*, 445 N.E.2d 506, 508 (Ill. App. Ct. 1983); *Czajkowski* v. *City of Chicago*, 810 F. Supp. 1428, 1435–36 (N.D. Ill. 1992)). Agencies and courts can lose jurisdiction or decide not to exercise it on many grounds. It is arbitrary for the NLRB to decide that, unlike the federal courts and other agencies, its exercise of jurisdiction is so paramount that it can flatly rule out the application of judicial estoppel to bar jurisdiction.

Indeed, this case illustrates why a categorical bar on the doctrine's use to deny jurisdiction makes no sense. The Union's conduct—changing positions to avoid the result of a decision of this Court—calls into question the agency's integrity, encourages strategic manipulation by the parties, and further politicizes the agency's

decision making. It also unfairly advantaged and disadvantaged the respective parties without any equitable consideration whatever. See note 1, *supra*. It is the classic case for application of judicial estoppel. The Board's decision to adopt an unprecedented rule categorically banning its application once the D.C. Circuit made clear that the doctrine would likely apply to the Union's attempt to change position itself appears opportunistic, particularly since the reasons for its adoption are arbitrary.

II. THE D.C. CIRCUIT'S AFFIRMANCE OF THE BOARD'S CATEGORICAL RULE WILL HAVE IMPORTANT, DAMAGING REPERCUSSIONS.

The D.C. Circuit's decision is important. The NLRB "has the primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990). As shown above, the NLRB's rule is unprecedented, unreasonable, and will damage the agency's credibility. The context here heightens the importance of the case and the damage it does to public respect for the agency—the sole reason for the Union's decision to reverse its longstanding position about the NLRB's jurisdiction was its desire to evade *Janus*. This about-face should have been judicially estopped.

Further, the D.C. Circuit is viewed as the preeminent appellate court for the development of administrative law. See generally Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 146–47, 152 (2013). It is unlikely that any other court of appeals will countermand the D.C. Circuit's approval of the NLRB's new rule. This Court has routinely granted petitions for certiorari absent a circuit conflict when the D.C. Circuit has resolved the legality of an important agency rule. See, *e.g.*, *Am. Hosp.*

Ass'n v. *Becerra*, 142 S. Ct. 1896 (2022); *FERC* v. *Ele. Power Supply Ass'n*, 136 S. Ct. 760 (2016); *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302 (2014).

Moreover, the D.C. Circuit's endorsement of the Board's rule may result in other agencies adopting rules forbidding application of judicial estoppel to deny jurisdiction. Parties will understand that no disavowal of agency jurisdiction is final and binding. Instead, agencies will be free to reassess jurisdiction with any change in composition without concern that it is arbitrary or unreasonable for them to do so. It is surely tempting for agencies to adopt rules ensuring that their hands are never tied and they can always assert jurisdiction. Doctrines like judicial estoppel already give agencies significant, albeit guided, discretion to assert jurisdiction. The integrity of agency adjudications will be compromised by the D.C. Circuit's decision allowing agencies to abandon judicial estoppel altogether and to assert jurisdiction despite evident and serious party misconduct.

In addition, the reasons the Board and the D.C. Circuit cited to bar the invocation of judicial estoppel to deny jurisdiction apply equally to any argument that a party has waived jurisdiction or is otherwise precluded or estopped from asserting it. The consequences of the Board's rule will be even more harmful if the Board and other federal agencies generally adopt rules that bar the declination of jurisdiction in all similar circumstances.

The damage the rule will inflict on the Board's credibility will be further exacerbated by the structure of the Board. As this Court is aware, the NLRB's composition and the political party of the majority of its members both change with presidential administrations. This reality inherently politicizes its adjudications. The Board's new rule enhances this damaging

perception. It invites parties to deny or waive Board jurisdiction when favorable to their interests with no concern about their ability to invoke Board jurisdiction when the political landscape changes. And, of course, once a categorical rule is approved, then the circuit courts of appeals will lose their ability to review—and find arbitrary or unlawful—the Board's refusal to apply discretionary doctrines such as judicial estoppel, preclusion or waiver, no matter how egregious the party misconduct or how unfair the advantage it provides one party over another.

To be sure, this case does not fall within the usual criteria of Supreme Court Rule 10, but it does present an important question of administrative law that the D.C. Circuit resolved incorrectly and in tension with this Court's delineation of the doctrine of judicial estoppel. And the D.C. Circuit decided the case incorrectly without consideration of the inequitable, manipulative and damaging consequences for the NLRB's decision making and for administrative law generally. This Court should grant review or summarily reverse the D.C. Circuit and order it to require the NLRB to apply the doctrine of judicial estoppel to the Union's change of position in this case.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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