APPENDIX

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.*

No. 21-1111

Consolidated with 21-1124

TEMPLE UNIVERSITY HOSPITAL, INC.,

Petitioner / Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent / Cross-Petitioner

TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS,

Intervenor

Argued February 15, 2022

Decided July 8, 2022

Opinion

Srinivasan, Chief Judge:

For more than four decades, labor relations between Temple University Hospital and the professional and

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* Circuit Judge, now Justice, Jackson was a member of the panel at the time the case was argued but did not participate in the opinion.

technical employees working there occurred under the jurisdiction of the Pennsylvania Labor Relations Board. In 2015, however, the labor union representing those employees petitioned the National Labor Relations Board to exercise jurisdiction over its relationship with the Hospital. Over the Hospital's objections, the NLRB granted the petition, asserted jurisdiction, and certified the union as the representative of an expanded unit of employees.

Dissatisfied with that result, the Hospital refused to bargain with the union and eventually filed a petition for review in this court. Although the Hospital raised several arguments, we considered only one: its contention that the union was judicially estopped from invoking the NLRB's jurisdiction because the union had previously insisted that the NLRB in fact lacked jurisdiction. Siding with the Hospital, we held that the NLRB had misapplied the relevant judicial-estoppel analysis and remanded for further proceedings. *See Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729, 735–37 (D.C. Cir. 2019).

On remand, the NLRB again asserted jurisdiction over the Hospital after determining that principles of judicial estoppel are inapplicable. The Hospital continues to resist that result, and it renews the additional arguments we had no occasion to address in 2019. Because the Hospital identifies no error in the NLRB's decision, we deny the petition for review and grant the Board's cross-application for enforcement.

I.

A.

The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, guarantees employees the right "to bargain collectively through representatives of their own

choosing." 29 U.S.C. § 157. Section 8 of the Act bars employers from engaging in a host of unfair labor practices. Among them, an employer may not "refuse to bargain collectively with the representatives of his employees." *Id.* § 158(a)(5). Although the NLRA defines "employer" broadly, the statute specifically exempts "any State or political subdivision thereof." *Id.* § 152(2).

Under Section 9 of the Act, a labor organization or group of employees may file a petition with the National Labor Relations Board (NLRB or Board) alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer has declined to recognize their representative. *Id.* § 159(c)(1)(A). Upon the filing of a petition, the Board must decide "the unit appropriate for the purposes of collective bargaining." *Id.* § 159(b). A representative becomes the exclusive representative of employees in a particular collective-bargaining unit upon a majority vote of the relevant employees and the Board's certification of the results. *Id.* § 159(a)–(c).

The Board has provided specific instruction concerning the appropriate composition of bargaining units in the health care setting since 1989, when it promulgated what has become known as the Health Care Rule. *See* 29 C.F.R. § 103.30; *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 608, 615–17, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991). Applicable to acute-care hospitals, the Health Care Rule sets out eight units as the "only appropriate units" for purposes of representation petitions filed under the NLRA. 29 C.F.R. § 103.30(a). Although units not described in the Health Care Rule are deemed nonconforming, *id.* § 103.30(f)(5), the Rule provides that combinations of the enumerated units

may be appropriate and excepts preexisting nonconforming units from its requirements, *id.* § 103.30(a).

The Board, of course, is not the only labor relations authority in the country. Although the Board retains exclusive jurisdiction over activities "arguably subject" to the NLRA, state labor boards administer and enforce their own labor laws against entities outside the Board's jurisdiction. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244–46, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Occasionally, the Board will exercise jurisdiction over a particular bargaining relationship previously under the supervision of a state agency. In such circumstances, the Board generally extends "comity" to the state agency's elections and certifications, "provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements." *Allegheny Gen. Hosp.*, 230 N.L.R.B. 954, 955 (1977). When it extends comity, the Board accords the "same effect to the elections and certifications of responsible state government agencies" as its own. *Id.*

B.

Our 2019 opinion in this case sets out the relevant factual background, *see Temple Univ. Hosp.*, 929 F.3d at 731–33, but we recount the key points here. Temple University Hospital is an acute-care hospital located in Philadelphia, Pennsylvania. Acquired in 1910 by Temple University—a state-related university also based in Philadelphia—the Hospital initially functioned as an unincorporated division of the University. That changed in 1995, when the Hospital became a distinct nonprofit corporation. The sole shareholder of that corporation is Temple University Health System, a holding company the University created for its

healthcare-related assets. As an independent corporate entity, the Hospital generally conducts its own collective bargaining and handles personnel decisions for non-executive employees. But the University and the Hospital nonetheless retain a number of close operational and budgetary ties.

In 2005, the Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (the Union) filed a petition with the Pennsylvania Labor Relations Board (PLRB) to represent a previously certified bargaining unit of professional and technical employees—a unit that a different union had represented since the 1970s. In the ensuing proceedings, both the Union and the Hospital contended—over the then-incumbent union's opposition—that the PLRB, rather than the NLRB, properly had jurisdiction over the Hospital. The PLRB agreed, and the Union prevailed in the subsequent election. It has represented the unit ever since.

Ten years later, in 2015, the Union petitioned the NLRB to assert jurisdiction over its relationship with the Hospital, notwithstanding the Union's repeated prior invocations of the PLRB's authority. The specific basis for the Union's petition was its desire to add two classifications of unrepresented Hospital employees—professional medical interpreters and transplant financial coordinators, comprising a total of eleven individuals—to the existing professional-technical bargaining unit. The petition asked the NLRB to conduct an election in which the petitioned-for employees would vote on whether to join the existing unit.

The Hospital mounted several defenses. First, it contended that the Union should be judicially estopped from invoking the Board's jurisdiction because of the Union's prior representations that the PLRB, not the

NLRB, had jurisdiction over the Hospital. Second, it maintained that the Hospital was a "political subdivision" of Pennsylvania and therefore exempt from the Board's jurisdiction. *See* 29 U.S.C. § 152(2). Third, it argued that the Board should decline to exercise its jurisdiction on account of the close ties between the Hospital and the University. Finally, it submitted that the Board should not extend comity to the PLRB's certification of the professional-technical unit.

An Acting Regional Director of the NLRB ruled in favor of the Union. Rejecting each of the Hospital's arguments, he asserted jurisdiction over the Hospital and extended comity to the PLRB's certification of the professional-technical unit. The Union won the ensuing election among the petitioned-for interpreters and financial coordinators, and the Acting Regional Director certified it as the exclusive collective-bargaining representative of the newly expanded professional-technical unit.

The Board affirmed the Acting Regional Director's decision. Seeking to contest the validity of the Board's certification of the Union, the Hospital refused to bargain with the Union. The Union filed an unfair-labor-practice charge with the Board, which found that the Hospital had violated the NLRA. The Hospital then lodged a petition for review in this court.

Although the Hospital briefed each of the four primary arguments it had pressed before the Board, we reached only its first contention concerning judicial estoppel. We agreed with the Hospital that the Board had misapplied the judicial-estoppel analysis prescribed by the Supreme Court. *Temple Univ. Hosp.*, 929 F.3d at 735–36 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–52, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). We remanded the case for further proceedings.

On remand, the Board again declined to estop the Union from invoking its jurisdiction. But its path to that result was different. Instead of assuming the availability of judicial estoppel in Board proceedings and nonetheless declining to apply it based on a balancing of the relevant factors, the Board this time concluded that judicial estoppel "is not available in proceedings . . . where the Board's jurisdiction is in issue," such that the doctrine's application "could compel the Board to surrender its jurisdiction." Supplemental Decision and Order at 1–2, J.A. 169–70. With judicial estoppel off the table, the Board reaffirmed its prior determination that the Hospital's refusal to bargain with the Union violated the NLRA. *Id.* at 4, J.A. 172.

The Hospital once again petitions for review, and the Board cross-applies for enforcement of its order. The Union has intervened in support of the Board's decision.

II.

The Hospital contends that the Board improperly asserted jurisdiction over this dispute and erroneously extended comity to the PLRB's prior certification of the professional-technical bargaining unit. A court "must uphold the judgment of the Board unless its findings are unsupported by substantial evidence, or it acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1100 (D.C. Cir. 2019). We find no error in the Board's decision.

A.

The Hospital first argues that the doctrine of judicial estoppel should have foreclosed the Union's attempt to invoke the Board's jurisdiction. Judicial

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." *New Hampshire*, 532 U.S. at 749, 121 S.Ct. 1808 (quoting 18 Moore's Federal Practice § 134.30 (3d ed. 2000)). According to the Hospital, the Union's prior insistence that the PLRB—and not the NLRB—properly had jurisdiction over the Hospital should estop the Union from reversing course in this case.

Whether a nonjudicial tribunal such as the Board "may itself invoke judicial estoppel appears to be an issue of first impression." *Temple Univ. Hosp.*, 929 F.3d at 734. But we need not consider that question here, for the Board did not resolve it. Instead, the Board made a threshold determination that, while judicial estoppel might be available in certain Board proceedings, the doctrine is unavailable when its "application . . . could compel the Board to surrender its jurisdiction." Supplemental Decision and Order at 2, J.A. 170. That is, the Board concluded that a party cannot rely on judicial estoppel to prevent the Board from entertaining a matter that would otherwise fall within its statutory authority.

As judicial estoppel is an "equitable doctrine" invoked by a tribunal "at its discretion," *New Hampshire*, 532 U.S. at 750, 121 S.Ct. 1808 (citation omitted), we review the Board's "decision . . . not to invoke[ ] judicial estoppel for abuse of discretion." *Temple Univ. Hosp.*, 929 F.3d at 734. In doing so, we confine our review to the adequacy of the reasons articulated in the Board's order. *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012). The Board did not abuse its discretion in determining that judicial estoppel is unavailable in cases in which the Board's jurisdiction is at issue.

The Board centrally grounded that conclusion in "[f]ederal labor policy," which, to the Board, "weighs heavily against allowing judicial estoppel to be used as a ground to limit [its] jurisdiction." Supplemental Decision and Order at 3, J.A. 171. The Board located the relevant pro-enforcement policy in Section 10(a) of the NLRA. *See* 29 U.S.C. § 160(a). That provision "empower[s]" the Board "to prevent any person from engaging in any unfair labor practice (listed in [Section 8] of [the Act]) affecting commerce," a power that "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.*

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 brought by the Union against the Hospital and could issue rulings the Board would have no power to review. The Board declined to establish a doctrine under which "the power Congress endowed [the Board] with in Section 10(a) could be surrendered to the parties and the history of their petition-filing and litigation choices over time." Supplemental Decision and Order at 4, J.A. 172. "Even assuming Section 10(a) would permit this," the Board explained, "the federal policy embodied in that statutory provision convinces us that we ought not do so." *Id.*

The Board permissibly concluded that Congress's broad conferral of statutory authority to prevent "*any* person" from committing "*any* unfair labor practice" affecting commerce—notwithstanding the existence of "*any* other" law—militated against enabling judicial estoppel to prevent the Board from exercising its authority in cases in which it could otherwise act. 29 U.S.C. § 160(a) (emphases added). The Board "has the

primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990). And we cannot say that the Board abused its discretion in determining that "plac[ing] [its] jurisdictional powers in the hands of litigants" would be at odds with Congress's broad empowerment of the Board to enforce the NLRA in cases satisfying the Act's jurisdictional prerequisites. Supplemental Decision and Order at 3, J.A. 171; *cf. Hammontree v. NLRB*, 925 F.2d 1486, 1491–92 (D.C. Cir. 1991) (construing Section 10(a)'s "affirmative grant of authority to the Board" as providing that "no one *other than* the Board shall diminish the Board's authority over [unfair-labor-practice] claims"); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S.Ct. 312, 9 L.Ed.2d 279 (1963) ("This Court has consistently declared that in passing the [NLRA], Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.").

The Hospital points out that the Board's jurisdiction is discretionary and not mandatory. The Board, though, recognized as much, acknowledging that it "does not always exercise the power Congress granted it in Section 10(a)." Supplemental Decision and Order at 4, J.A. 172. The fact that the Board may at times decline to exercise its jurisdiction is by no means inconsistent with its choice to avoid a regime in which the petition-filing practices of private parties—rather than the Board's own discretionary decisions—could prevent it from hearing a dispute it would otherwise entertain.

In addition to its reliance on federal labor policy, the Board also considered judicial precedent and its own

decisions. As for the former, the Board observed that "federal courts have generally declined to apply judicial estoppel to create or defeat jurisdiction." *Id.* at 3, J.A. 171 (citing *City of Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1006 n.6 (9th Cir. 2010); *Whiting v. Krassner*, 391 F.3d 540, 544 (3d Cir. 2004); *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000)). As for its own precedent, the Board relied on two decisions in which it asserted jurisdiction over bargaining relationships notwithstanding the parties' historically inconsistent positions on whether jurisdiction in fact existed. *Id.* at 4, J.A. 172 (citing *Wyndham West at Garden City*, 307 N.L.R.B. 136 (1992) (advisory opinion); *We Transport, Inc.*, 215 N.L.R.B. 497 (1974)).

The Hospital is correct that neither judicial nor administrative precedent compelled the Board to conclude that litigants cannot use judicial estoppel as a means of limiting the Board's jurisdiction. But the Board did not suggest otherwise. It instead considered nonbinding judicial precedent only as a "preliminar[y]" matter, and it acknowledged that court decisions did not uniformly point in one direction. *Id.* at 3, J.A. 171 (citing *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 34 (1st Cir. 2018)). And with regard to its own precedent, it recognized that the applicability of judicial estoppel in Board proceedings is an issue it "has not squarely addressed." *Id.* at 2, J.A. 170. At bottom, the Board permissibly reasoned that judicial and administrative precedent generally reinforced its policy-driven decision to make judicial estoppel unavailable in the circumstances of this case.

Contrary to the Hospital's contention, the Board did not flout this court's 2019 decision in this case. There, we remanded in part "for the Board to determine in

the first instance whether judicial estoppel is available in NLRB proceedings." *Temple Univ. Hosp.*, 929 F.3d at 737. The Board could save that broader question for another day and determine that, even assuming judicial estoppel may be available in some proceedings, it cannot be used to defeat the Board's jurisdiction.

B.

The Hospital next challenges the Board's determination that the Hospital is not a political subdivision of Pennsylvania exempt from the NLRB's jurisdiction. We see no basis to set aside the Board's conclusion.

Section 8 of the NLRA enumerates unfair labor practices that an "employer" may not perform, 29 U.S.C. § 158(a), and the Act defines "employer" to exclude "any State or political subdivision thereof," *id.* § 152(2). Although the statute does not further define "political subdivision," the Supreme Court has upheld the Board's construction of the term to mean an entity that is either "(1) created directly by the state, so as to constitute [a] department[ ] or administrative arm[ ] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 604–05, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971). An entity satisfying either prong of that test is not a statutory "employer" and falls outside the Board's jurisdiction. *Midwest Div.-MMC, LLC v. NLRB*, 867 F.3d 1288, 1296 (D.C. Cir. 2017).

All agree that the Hospital was not "created directly by the state." *Hawkins Cty.*, 402 U.S. at 604, 91 S.Ct. 1746. The sole question, then, is whether the Hospital is "administered by individuals who are responsible to public officials or to the general electorate." *Id.* at 604–05, 91 S.Ct. 1746. Under that prong of the *Hawkins*

County test, "the pertinent question is 'whether a majority of the individuals who administer the entity . . . are appointed by and subject to removal by public officials.'" *Midwest Div.-MMC*, 867 F.3d at 1297 (alteration in original) (quoting *Pilsen Wellness Ctr.*, 359 N.L.R.B. 626, 628 (2013)). In *Midwest Division-MMC*, the employer (also an acute-care hospital) offered no evidence that the members of the relevant peer review committee (the entity in question) were either appointed or removable by public officials. In those circumstances, the Board reasonably determined that the hospital committee did not qualify as an exempt political subdivision. *Id.*

The same reasoning controls here. As the Acting Regional Director explained, "no government entity has the authority to appoint or remove a Hospital board member, and no member of the board . . . is a government official or works for a government entity." Regional Director's Decision and Direction of Election at 14, J.A. 82. The Hospital's board members, rather, are "subject solely to private appointment and removal." *Id.* Because a majority of the Hospital's board members are neither appointed by nor subject to removal by public officials (indeed, none are), the Hospital is not "administered by individuals who are responsible to public officials or to the general electorate." *Hawkins Cty.*, 402 U.S. at 604–05, 91 S.Ct. 1746.

Invoking a non-precedential advice memorandum issued by the NLRB's General Counsel, the Hospital points to additional factors purportedly establishing that it is an exempt political subdivision. As the Board explained, however, "[w]here an examination of the appointment-and-removal method yields a clear answer to whether an entity is administered by individuals who are responsible to public officials or to the

general electorate, the Board's analysis properly ends." Order Granting Review in Part at 2 n.2, J.A. 147 (quotation marks omitted) (quoting *Pa. Virtual Charter Sch.*, 364 N.L.R.B. No. 87, at *13 (2016)). The Hospital does not challenge that controlling standard—a standard that this court and numerous others have consistently applied. *See, e.g.*, *Midwest Div.-MMC*, 867 F.3d at 1297; *Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 776–77 (5th Cir. 2018) (collecting cases); *cf. Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 717 (D.C. Cir. 2000) ("[T]he Board has long and reasonably preferred bright line rules in order to avoid disputes over its jurisdiction."). The Board thus reasonably determined that the Hospital does not qualify as a political subdivision of Pennsylvania.

C.

The Hospital next contends that, insofar as the Board had jurisdiction, the Board should have declined to exercise it. It is true that the Board may properly decline to exercise jurisdiction if it concludes that "the policies of the [NLRA] would not be effectuated by its assertion of jurisdiction." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684, 71 S.Ct. 943, 95 L.Ed. 1284 (1951); *accord Temple Univ. Hosp.*, 929 F.3d at 732 n.*. That decision, though, is inherently a discretionary one. While the Board may not act arbitrarily or cause an employer unfair and substantial prejudice, its discretionary determination to assert jurisdiction is otherwise "essentially unreviewable." *Hum. Dev. Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991) (quoting *NLRB v. Kemmerer Vill., Inc.*, 907 F.2d 661, 663–64 (7th Cir. 1990)). Indeed, we have long emphasized "the broad scope of the Board's discretion in determining whether an abstention from jurisdiction is likely to promote the objectives of the Act."

Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 782 (D.C. Cir. 1969). "[I]n the absence of extraordinary circumstances whether jurisdiction should be exercised is for the Board, not the courts, to determine." *Id.* at 783 (quoting *NLRB v. WGOK, Inc.*, 384 F.2d 500, 502 (5th Cir. 1967)).

The Hospital nonetheless contends that the Board abused its discretion by exercising jurisdiction in this case. The Hospital emphasizes its close ties to the University, over which the Board a half-century ago declined to assert jurisdiction in light of the University's "unique relationship" with Pennsylvania. *See Temple Univ.*, 194 N.L.R.B. 1160, 1161 (1972). As the Board explained, however, its more recent practice has been to "assert jurisdiction over an employer, despite its close ties with an exempt government entity, as long as it meets the definition of employer set out in Section 2(2) of the Act and the applicable monetary jurisdictional standards." Decision on Review and Order at 2, J.A. 149 (citing *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995)). The Board reasonably found both criteria satisfied, explaining that the Hospital "possesses sufficient control over its employees' terms and conditions of employment" and that there was "no dispute that the [Hospital] meets the Board's monetary jurisdictional standards." *Id.*

The Board also permissibly rejected the Hospital's claim that asserting jurisdiction would substantially prejudice the Hospital by disrupting existing bargaining relationships under Pennsylvania law. As the Board reasonably determined, "[t]he stable bargaining relationship has been between the [Hospital] and Union, not between the [Hospital] and the PLRB." *Id.* at 3, J.A. 150 (quoting *MCAR, Inc.*, 333 N.L.R.B. 1098, 1104 (2001)). The Board explained that it has

repeatedly exercised jurisdiction even when a state agency such as the PLRB had previously asserted jurisdiction. *Id.* And the Board reasonably declined to consider the Union's purpose for invoking the Board's jurisdiction, as well as the Hospital's offers to add the petitioned-for employees to the existing bargaining unit under Pennsylvania law. While the Board could have afforded greater weight to such considerations, its decision not to do so evinces no abuse of discretion.

D.

The Hospital's final contention is that the Board erroneously extended comity to the PLRB's previous certification of the professional-technical bargaining unit. The Board, the Hospital maintains, should not have accorded the "same effect to the elections and certifications of" the PLRB as the Board's own, *Allegheny Gen. Hosp.*, 230 N.L.R.B. at 955, but rather should have required a new representation petition, held a federally administered election, and itself certified the bargaining unit upon a majority vote of the relevant employees.

The Hospital contends that extending comity was improper for two reasons: (i) the PLRB-certified unit is inconsistent with the Board's Health Care Rule; and (ii) the Board arbitrarily departed from its own precedent. Neither argument has merit.

1.

Under the Board's Health Care Rule, two of the eight permissible bargaining units in acute-care hospitals are "[a]ll professionals except for registered nurses and physicians" and "[a]ll technical employees." 29 C.F.R. § 103.30(a)(3)–(4). Any deviating unit is nonconforming—except that, as relevant here, the Rule allows both combinations of the eight units and

nonconforming units that existed at the time of the Rule's promulgation in 1989. *Id.* § 103.30(a), (f)(5). In this case, the Board determined that both of those exceptions applied. Specifically, the PLRB-certified unit was a "combination of two of the eight specified units"—i.e., professionals and technical employees. Decision on Review and Order at 4, J.A. 151. Alternatively, "even assuming the unit is nonconforming, it was and still is an 'existing non-conforming unit[ ]'" within the meaning of the Rule because the unit was originally certified by the PLRB in 1975 and its composition "has largely remained the same" in the years since. *Id.* (quoting 29 C.F.R. § 103.30(a)).

We sustain the Board's decision on that latter ground, which the Board made clear was an independent basis for its order. "We accord the Board an especially wide degree of discretion on questions of representation." *Rush Univ. Med. Ctr. v. NLRB*, 833 F.3d 202, 206 (D.C. Cir. 2016) (quotation marks and citation omitted). The Board acted within its discretion in determining that the professional-technical bargaining unit was an "existing" unit at the time of the Health Care Rule's promulgation.

The Hospital correctly points out that the unit has changed in some respects since its original certification by the PLRB in 1975. But the Board reasonably determined that the changes did not cause the unit to run afoul of the Rule. While the unit had a different collective-bargaining representative in 1975, the Board permissibly found that the mere change in representation did not divest the unit of its existing nonconforming status. Decision on Review and Order at 4, J.A. 151; *see Crittenton Hosp.*, 328 N.L.R.B. 879, 880 (1999). As for adjustments in the unit's scope, the Board reasonably determined that a unit whose composition

"has largely remained the same" over the past half-century retains its identity as an existing nonconforming unit. Decision on Review and Order at 4, J.A. 151. This court has previously upheld the Board's understanding that the mere addition of new employees to a preexisting nonconforming unit does not instantly require the expanded unit to comply with the Health Care Rule's strictures. *See Rush Univ. Med. Ctr.*, 833 F.3d at 204, 207–09. And to the extent the 1975-certified unit contained some employee groups that are no longer part of the unit, the unit still represents professional and technical employees at the Hospital.

2.

The Hospital contends that the Board's extension of comity in this case constituted an arbitrary departure from its decision in *Summer's Living Systems, Inc.*, 332 N.L.R.B. 275 (2000). In that proceeding, the Board declined to extend comity to a unit certified by a state board that lacked jurisdiction at the time it issued the certification. According to the Hospital, if the Union is correct that the Board has jurisdiction over the Hospital, then the Board also had jurisdiction in 2006, meaning that the PLRB lacked jurisdiction at the time it most recently certified the unit. Under *Summer's Living Systems*, the Hospital maintains, the Board could not extend comity to the PLRB's purportedly invalid certification.

The Board, however, adequately accounted for *Summer's Living Systems* and reasonably distinguished that decision. In *Summer's Living Systems*, the Board considered whether to extend comity to a series of certifications issued by a Michigan state labor agency. As *Summer's Living Systems* explained, the Michigan Court of Appeals later determined that the state agency's jurisdiction to issue the relevant

certifications had been preempted by the Board's jurisdiction. In those circumstances, the Board declined to extend comity to the preempted state certifications. *Summer's Living Sys.*, 332 N.L.R.B. at 276–77 & n.7, 286.

The Board thus explained here that *Summer's Living Systems*, unlike this case, involved an "intervening state court case" holding that the "state's jurisdiction over various units of employees was pre-empted by the Board's jurisdiction." Decision on Review and Order at 4–5 n.7, J.A. 151–52. In light of those contrasting circumstances, the Board reasonably determined that *Summer's Living Systems* "does not control" this case. *Id.* Comity to a state agency's determination, after all, is a doctrine aimed at respecting not only the preferences of employees and employers, but also the administrative processes giving rise to the state agency's decision. *See Allegheny Gen. Hosp.*, 230 N.L.R.B. at 955. The Board could permissibly grant comity here while withholding it in circumstances in which a state court deems the state labor agency to have lacked jurisdiction to issue the certifications to which comity might otherwise extend.

* * *

For the foregoing reasons, we deny the petition for review and grant the Board's cross-application for enforcement of its order.

So ordered.

APPENDIX B

United States Court of Appeals,
District of Columbia Circuit.

No. 18-1150
Consolidated with 18-1164

TEMPLE UNIVERSITY HOSPITAL, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

TEMPLE ALLIED PROFESSIONALS,
PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND
ALLIED PROFESSIONALS,

Intervenor

Argued February 25, 2019

Decided July 9, 2019

Before: Henderson and Tatel, Circuit Judges, and
Ginsburg, Senior Circuit Judge.

Opinion

Ginsburg, Senior Circuit Judge:

For more than 40 years, the labor relations of the petitioner, Temple University Hospital, were conducted under the jurisdiction of the Pennsylvania Labor

Relations Board (PLRB). Since 2006 the Hospital has been in a collective bargaining relationship with Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (the Union), which represents a unit of its professional and technical employees. In 2015 the Union petitioned the National Labor Relations Board (NLRB) to assert jurisdiction over their relationship. Over the Hospital's objections, the NLRB asserted jurisdiction and certified the Union as the representative of a larger unit of employees. The Hospital, however, refused to bargain with the Union in order to contest the NLRB's jurisdiction and its certification of the bargaining unit.

The NLRB rejected the Hospital's various challenges, including its argument that the Union was judicially estopped from bringing a petition before the Board because the Union had argued in prior proceedings that the NLRB lacked statutory jurisdiction. Specifically, in denying the Hospital's request for review of this question, the NLRB assumed *arguendo* that the doctrine of judicial estoppel applies in NLRB proceedings but, based upon its understanding of the Supreme Court's teaching in *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), as applied to the facts of this case, deemed it inappropriate. We hold that the NLRB misapplied *New Hampshire v. Maine* and remand this case for it to consider whether judicial estoppel is available in NLRB proceedings and, if so, whether to invoke it.

I. Background

The petitioner is an acute-care hospital located in Philadelphia, Pennsylvania. In 1910 it was acquired by Temple University — a private, "State-related university in the higher education system of the Commonwealth," Reg'l Dir.'s Decision and Direction of

Election at 3 [hereinafter RD Dec.], quoting the Temple University-Commonwealth Act, 1965 Pa. Laws 843, 843 — and became an unincorporated division of the University. In 1995 the Hospital became a separate nonprofit corporation, of which the sole shareholder is Temple University Health System, which was created by the University to hold its healthcare-related assets. Although the University and the Hospital are separate corporate entities and separate employers for the purpose of collective bargaining, there remain close operational ties between them.

In 2005 the Union filed a petition with the PLRB seeking to represent an already-certified bargaining unit of professional and technical employees at the Hospital (hereinafter technical-professional unit). *In re the Employees of Temple University Health System*, 39 PPER ¶ 49, Case No. PERA-R-05-498-E (PLRB Apr. 21, 2006). During those proceedings, the incumbent union, the Professional and Technical Employees Association, argued the NLRB had jurisdiction over the Hospital, *id.*, which would preempt the jurisdiction of the state labor board, *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). The Union, of course, contended the PLRB properly had jurisdiction. The PLRB concluded it had jurisdiction over the Hospital and held the previously certified unit was appropriate for collective bargaining. 39 PPER ¶ 49. The PLRB then conducted an election; the Union prevailed and has represented the unit ever since.

The Union has stipulated that "since 2005, any and all petitions for representation, requests for certification, petitions for unit clarification, petitions for amendment [or] clarification and charges of unfair labor practices have all been filed by [the Union] with

the Pennsylvania Labor Relations Board." During that time, the Union filed no fewer than 21 unfair labor practice charges, including one for which the Union filed its post-hearing brief as recently as February 2015. *See Pennsylvania Association of Staff Nurses and Allied Professionals v. Temple University Health System*, 48 PPER ¶ 54, Case No. PERA-C-14-259-E (PLRB Nov. 30, 2016). The Union has further stipulated that, "in each instance in which a petition or charge was filed, [the Union] alleged that . . . Temple University Hospital . . . was a public employer within the meaning of Section 301(1) of PERA," that is, the orthographically peculiar Pennsylvania Public Employe Relations Act. As relevant here, the PERA excludes from the definition of "public employer" any "employer[ ] covered or presently subject to coverage under . . . the 'National Labor Relations Act.'" 43 Pa. Stat. Ann. § 1101.301(1).

Nonetheless, in October 2015, when the Union wanted to add a group of unrepresented employees to the existing technical-professional unit, it sought the approval of the NLRB rather than that of the PLRB. The Union had notified the Hospital of this change, explaining that it anticipated the Supreme Court's impending decision in *Friedrichs v. California Teachers Ass'n*, —— U.S. ——, 136 S. Ct. 1083, 194 L.Ed.2d 255 (2016), would be unfavorable to its interests. The Hospital objected; it argued the NLRB should dismiss the petition on the grounds that (1) the Union is judicially estopped from invoking the jurisdiction of the NLRB; (2) the Hospital is a "political subdivision" of Pennsylvania and therefore is not subject to the jurisdiction of the NLRB, *see* 29 U.S.C § 152(2); and (3) due to the close ties between the Hospital and the University, the NLRB should exercise its discretion to

decline jurisdiction over the Hospital.* The Hospital further urged the NLRB not to "grant comity" to the PLRB's certification of the technical-professional unit, and instead to determine for itself whether the unit is "appropriate for the purposes of collective bargaining" under the National Labor Relations Act (NLRA). *See* 29 U.S.C. § 159(b).

An Acting Regional Director of the NLRB conducted a hearing, after which he rejected all the Hospital's jurisdictional challenges and granted comity to the PLRB's certification of the bargaining unit; he therefore directed an election among the petitioned-for employees. The Union won the election and the Acting Regional Director certified it as the collective-bargaining representative of the newly expanded technical-professional unit.

Upon the Hospital's request for review of the Acting Regional Director's decision, the NLRB agreed to review only two questions: (1) whether it should exercise its discretion to decline jurisdiction over the Hospital and, if not, then (2) whether it should extend comity to the PLRB's certification of the technical-professional unit; over the dissent of Member Miscimarra, it denied the request for review as to the other issues the Hospital had raised, including whether the Union should be judicially estopped from petitioning the NLRB. NLRB Order Granting Review in Part and

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* Even if an employer comes within the statutory jurisdiction of the NLRB, the Board may exercise its discretion not to assert jurisdiction. *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of Am., AFL v. NLRB*, 238 F.2d 38, 40 (D.C. Cir. 1956) (citing *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684, 71 S.Ct. 943, 95 L.Ed. 1284 (1951)). In 1972 the NLRB had declined to exercise jurisdiction over the University. *Temple University*, 194 NLRB 1160, 1161 (1972).

Invitation to File Briefs at 1. In a footnote explaining its refusal to revisit the issue of judicial estoppel, the Board said it was "assuming arguendo that the doctrine of judicial estoppel . . . applies in Board proceedings" and then went on to "affirm the Acting Regional Director's conclusion" that judicial estoppel was not appropriate in this case. *Id.* at 2 n.2. Then, in December 2017, the Board issued its Decision on Review and Order affirming the Acting Regional Director's ruling.

In order to contest the validity of the certification, the Hospital refused to bargain with the Union. In response, the Union filed an unfair labor practice charge with the NLRB, alleging the Hospital had violated §§ 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1) and 158(a)(5). The General Counsel of the NLRB issued a complaint against the Hospital and moved for summary judgment, which the NLRB granted in May 2018. *Temple University Hospital*, 366 NLRB No. 88 (May 11, 2018). In its Decision and Order, the NLRB did not address anew the Hospital's jurisdictional or certification arguments, stating that "all representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding." *Id*. The Hospital subsequently filed a timely petition for review and the NLRB cross-applied for enforcement of its order.

II. Analysis

The Hospital raises two issues on appeal: First, whether the NLRB properly asserted jurisdiction over the Hospital and second, whether the NLRB properly granted comity to the PLRB's certification of the technical-professional unit. We do not reach the second issue because we conclude the NLRB erred in arriving at its jurisdictional holding.

The NLRA exempts "any State or political subdivision thereof" from the definition of an "employer" within the jurisdiction of the NLRB. 29 U.S.C § 152(2). In this case, the Union maintains and the NLRB agrees that the Hospital is not a "political subdivision" of the Commonwealth of Pennsylvania, and hence is not exempt from the jurisdiction of the NLRB. The Hospital contends the Union should have been judicially estopped from taking that position before the NLRB because the Union previously "convinc[ed] the PLRB that the [NLRB] lacked jurisdiction" over the Hospital. That is, the Union argued to the PLRB during the representation proceedings in 2005 and 2006 — and implicitly if not explicitly reiterated in the dozens of cases it has brought before the PLRB since then — that the NLRB did not have jurisdiction over the Hospital, and the PLRB agreed; yet, the Union now contends the NLRB does have jurisdiction.

The doctrine of judicial estoppel is that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *New Hampshire v. Maine*, 532 U.S. at 749, 121 S.Ct. 1808. The doctrine "protects the integrity of the judicial process," *Davis v. D.C.*, 925 F.3d 1240, 1256 (D.C. Cir. 2019), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *New Hampshire v. Maine*, 532 U.S. at 750, 121 S.Ct. 1808 (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). The Supreme Court has said there is no "exhaustive formula for determining the applicability of judicial estoppel." *Id*. at 751, 121 S.Ct. 1808. Nevertheless, the Court has set forth three key factors that "inform the decision" whether "the balance of equities" favors applying the doctrine in a particular

case: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51, 121 S.Ct. 1808 (cleaned up).

As a threshold matter, however, one might wonder whether a doctrine known as "judicial" estoppel has force in proceedings before the NLRB, which is an administrative tribunal. Indeed, the Union and the NLRB raise this very question. Although most circuits have applied judicial estoppel in cases where the first proceeding was before an agency, *see Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 798 (8th Cir. 2014); *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1210 (10th Cir. 2011); *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1354 (Fed. Cir. 2010); *Valentine-Johnson v. Roche*, 386 F.3d 800, 811 (6th Cir. 2004); *Detz v. Greiner Indus., Inc.*, 346 F.3d 109, 118–19 (3d Cir. 2003); *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 198 (4th Cir. 1998); *Portela-Gonzalez v. Sec'y of the Navy*, 109 F.3d 74, 78 (1st Cir. 1997); *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2d Cir. 1997); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993), and no circuit has declined to do so, whether a nonjudicial tribunal may itself invoke judicial estoppel appears to be an issue of first impression. *But cf., e.g.*, *Doe v. Dep't of Justice*, 123 M.S.P.R. 90, 94–96 (2015) (doctrine

applied by the Merit Systems Protection Board); *In re Time Warner Cable*, 21 FCC Rcd. 9016, 9020 (2006) (doctrine applied by the Federal Communications Commission).

Here, the NLRB held that even "assuming arguendo that the doctrine of judicial estoppel . . . applies in Board proceedings," the *New Hampshire v. Maine* factors did not counsel applying it in this case. NLRB Order Granting Review in Part and Invitation to File Briefs at 2 n.2. Without addressing the first factor, the Board adopted the Acting Regional Director's conclusion that the second and third factors were not present, and hence declined to apply the doctrine. It explained:

> We agree with the Acting Regional Director's findings that processing the petition will not confer an unfair advantage on the Petitioner or impose an unfair detriment on the Employer; there is no evidence that the Petitioner misled the PLRB, and there is an inadequate basis to believe the PLRB would have reached a different result had the Petitioner taken some contrary position before the PLRB.

Id.

On appeal, "heeding the Supreme Court's description of judicial estoppel as 'an equitable doctrine invoked by a court at its discretion,'" we review the decision to invoke (or not to invoke) judicial estoppel for abuse of discretion. *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 927 (D.C. Cir. 2016) (quoting *New Hampshire v. Maine*, 532 U.S. at 750, 121 S.Ct. 1808). At the same time, we must confine our review to the adequacy of the reasons given by the Board, as "courts may not accept appellate counsel's *post hoc* rationalization for agency action; *Chenery* requires

that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962), and citing *SEC v. Chenery*, 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947)); *see also DHL Express, Inc. v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2016) ("deference is not warranted where the Board fails to adequately explain its reasoning") (cleaned up).

Notwithstanding the discretionary nature of the NLRB's determination whether to invoke judicial estoppel, we must overturn its decision because, as explained below, the agency misapplied the teaching of *New Hampshire v. Maine*. In so doing, we do not answer the question whether judicial estoppel applies in NLRB proceedings. The Board merely assumed *arguendo* the doctrine applies. Having rejected the Board's analysis of the *New Hampshire v. Maine* factors, we think it appropriate for the Board to consider in the first instance whether judicial estoppel is applicable in its proceedings.[†]

[†] We here clarify a point to guide the agency's decision on remand: Subsumed within the Board's assumption is the argument, advanced by the Union and by the Acting Regional Director, that the NLRB "will not bar a party . . . from invoking rights under the [NLRA] based on a position the [party] took in a proceeding in which the [NLRB] was not a party." Intervenor Br. 12; RD Dec. at 12 ("as the Board was not a party to the prior proceeding, it is not precluded from determining jurisdiction"); *see also* RD Dec. at 8. The relevant "parties" in the judicial estoppel analysis do not include the forum. Relatedly, to the extent the NLRB has required identity of the parties as a prerequisite for judicial estoppel, it appears to have confused judicial estoppel with issue preclusion. *See, e.g.*, RD Dec. at 8, 12

Although the NLRB did not expressly say so, we agree with the Acting Regional Director that the first factor — whether the Union's current position is "clearly inconsistent" with its earlier position — is obviously present here, as the Board's counsel on appeal appears to concede. *See* RD Dec. at 12; Appellee Br. 42. As the Acting Regional Director put it, "The Hospital is correct that [the Union] argued to the PLRB that the [NLRB] did not have jurisdiction, that the PLRB accepted this argument, and that [the Union] currently contends that the [NLRB] has jurisdiction over the Hospital." RD Dec. at 12.

As for the second factor in *New Hampshire v. Maine* — whether the Union "succeeded in persuading" the prior tribunal — the NLRB was not satisfied because "there is no evidence that the Petitioner misled the PLRB, and there is an inadequate basis to believe the PLRB would have reached a different result had the Petitioner taken some contrary position before the PLRB." NLRB Order Granting Review in Part and Invitation to File Briefs at 2 n.2. This explanation reflects a misunderstanding of the second factor. To begin, nothing in *New Hampshire v. Maine* suggested the party's inconsistent position must be a but-for cause of the first tribunal's decision. New Hampshire and Maine had previously litigated the location of part of the border between them, which had been "fixed in 1740 by decree of King George II of

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(citing *In Re Lincoln Ctr. for the Performing Arts*, 340 NLRB 1100, 1127 (2003)). Judicial estoppel is "a discrete doctrine" serving a different purpose than issue preclusion. *See New Hampshire v. Maine*, 532 U.S. at 748–49, 121 S.Ct. 1808. If one party is taking a position inconsistent with its position in a prior proceeding, it matters not whether the adverse party was the same in both proceedings.

England" as "the Middle of the [Piscataqua] River." 532 U.S. at 746, 121 S.Ct. 1808. Because New Hampshire had agreed in the 1970s that the words "Middle of the River" meant "the middle of the Piscataqua River's main channel of navigation," the Supreme Court judicially estopped it from asserting in 2001 that "the boundary runs along the Maine shore." *Id.* at 745, 121 S.Ct. 1808. Notably, the Court did not analyze whether or how New Hampshire's position had affected its decision in the first proceeding; it was enough that the Court had adopted the interpretation urged by New Hampshire. *See id.* at 752, 121 S.Ct. 1808.

Similarly, there is no independent requirement of evidence that the party changing its position had actively misled the first tribunal. In *New Hampshire v. Maine* the Court said "judicial acceptance of an inconsistent position in a later proceeding" may itself be enough to "create the perception that either the first or the second court was misled." *Id.* at 750, 121 S.Ct. 1808; *see also id.* at 755, 121 S.Ct. 1808 ("We cannot interpret 'Middle of the River' in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process"). Hence, evidence of deception is not necessary to perfect the Hospital's call for judicial estoppel. Of course, that an inconsistency arose out of "inadvertence or mistake" might be a valid reason for declining to apply judicial estoppel, *see id*. at 753, 121 S.Ct. 1808, but the NLRB understandably did not rely upon that possible exception on the facts of this case.

With regard to the third factor, the Hospital argued it had incurred an "unfair detriment" as a consequence of the Union having previously sought the PLRB's jurisdiction because, had it been before the NLRB during prior labor disputes, it might have availed itself

of certain legal remedies available under the NLRA but not under the PERA. The Board adopted the Acting Regional Director's conclusion that the unfair detriment alleged by the Hospital was "not the type of detriment or advantage about which the Supreme Court was concerned in *New Hampshire v. Maine*." RD Dec. at 12. Neither the Acting Regional Director nor the Board gave any explanation of why the Hospital's proffer fell short, nor did they specify what "type" of detriment or advantage would suffice. The NLRB's appellate counsel attempts to clarify that there can be no unfair advantage or detriment because "the Union and Hospital were on the same side, both arguing that the PLRB had jurisdiction." Yet, the same was true in *New Hampshire v. Maine*; during their first litigation over their border, New Hampshire and Maine had agreed upon the meaning of the "Middle of the River." *See* 532 U.S. at 752, 121 S.Ct. 1808. We therefore hold the NLRB failed adequately to explain its determination that there was no unfair advantage or detriment here. *See Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) ("There is a fine line between agency reasoning that is so crippled as to be unlawful and action that is potentially lawful but insufficiently or inappropriately explained. Remand is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so.") (cleaned up).

We also reject two other proffered justifications for the Board's decision. First, the Union contends that judicial estoppel applies only to assertions "of fact rather than law or legal theory." Intervenor Br. 11 (quoting *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)). Second, the Union and the Board argue that "there is an exception to . . . judicial estoppel when it

comes to jurisdictional facts or positions." Intervenor Br. 11 (quoting *Whiting v. Krassner*, 391 F.3d 540, 544 (3d Cir. 2004)); *see* Appellee Br. 40 (citing *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227–28 (10th Cir. 2011)). Because the Board did not rest its decision on either proposition, however, we cannot sustain its decision on either basis. Moreover, we seriously doubt the correctness of the former, as *New Hampshire v. Maine* itself concerned New Hampshire's change in position on a legal issue, *viz.*, the proper interpretation of the words "Middle of the River" in the 1740 decree of King George II. 532 U.S. at 746, 121 S.Ct. 1808.

Having found the NLRB's analysis of the *New Hampshire v. Maine* factors invalid, nothing remains of its reasons for refusing to apply judicial estoppel. We therefore remand the case for the Board to determine in the first instance whether judicial estoppel is available in NLRB proceedings. If the Board determines that judicial estoppel is available in appropriate circumstances, then under *New Hampshire v. Maine* it will next have to determine — and adequately explain — whether the Hospital has made a sufficient showing of unfair advantage or unfair detriment and whether the ultimate "balance of equities" favors its application on the facts of this case.

III. Conclusion

For the foregoing reasons, we grant the Hospital's petition for review, deny the Board's cross-application for enforcement, and remand the case to the Board for proceedings consistent with this opinion.

So ordered.

APPENDIX C

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

TEMPLE UNIVERSITY HOSPITAL, INC.

AND

TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS (PASNAP)

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Case 04-CA-174336

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April 12, 2021

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SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

This case is before the National Labor Relations Board on remand from the United States Court of Appeals for the District of Columbia Circuit.[1] In this test-of-certification proceeding, the Board granted the General Counsel's motion for summary judgment and found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of a unit of professional and technical employees and previously unrepresented medical interpreters and transplant financial coordinators. 366 NLRB No. 88 (2018). In

[1] *Temple University Hospital, Inc. v. NLRB*, 929 F.3d 729 (D.C. Cir. 2019).

the underlying representation case, the Board had rejected the Respondent's contention that the Union was judicially estopped from invoking the Board's jurisdiction. On review of the instant unfair labor practice case, the court found fault with the Board's analysis of the Respondent's judicial estoppel argument and remanded the case for the Board to determine "whether judicial estoppel is available in NLRB proceedings and, if so, whether to invoke it." *Temple University Hospital v. NLRB*, 929 F.3d at 731. For the reasons set forth below, we find that although judicial estoppel may be available in certain Board proceedings, it is not available in proceedings such as this, where the Board's jurisdiction is in issue. Accordingly, we reaffirm our conclusion that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.

Factual and Procedural History

The Respondent is a nonprofit acute care hospital in Philadelphia, Pennsylvania. For more than 30 years prior to 2006, the Professional and Technical Employees Association, National Union of Hospital and Health Care Employees, AFSCME District 1199C (District 1199C) represented the Respondent's professional and technical employees, and the parties conducted their labor relations under the jurisdiction of the Pennsylvania Labor Relations Board (PLRB). In 2005, the Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (the Union) filed a petition with the PLRB, seeking to represent the unit. In that proceeding, the Respondent and the Union took the position that the PLRB had jurisdiction over the Respondent, while District 1199C contended that the Board had jurisdiction. The PLRB asserted jurisdiction over the Respondent and con-

ducted an election. The Union won and was certified by the PLRB.

In 2015, the Union petitioned the Board for an *Armour-Globe* election among 12 unrepresented professional medical interpreters and transplant financial coordinators to determine whether they wished to be included in the professional and technical unit.[2] The Respondent sought dismissal of the petition on multiple grounds, including that the Union was judicially estopped from invoking the Board's jurisdiction because it had argued in the earlier proceeding before the PLRB that the Board lacked jurisdiction over the Respondent.[3] The Acting Regional Director found that

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[2] An *Armour-Globe* election permits employees who share a community of interest with an already-represented unit of employees to vote on whether to join the existing unit. See *Armour & Co*., 40 NLRB 1333 (1942), and *Globe Machine & Stamping Co*., 3 NLRB 294 (1937).

[3] Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). "[I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* (citations and internal quotation marks omitted). More specifically, judicial estoppel applies to prevent a party that prevailed on an argument in one phase of a case from relying on a contradictory argument to prevail in another phase. See *id.* at 749. The facts of *New Hampshire v. Maine* are illustrative. In 1977, the State of New Hampshire stipulated to the Supreme Court that the boundary line between itself and Maine ran down the navigable middle of the Piscataqua River. In 2001, New Hampshire changed position and argued to the Court that the boundary line hugs the river's Maine shoreline. Invoking judicial estoppel, the Court dismissed the case, applying the following factors to determine whether the balance of equities favored dismissal: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept its earlier position such

the Board had jurisdiction over the Respondent and directed an election. The Union won the election and was certified as the exclusive collective-bargaining representative of the expanded unit.

The Respondent filed a request for review, and the Board granted review in part but denied review with respect to the Acting Regional Director's ruling on judicial estoppel. Assuming for the sake of argument that judicial estoppel applies in Board proceedings, the Board affirmed the Acting Regional Director's conclusion that the Union was not estopped from invoking the Board's jurisdiction. *Temple University Hospital, Inc.*, 04-RC-162716, 2016 WL 7495062, at *1 fn. 2 (Dec. 29, 2016). Citing *New Hampshire v. Maine*, supra, the Board stated: "We agree with the Acting Regional Director's findings that processing the petition will not confer an unfair advantage on the [Union] or impose an unfair detriment on the Employer; there is no evidence that the [Union] misled the PLRB, and there is an inadequate basis to believe the PLRB would have reached a different result had the [Union] taken some contrary position before the PLRB." *Id*. In its subsequent Decision on Review and Order, the Board affirmed the Acting Regional Director's decision in full. *Temple University Hospital, Inc.*, 04-RC-162716, 2017 WL 6379903 (Dec. 12, 2017).[4]

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that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. *Id*. at 750-751.

[4] In doing so, the Board rejected the Respondent's contentions that, separate and apart from the issue of judicial estoppel, the Board should exercise its discretion to decline jurisdiction over the Respondent because of its relationship with Temple University,

Thereafter, the Respondent refused to recognize and bargain with the Union, and the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by doing so. See *Temple University Hospital, Inc.*, 366 NLRB No. 88 (2018). The Respondent petitioned the court for review of the Board's order, contending in part that the Board had erred by failing to judicially estop the Union from invoking its jurisdiction. The Board cross-applied for enforcement.

On review, the D.C. Circuit did not decide whether judicial estoppel applies in Board proceedings. However, the court concluded that the Board's bargaining order was unenforceable because the Board had misapplied the *New Hampshire v. Maine* factors in the underlying representation case. 929 F.3d at 735-736. Because the Board had merely assumed without deciding that judicial estoppel is available in Board proceedings, the court remanded the case for the Board "to determine in the first instance whether judicial estoppel is available in NLRB proceedings. . . . in appropriate circumstances." *Id.* at 737. On September 26, 2019, the Board notified the parties to this proceeding that it had accepted the court's remand and invited them to file statements of position. The Respondent and the

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over which the Board has declined to exercise jurisdiction "because of the 'unique relationship between the University and the Commonwealth [of Pennsylvania].'" *Id.* at *1 (quoting *Temple University,* 194 NLRB 1160, 1161 (1972)). The Board also rejected the Respondent's argument that the Board should not extend comity to the technical-professional unit previously certified by the PLRB because the unit does not conform to the Board's prescribed units for healthcare facilities. *Id.* at *2-*3. The Respondent reiterates those contentions in its position statement on remand, but we have already held that they are not "properly litigable in this unfair labor practice proceeding." *Temple University Hospital*, *Inc.*, 366 NLRB No. 88, slip op. at 1-2 (2018).

Charging Party Union each filed a statement of position.

The Board has delegated its authority in this proceeding to a three-member panel.

We have carefully reviewed the record and the parties' statements of position in light of the court's decision, which we accept as the law of the case. For the reasons explained below, we hold that judicial estoppel is not available in this or any Board proceeding where application of that doctrine could compel the Board to surrender its jurisdiction.

Analysis

Whether judicial estoppel is available in Board proceedings is an issue that prior to now the Board has not squarely addressed. Parties have urged its application in other cases, and the Board has declined to apply it on other grounds.[5] The D.C. Circuit has observed that "whether a nonjudicial tribunal may itself invoke judicial estoppel appears to be an issue of first impression." 929 F.3d at 734. "[O]ne might wonder," said the court, "whether a doctrine known as 'judicial' estoppel has force in proceedings before the NLRB, which is an administrative tribunal." *Id.* Similarly, the Supreme Court, addressing an estoppel argument urged by a litigant against the Board,

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[5] See *Precision Industries*, 320 NLRB 661, 663 (1996) ("[A]ssuming arguendo that th[e judicial estoppel] doctrine is applicable to proceedings before the Board," the parties had not taken inconsistent positions.), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); see also *Kvaerner Songer, Inc.*, 343 NLRB 1343, 1346 fn. 9 (2004) (finding it unnecessary to reach the question of collateral and judicial estoppel argued by the General Counsel as an alternative ground for finding that the parties' hiring hall arrangement was nonexclusive).

observed that "the differences in origin and function between administrative bodies and courts 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944) (quoting *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)).

We do not foreclose the possibility that a future case may present circumstances under which judicial estoppel may be appropriately applied. Notwithstanding the Supreme Court's observation concerning "differences in . . . function between administrative bodies and courts," *id.*, the Board operates predominantly as a quasi-judicial tribunal, filling in the interstices of the Act by issuing decisions based on the facts presented in particular cases. Here, however, the Respondent sought to use judicial estoppel as a basis for compelling the Board to surrender its jurisdiction. For the following reasons, we hold that judicial estoppel is unavailable for that purpose in Board proceedings.

Preliminarily, we observe that federal courts have generally declined to apply judicial estoppel to create or defeat jurisdiction. See *Hansen v. Harper Excavating, Inc*., 641 F.3d 1216, 1227-1228 (10th Cir. 2011); *City of Colton v. American Promotional Events, Inc.-West*, 614 F.3d 998, 1006 fn. 6 (9th Cir. 2010), cert. denied 562 U.S. 1062 (2010); *Whiting v. Krassner*, 391 F.3d 540, 544 (3d Cir. 2004), cert. denied 545 U.S. 1131 (2005); *Da Silva v. Kinsho International Corp.*, 229 F.3d 358, 361 (2d Cir. 2000); but see *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 34 (1st Cir. 2018). In *Whiting*, a threshold issue of mootness was raised, and Whiting, invoking judicial estoppel, argued that Krassner was estopped from taking a certain position

on that issue because he had taken the opposite position before the district court. Rejecting this argument, the court stated:

> [T]here is an exception to the general concept of "judicial estoppel" when it comes to jurisdictional facts or positions, such that it has been said that "judicial estoppel . . . cannot conclusively establish jurisdictional facts." *In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 861 (5th Cir. 1976). Mootness must be examined by the court on its own and courts have generally refused to resort to principles of judicial estoppel to prevent a party from "switching sides" on the issue of jurisdiction.

391 F.3d at 544 (citing *Da Silva*, supra). In *Da Silva*, both parties reversed themselves, before the court of appeals, on positions they had taken before the district court regarding subject-matter jurisdiction. Declining to apply judicial estoppel, the court stated that the parties' "prior litigating positions do not preclude either side from asserting its current position since the issue of subject matter jurisdiction is one we are required to consider, even if the parties have . . . switched sides on the issue." 229 F.3d at 361.

Like the courts, we are also unwilling to place our jurisdictional powers in the hands of litigants. Were judicial estoppel available here, we could be compelled to surrender our jurisdiction to the PLRB if the balance of equities under *New Hampshire v. Maine* favored estoppel. In other words, whether we would retain jurisdiction could depend on the parties' petition-filing and litigation choices over time. Whatever the circumstances under which the Board might appropriately apply judicial estoppel in a future case, we hold it unavailable to dictate our jurisdiction here.

There is no question that the Board has jurisdiction of the Respondent as an employer under Section 2(2) of the Act. The 1974 Health Care Amendments to the Act extended the Board's jurisdiction to nonprofit hospitals and other healthcare facilities.[6] The Respondent is not a political subdivision of the Commonwealth of Pennsylvania, nor is it otherwise excluded from statutory employer status. It is not a member of a class or category of employers over which the Board has declined to exercise jurisdiction under Section 14(c) of the Act.[7] And we have rejected the Respondent's contention that its relationship with Temple University distinguishes it, for jurisdictional purposes, from other employers over which we have jurisdiction under Section 2(2). See *Temple University Hospital, Inc.*, 04-RC-162716, 2017 WL 6379903, at *1. Moreover, although the Respondent raised judicial estoppel in the underlying representation case, a finding that we are constrained to surrender jurisdiction to the PLRB would mean that the PLRB has jurisdiction over the Respondent in all cases, including unfair labor practice cases.

Federal labor policy weighs heavily against allowing judicial estoppel to be used as a ground to limit our jurisdiction in this way. Section 10(a) of the Act, 29 U.S.C. § 160(a), states in relevant part: "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 [i.e., Section 8 of the

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[6] Public Law 93-360, 88 Stat. 395 (July 26,1974).

[7] Sec. 14(c)(1) provides in relevant part that "[t]he Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. § 164(c)(1).

Act]) 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 . . .*" (emphasis added). Pennsylvania law contains "unfair practice" prohibitions that parallel the prohibitions set forth in Section 8 of the Act, and it empowers the PLRB to prevent those unfair practices.[8] Thus, unfair practice proceedings before the PLRB constitute a "means . . . established by law" to prevent the same kinds of misconduct that Section 10(a) empowers the Board to prevent, and Section 10(a) provides that our power to prevent such misconduct "shall not be affected by any other means of . . . prevention . . . established by . . . law." Were we to treat judicial estoppel as a cognizable argument here, the power Congress endowed us with in Section 10(a) could be surrendered to the parties and the history of their petition-filing and litigation choices over time. Even assuming Section 10(a) would permit this, the federal policy embodied in that statutory provision convinces us that we ought not do so. See also *NLRB*

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[8] See, e.g., Pennsylvania Public Employe [sic] Relations Act (the PERA), 43 Pa. Stat. § 1101.1201(a)(1) (prohibiting public employers from "[i]nterfering, restraining or coercing employes in the exercise of the rights guaranteed" by Section 401 of the PERA); *id.* § 1101.1201(a)(3) (prohibiting public employers from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization"); *id.* § 1101.1201(a)(5) (prohibiting public employers from "[r]efusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit"); *id.* § 1101.1301 (empowering the PLRB "to prevent any person from engaging in any unfair practice listed in" the PERA); see also Pennsylvania Labor Relations Act (the PLRA), 43 Pa. Stat. § 211.8(a) (empowering the PLRB "to prevent any person from engaging in any unfair labor practice" listed in the PLRA).

v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786 (1990) (emphasizing "that the NLRB has the primary responsibility for developing and applying national labor policy").

To be sure, the Board does not always exercise the power Congress granted it in Section 10(a). For example, it defers unfair labor practice charges to arbitration where the standards for deferral are met. But federal law favors arbitration as a matter of policy: Section 203(d) of the Labor Management Relations Act declares "[f]inal adjustment by a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Moreover, although Board precedent has oscillated over the years between more and less restrictive deferral standards,[9] the Board has never surrendered its *jurisdiction* over the parties to an arbitrator, and it exercises its jurisdiction to review arbitral decisions and reject those that are repugnant to the Act.[10] Here, in contrast, the Respondent urges us to surrender our jurisdiction over it to the PLRB, and we certainly have no power to review decisions issued by that state board.

Consistent with Section 10(a) and federal labor policy, the Board has not hesitated to assert jurisdiction notwithstanding parties' inconsistent positions on that issue over time. In *Wyndham West at Garden City*, 307 NLRB 136 (1992) (Advisory Opinion), the Board addressed a situation in which an employer had obtained dismissal of a representation petition by

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[9] For a thorough review of this history, see *United Parcel Service*, 369 NLRB No. 1 (2019)

[10] See *id.*

claiming it did not meet the Board's jurisdictional standards, but after the union invoked a state labor board's jurisdiction, the employer reversed course and claimed that it was subject to the Board's jurisdiction. Despite the union's objection to the employer's inconsistent positions, the Board advised that it would assert jurisdiction over the employer. Also, in *We Transport, Inc.*, 215 NLRB 497 (1974), the employer filed a petition with a state labor board, which conducted an election that the union won. A few years later, the employer filed an RM petition with the Board. The Board rejected a dissenting member's argument that the state labor board alone was entitled to assert jurisdiction and found that the employer was subject to the Board's jurisdiction. Similarly here, the fact that the Union previously submitted itself to the PLRB's jurisdiction and subsequently invoked ours ought not control the Board's exercise of its jurisdictional powers. Cf. *Kelly Services, Inc.*, 368 NLRB No. 130, slip op. at 4 (2019) (invalidating an arbitration agreement that sought to limit the Board's power to prevent unfair labor practices). Indeed, the Supreme Court has recognized that the Board cannot be "render[ed] powerless to prevent an obvious frustration of the Act's purposes" through incorporation of "the judicial concept of estoppel into its procedure." *Wallace Corp.*, supra at 253.

The Board has also asserted jurisdiction over nonprofit hospitals irrespective of their prior submission to the jurisdiction of state labor relations authorities. See *Vancouver Memorial Hospital*, 219 NLRB 73, 73 (1975) (Advisory Opinion); *Yale-New Haven Hospital*, 214 NLRB 130 (1974) (Advisory Opinion). Further, in *Management Training Corp.*, 317 NLRB 1355, 1358 (1995), the Board stated that in determining whether to assert jurisdiction over an employer that provides

services to or for an exempt entity, it will consider only whether the employer meets the statutory definition of employer under Section 2(2) and applicable jurisdictional standards. See also *Correctional Medical Services*, 325 NLRB 1061 (1998); *Methodist Hospital of Kentucky*, 318 NLRB 1107 (1996), enfd. in relevant part sub nom. *Pikesville United Methodist Hospital of Kentucky v. United Steelworkers of America,* 109 F.3d 1146 (6th Cir. 1997). As determined in the representation case, there is no question that the Respondent meets both the statutory and monetary requirements for the Board's assertion of jurisdiction, which is appropriate notwithstanding the Respondent's close ties with Temple University.[11]

For these reasons, we hold that judicial estoppel is not available in this proceeding to divest the Board of jurisdiction over the Respondent, and we find that the Board properly asserted jurisdiction in 2016.[12] No other question having been presented for our consideration, we reaffirm the Board's prior finding that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union, and we will issue an appropriate Supplemental Order.

ORDER

The National Labor Relations Board orders that the Respondent, Temple University Hospital, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

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[11] See supra fn. 4.

[12] Having found that judicial estoppel is unavailable to defeat Board jurisdiction, we need not reach the court's second question: whether, if judicial estoppel is available, the balancing of the equities under *New Hampshire v. Maine* favors its application here.

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) (the Union) as the exclusive collective-bargaining representative of all full-time and regular part-time professional medical interpreters and transplant financial coordinators employed by the Respondent as part of the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of all full-time and regular part-time professional medical interpreters and transplant financial coordinators employed by the Respondent as part of the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> A subdivision of Temple University Health System's unit working at Temple University Hospital and Temple University Children's Medical Center comprised of all full-time and regular part-time professional and technical employees [employed by the Respondent], excluding [all other employees,] physicians, nurses, pharmacists, office clerical employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act.

(b) Post at its facilities in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

[13] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and former employees employed by the Respondent at any time since February 23, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 12, 2021

Lauren McFerran
Chairman

William J. Emanuel
Member

John F. Ring
Member

APPENDIX D

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

TEMPLE UNIVERSITY HOSPITAL, INC.
AND TEMPLE ALLIED PROFESSIONALS,
PENNSYLVANIA ASSOCIATION OF STAFF
NURSES AND ALLIED PROFESSIONALS
(PASNAP)

Case 04-CA-174336

May 11, 2018

SUMMARY

The Board granted the General Counsel's Motion for Summary Judgment in this test-of-certification case on the ground that the Respondent failed to raise any issues that were not, or could not have been, litigated in the underlying representation proceeding in which the Union was certified as the bargaining representative of the Respondent's professional medical interpreters and transplant financial coordinators as part of the existing unit of professional and technical employees.

Charge filed by Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP). Members Pearce, McFerran, and Emanuel participated.

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and amended charge filed on April 15 and April 25, 2016, respec-

tively,[1] by Temple Allied Professionals/Pennsylvania Association of Staff Nurses and Allied Professionals (the Union), the General Counsel issued the complaint on January 19, 2018, alleging that Temple University Hospital, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 04-RC-162716.[2] (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer,

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[1] Although the Respondent in its answer denies knowledge regarding portions of par. 1(a) and (b) of the complaint, alleging filing and service of the charge and amended charge, the Respondent admits that the charge and amended charge were filed on the alleged dates and that they were served on the Respondent.

On January 17, 2018, the Acting Regional Director approved withdrawal of the portion of the charge alleging that the Respondent refused to provide information to the Union in violation of Sec. 8(a)(5) and (1) of the Act.

[2] By letter dated February 23, 2016, the Union referenced the certification and requested that the Respondent agree to schedule negotiations. Although the Respondent's answer denies the complaint's allegation that the Union's letter requested recognition and bargaining with the Union as the representative of the professional medical interpreters and transplant financial coordinators, the Respondent admits that the Union's letter referenced the Board's letter certifying the Union as those employees' representative and asked the Respondent to confirm its availability to bargain on one of four stated dates. Further, the Respondent admits that, since February 23, 2016, it has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the professional medical interpreters and transplant financial coordinators. We find that there is no factual dispute that the Union's letter constituted a request for recognition and bargaining regarding those employees.

admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 9, 2018, the General Counsel filed a Motion for Summary Judgment and a brief in support of its motion. On February 13, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent and the Union filed responses.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Acting Regional Director for Region 4's certification of the Union on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board lacks jurisdiction over the Respondent because of its association with Temple University; that, even assuming the Board has jurisdiction over the Respondent, it should exercise its discretion and decline to assert that jurisdiction; that the Board should find that the preexisting unit certified by the Pennsylvania Labor Relations Board (PLRB) does not warrant comity; and that the Union should be estopped from arguing that the Board has jurisdiction because of its prior reliance on PLRB's jurisdiction.[3]

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[3] The Respondent advances an affirmative defense that could not have been raised in the representation proceeding: that the complaint fails to state a claim under the Act upon which relief can be granted. In addition, the Respondent advances the affirmative defense that the union's request for NLRB jurisdiction is barred by the Supreme Court's decision in *New Hampshire v. Maine*, 532 U.S. 742 (2001), and by the doctrines of

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[4]

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laches, estoppel, and/or waiver. The Respondent has not offered any explanation or evidence to support these bare assertions, beyond its previously litigated contentions that the Union has impermissibly changed its position regarding the Board's jurisdiction. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's motion for summary judgment in this proceeding. See, e.g., *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58, slip op. at 1 fn. 1 (2018); *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enfd. 2006 WL 4539237 (D.C. Cir. 2006); *Circus Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995). In addition, insofar as the Respondent's laches argument may relate to delays in the Board's proceedings, the Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. *Entergy Mississippi, Inc.*, 361 NLRB 892, 893 fn. 5 (2014), affd. in relevant part 810 F.3d 287 (5th Cir. 2015), citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); see *NLRB v. Quinn Restaurant Corp.*, 14 F.3d 811, 817 (2d Cir. 1994).

[4] In its response to the Notice to Show Cause, the Respondent acknowledges that generally, in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. This principle is longstanding and endorsed by the Supreme Court. See *Pittsburgh Plate Glass*, 313 U.S. at 162. The Respondent argues, however, that the Board is not precluded from reconsidering such previously litigated issues in order to correct

Accordingly, we grant the Motion for Summary Judgment.[5]

On the entire record, the Board makes the following

Findings of Fact

i. jurisdiction

At all material times, the Respondent has been a corporation engaged in the operation of an acute-care hospital in Philadelphia, Pennsylvania.[6]

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erroneous conclusions from prior proceedings, citing *St. Francis Hospital*, 271 NLRB 948, 949 (1984), and *Sub-Zero Freezer Co.*, 271 NLRB 47, 47 (1984). *St. Francis Hospital* and *Sub-Zero Freezer* are two of a limited number of cases in which the Board has departed from the rule that, in a certification-testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be relitigated and will not be reconsidered. Having reviewed the facts and arguments presented by the Respondent in its response to the Notice to Show Cause, we find no basis for departing from our longstanding rule or disturbing our Decision on Review and Order affirming the Acting Regional Director's decision in the underlying representation case. See *Memorial Hospital of Salem County*, 357 NLRB No. 119, slip op. at 1-2 fn. 5 (2011); cf. *Local 340, New York New Jersey Regional Joint Board*, 365 NLRB No. 61 (2017).

[5] The Respondent's request that the complaint be dismissed is therefore denied.

Member Emanuel did not participate in the underlying representation proceeding. He expresses no opinion on the merits of the Board's decision in that proceeding. Nonetheless, he agrees with his colleagues that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

[6] In its answer, the Respondent denies the complaint allegation that "[a]t all material times, Respondent, a corporation, has

During the year preceding the issuance of the complaint, in conducting its operations described above, the Respondent derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14), and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[7]

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operated an acute-care hospital with four locations in Philadelphia, Pennsylvania." It admits, however, that the Respondent "is a corporation and has operated an acute care hospital in Philadelphia, Pennsylvania since 1996." It further states that, for 125 years before the Respondent's 1996 incorporation, it operated as an unincorporated subsidiary of Temple University.

[7] The Respondent in its answer denies the conclusory allegations in pars. 2(c) and 3 of the complaint that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and a health care institution within Sec. 2(14) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. However, the Respondent's answer admits the underlying factual allegations that, during the year preceding issuance of the complaint, the Respondent derived gross revenues in excess of $500,000, and purchased and received goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania. These admissions are sufficient to establish that the Respondent is engaged in commerce. See *Siemons Mailing Service*, 122 NLRB 81 (1958). Further, in the underlying representation proceeding, the Respondent stipulated that the Union is a labor organization within the meaning of the Act. Accordingly, we find that the Respondent's denials in its answer do not raise any issue

ii. alleged unfair labor practices

A. The Certification

At all materials times John Lasky, Chief Human Resources Officer of Temple University Health System, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.[8]

Following a self-determination election held on January 28, 2016, the Acting Regional Director for Region 4 issued a certification of representative on February 18, 2016, certifying that the Union is the exclusive collective-bargaining representative of "all full-time and regular part-time professional medical interpreters and all full-time and regular part-time transplant financial coordinators employed by the Employer" (the Voting Group) as part of the existing unit of professional and technical employees it currently represents:[9]

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warranting a hearing regarding these allegations. See, e.g., *Spruce Co.*, 321 NLRB 919, 919 fn. 2 (1996), and cases cited there.

[8] The Respondent in its answer denies the complaint's allegation that Lasky has been employed by the Respondent as its Chief Human Resources Officer but states that he holds that position as an employee of Temple University Health System (TUHS). The General Counsel concedes that Lasky is employed by TUHS, rather than the Respondent, and notes that he was alleged as TUHS's employee in the underlying representation case. The Respondent does not dispute that Lasky acts as the Respondent's representative through his position with TUHS.

[9] The existing unit was certified by the PLRB on July 24, 2006. Although the Complaint alleged a different certification date, the General Counsel acknowledges that the correct date is July 24, 2006, as stated by the Respondent.

A subdivision of Temple University Health System's unit working at Temple University Hospital and Temple University Children's Medical Center comprised of all full-time and regular part-time professional and technical employees [employed by the Respondent], excluding [all other employees,] physicians, nurses, pharmacists, office clerical employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act.

The Acting Regional Director further certified that the professional employees wished to be included with nonprofessional employees in a unit for the purposes of collective bargaining.[10] The Union continues to be the exclusive collective-bargaining representative of the unit, including the employees in the voting group, under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated February 23, 2016, the Union requested that the Respondent recognize it as the exclusive collective-bargaining representative of the Voting Group and bargain collectively with the Union as the exclusive collective-bargaining representative of the professional medical interpreters and transplant financial coordinators. Since about February 23, 2016, the Respondent has failed and refused to do so.

The Acting Regional Director's certification substitutes the spelling "employees" wherever the PLRB certification uses "employes."

[10] The professional medical interpreters voted on whether they wished to be included in a unit with nonprofessional employees, as well as voting on whether they wanted to be represented by the Union for purposes of collective bargaining. The transplant financial coordinators voted only on the latter question.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By failing and refusing, since about February 23, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the professional medical interpreters and transplant financial coordinators as part of the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.[11]

ORDER

The National Labor Relations Board orders that the Respondent, Temple University Hospital, Inc.,

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[11] The Charging Party's brief in support of the General Counsel's motion requests that the Board require the Respondent to bargain in good faith with the Union as the exclusive representative of the unit for the period set forth in *Mar-Jac Poultry Co*., 136 NLRB 785 (1962). Such a remedy, however, is inappropriate where, as here, the underlying representation proceeding involved a self-determination election. See *Winkie Mfg. Co.*, 338 NLRB 787, 788 fn. 3 (2003), affd. 348 F.3d 254 (7th Cir. 2003); *White Cap, Inc*., 323 NLRB 477, 478 fn. 3 (1997), and cases cited there.

Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) (the Union) as the exclusive collective-bargaining representative of all full-time and regular part-time professional medical interpreters and all full-time and regular part-time transplant financial coordinators employed by the Respondent as part of the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of all full-time and regular part-time professional medical interpreters and all full-time and regular part-time transplant financial coordinators employed by the Respondent as part of the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> A subdivision of Temple University Health System's unit working at Temple University Hospital and Temple University Children's Medical Center comprised of all full-time and regular part-time professional and technical employees [employed by the Respondent], excluding [all other employees,] physicians, nurses, pharmacists, office clerical

employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Acting Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 23, 2016.

(c) Within 21 days after service by the Region, file with the Acting Regional Director for Region 4 a sworn certification of a responsible official on a form provided

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[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 11, 2018

Mark Gaston Pearce
Member
Lauren McFerran
Member
William J. Emanuel
Member

APPENDIX

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not fail and refuse to recognize and bargain with Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) (the Union) as the exclusive collective-bargaining representative of our professional medical

interpreters and our transplant financial coordinators in the bargaining unit.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our professional medical interpreters and our transplant financial coordinators as part of the following bargaining unit:

A subdivision of Temple University Health System's unit working at Temple University Hospital and Temple University Children's Medical Center comprised of all full-time and regular part-time professional and technical employees [employed by the Respondent], excluding [all other employees,] physicians, nurses, pharmacists, office clerical employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act.

Temple University Hospital, Inc.

The Board's decision can be found at https://www.nlrb.gov/case/04-CA-174336 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 04-RC-162716

TEMPLE UNIVERSITY HOSPITAL, INC.

Employer

and

TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS (PASNAP)

Petitioner

DECISION ON REVIEW AND ORDER

On December 29, 2016, the National Labor Relations Board (Board) granted in part the Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election[1] and invited the parties and interested amici to address (1) whether the Board should exercise its discretion to decline jurisdiction over the Employer; and (2) whether the Board should extend comity to a unit of the Employer's professional and technical employees certified by the Pennsylvania

[1] The Acting Regional Director directed an *Armour-Globe* self-determination election to determine whether the petitioned-for professional medical interpreters and transplant financial coordinators wished to be included in the existing bargaining unit of professional and technical employees employed by the Employer.

Labor Relations Board (PLRB) in 2006.[2] The parties filed briefs on review and responsive briefs, and the American Federation of Labor and Congress of Industrial Organizations filed an amicus curiae brief.

The Board has delegated its authority in the proceeding to a three-member panel. After carefully reviewing the record, briefs on review, and amicus curiae brief, we have decided to affirm the Acting Regional Director's decision. As explained below, we find no compelling reasons to exercise our discretion to decline jurisdiction over the Employer. We further decide to extend comity to the professional and technical unit certified by the PLRB in 2006.

The Employer has not persuaded us to take the rare step of exercising our discretion to decline jurisdiction over this nonprofit hospital that otherwise indisputably meets the Board's jurisdictional standards. The Employer and our dissenting colleague contend that the Board should decline jurisdiction because of the Employer's close ties with Temple University and its long history of bargaining with its represented employees under a state labor relations statute. We find no merit in those arguments.

Although, in certain circumstances, the Board may decline jurisdiction over private sector employers with

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[2] The Board denied the Employer's Request for Review of the Acting Regional Director's finding that: (1) the Employer is not a political subdivision under Sec. 2(2) of the Act; and (2) even assuming principles of judicial estoppel apply, the Petitioner was not estopped from bringing the instant petition. Chairman Miscimarra would have granted the Employer's Request for Review with respect to all of the issues raised therein. He concurred in granting review with respect to whether the Board should exercise its discretion to decline jurisdiction and whether the Board should extend comity to the unit certified by the PLRB.

close ties to a "political subdivision" explicitly excluded from the Act's coverage under Section 2(2) of the Act (see *Management Training*, 317 NLRB 1355, 1358 (1995)), the Board has never held that Temple University is an exempt political subdivision. Instead, the Board has only exercised its discretion to decline jurisdiction over the University because of the "unique relationship between the University and the Commonwealth [of Pennsylvania]." *Temple University*, 194 NLRB 1160, 1161 (1972).

Further, even assuming, arguendo, that the University could be analogized to an exempt political subdivision, we would not discretionarily decline jurisdiction in the circumstances of this case. In *Management Training*, the Board decided that it will assert jurisdiction over an employer, despite its close ties with an exempt government entity, as long as it meets the definition of employer set out in Section 2(2) of the Act and the applicable monetary jurisdictional standards. 317 NLRB at 1358. The Board further explained that "jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employee's [sic] terms and conditions of employment"; instead, the focus should be on whether the private employer controls "some matters relating to the employment relationship" involving the petitioned-for employees, such as to make it an employer under the Act. *Id.* at 1357-1358. Here, the record indicates that the Employer possesses sufficient control over its employees' terms and conditions of employment, including their wages and benefits and the procedures for hiring, discipline, discharge, assignment, promotions, and transfers, to permit meaningful

collective bargaining.[3] Indeed, the University is generally not involved in the day-to-day functioning of labor relations at the Hospital nor does it negotiate collective-bargaining agreements for the Employer. There is also no dispute that the Employer meets the Board's monetary jurisdictional standards. Therefore, applying the test in *Management Training*, we find that the Board should assert jurisdiction over the Employer. The fact that – as argued by the Employer and the dissent – the University also controls some aspects of the employment relationship and the

[3] The Employer and the dissent contend that the Employer is "substantially intertwined" with Temple University at the structural and operational level. In approximately 1995, however, the Employer became a non-profit corporation separate from the University, and at the hearing in this case the parties stipulated that the Employer and the University are not a single employer.

Our dissenting colleague states that "the Board's discretion to decline jurisdiction in a particular case does not depend on whether an employer and an exempt government entity constitute a single employer." He also states that *Management Training Corp.*, supra, "does not preclude, *or even weigh against*, declining jurisdiction as a discretionary matter in this case." (emphasis added). To the contrary, a fundamental premise of *Management Training* is that, as the Act contemplates, the Board should encourage the practice and procedure of collective bargaining to the greatest extent possible in order to minimize industrial strife. 317 NLRB at 1359. That policy objective *does* weigh against declining jurisdiction in this case, where, as described above, meaningful collective bargaining is possible, irrespective of single employer status. Moreover, nothing in the arguments advanced here by the Employer and our dissenting colleague outweighs these considerations that favor extending statutory coverage to the employees in this case.

Employer and University share some infrastructure and services, does not require a different result.[4]

Furthermore, the Commonwealth of Pennsylvania is not involved in the day-to-day operations of the Employer, except insofar as it licenses and regulates the healthcare and educational facilities of any nonprofit hospital corporation in the Commonwealth. Thus, unlike the Board's decision declining to assert jurisdiction over the University, there is no evidence that the Employer is "denominated as an 'instrumentality' of the Commonwealth" or that "there exist extensive, direct state controls" over the Employer's activities. *Temple University*, 194 NLRB at 1161. Accordingly, no "special circumstances" exist to decline jurisdiction as in *Temple University*. See, e.g., *St. Christopher's Hospital for Children*, 223 NLRB 166 (1976) (jurisdiction asserted over nonprofit hospital having contract with Temple University to serve as pediatrics department in the absence of evidence indicating that the considerations that led the Board to discretionarily decline jurisdiction over Temple University were equally applicable).

We also reject the Employer's and our dissenting colleague's contention that exercising jurisdiction will destabilize its decades-long bargaining relationships with the Petitioner and other unions covering multiple bargaining units, which are based on the parties operating under the Pennsylvania Public Employee Relations Act rather than the National Labor Relations Act. "[T]he stable bargaining relationship has been between the Employer and Union, not between the

[4] Nor does the fact that Hospital employees work side-by-side with, and may take direction from, medical staff employed directly by the University, alter our view.

Employer and the PLRB." See *MCAR, Inc.*, 333 NLRB 1098, 1104 (2001). We are confident that the Employer and the unions representing its employees can continue their stable bargaining relationships regardless of which agency exercises jurisdiction over the Employer. Indeed, the Board has repeatedly asserted jurisdiction over bargaining units previously certified by the PLRB. See, e.g., *MCAR, Inc.*, supra. Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction over the Employer.[5]

Nor has the Employer demonstrated that we should decline to extend comity to the unit of professional and technical employees previously certified by the PLRB. The Board will accord comity to a state certification where "the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements." *Doctors Osteopathic Hospital*, 242 NLRB 447, 448 (1979). We find that the

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[5] The Employer argues that as in *Northwestern University*, 362 NLRB No. 167 (2015), an assertion of jurisdiction will not promote uniformity and stability in labor relations. The Board's concerns about uniformity and stability in labor relations in *Northwestern University*, however, are not applicable here, as *Northwestern* involved college athletes and a school in league competition with public colleges over which the Board had no jurisdiction. This case, in contrast, involves a nonprofit hospital and classifications of employees over which the Board has asserted jurisdiction on numerous occasions.

As for the Petitioner's supposed motivation for seeking NLRA jurisdiction—the potential threat posed by litigation that could result in the loss of the union's agency fee provisions—not only is such a threat speculative, but the Petitioner's motivations are not a relevant consideration in deciding whether to decline jurisdiction.

PLRB certification has met these standards in the instant case.

The unit certified by the PLRB is a combined unit of all professional and technical employees, and the professional employees were afforded a separate vote to indicate their preference for joining the unit. The Employer argues that extending comity would contravene the Board's Health Care Rule, Section 103.30 of the Board's Rules and Regulations, because the unit is a non-conforming unit that was certified after the 1989 Health Care Rule. However, the Rule provides that any unit which is not one of the eight specified units *or* a combination among those eight units is "non-conforming." See Section 103.30(f)(5). Because the unit is a combination of two of the eight specified units, it is not a non-conforming unit.

Moreover, the current PLRB certification, while issued in 2006, is for a bargaining unit that was originally certified in 1975 (albeit with a different collective-bargaining representative). The composition of the unit has largely remained the same since then, and there is no contention or indication that the 2006 certified unit included any newly organized employees. Accordingly, even assuming the unit is non-conforming, it was and still is an "existing non-conforming unit[]" and is therefore appropriate within the meaning of the Rule. See Section 103.30(a).

We also reject the Employer's contention that if the Board asserts jurisdiction over the Employer, the 2006 PLRB certification would have been void when issued, and therefore comity cannot be extended to a non-existent PLRB-certified unit.[6] Contrary to the Employer,

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[6] This argument is premised on the Board having had jurisdiction in 2006 under either of two scenarios: (1) by virtue of

whether the Board could have asserted jurisdiction in 2006 is not a factor the Board considers when deciding whether to extend comity. E.g., *The West Indian Co., Ltd.*, 129 NLRB 1203 (1961) (granting comity despite contention of dissenting member that state certification was void *ab initio* because the Board had jurisdiction when certification issued).[7] It therefore

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the 1974 Healthcare amendments to the Act extending jurisdiction to nonprofit hospitals; or (2) by virtue of the Board's 1995 decision in *Management Training*, supra, 317 NLRB 1355. Under this latter scenario, the Employer analogizes the University to an exempt governmental entity and the Employer to a contractor.

[7] The Employer's contention that *Summer's Living Systems, Inc.*, 332 NLRB 275 (2000), enfd. sub nom. *Michigan Community Services, Inc. v. NLRB*, 309 F.3d 348 (6th Cir. 2002), controls this case is misplaced. In *Summer's Living Systems*, the Board found that state certifications issued for bargaining units during a time when the Board declined jurisdiction over the employing contractors (pursuant to *Res-Care, Inc.*, 280 NLRB 670 (1986)), were valid certifications and the Board accordingly extended comity. But as to the state certifications that issued after *Res-Care* was overruled by *Management Training*, supra, the Board found that these were void for want of state jurisdiction at the time of issuance, and on that basis, the Board did not extend comity to those certifications. Notably, prior to the Board's decision in *Summer's Living Systems*, a decision by the Michigan Court of Appeals determined that following issuance of *Management Training*, the state's jurisdiction over various elections held, and certifications issued, after *Management Training*, was pre-empted by the Board's jurisdiction. These elections and certifications were therefore void. See *American Federation of State, County and Municipal Employees v. Department of Mental Health*, 215 Mich. App. 1, 545 N.W.2d 363 (1996).

In this case, the Employer cites *Summer's Living Systems* to support its argument that the PLRB's 2006 certification is void because it was issued after the Board's decision in *Management Training*. The Employer's argument hinges on analogizing Temple University to an exempt government entity and the Employer to a private contractor for the exempt entity, as this

was appropriate for the Acting Regional Director to consider whether to extend comity to the PLRB-certified unit.

Accordingly, we affirm the Acting Regional Director's decision and find it would effectuate the policies of the Act to assert jurisdiction over the Employer, and we extend comity to the PLRB-certified unit of the Employer's professional and technical employees.

ORDER

This case is remanded to the Regional Director for further appropriate action.

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

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was the situation of the parties in *Summer's Living Systems*. As indicated above, however, the Board has never held that Temple University is actually an exempt government entity. Further, unlike the situation in *Summer's Living Systems*, the Board's jurisdiction here does not depend on a change in Board law; rather, the Board has jurisdiction because the Employer is a nonprofit hospital and the Board has had jurisdiction over nonprofit hospitals since 1974. Thus, the only issue here is whether the 2006 certification meets the extant standards for granting comity, and we agree with the Acting Regional Director's determination that it does meet those standards. Finally, even accepting the Employer's exempt entity analogy, the circumstances in *Summer's Living Systems* are distinguishable: unlike that case, there is no intervening state court case that determined, following a change in Board precedent, that the state's jurisdiction over various units of employees was preempted by the Board's jurisdiction. We therefore conclude that *Summer's Living Systems* does not control the outcome of this case.

Chairman Miscimarra, dissenting.

The Petitioner seeks a Board-conducted election to add approximately 11 employees of Temple University Hospital, Inc. ("the Hospital") in two unrepresented classifications to an existing bargaining unit of approximately 665 of the Hospital's professional and technical employees, which existing unit was certified by the Pennsylvania Labor Relations Board ("the PLRB"). The Petitioner presses the Board to conduct an election even though the Hospital has repeatedly offered to include employees in those two classifications to the existing unit under PLRB procedures. Unlike my colleagues, I think that the Board should, as a matter of discretion, decline to assert jurisdiction over the Hospital, thus leaving the Hospital and its unionized employees to bargain collectively under Pennsylvania's Public Employee Relations Act ("the PERA"), 43 P.S. § 1101.101 et seq., as they have done for at least the last 45 years.

The Board is not writing on a blank slate here. Since 1972, the Board has declined to assert jurisdiction over Temple University because of the "unique relationship between the University and the Commonwealth [of Pennsylvania]." *Temple University*, 194 NLRB 1160, 161 (1972). That unique relationship includes the fact that a 1965 Pennsylvania statute, the Temple University-Commonwealth Act, 24 P.S. § 2510-1 et seq., denominates Temple University an "instrumentality" of Pennsylvania, and the state has been substantially involved in the University's financial affairs and governance. *Id.* Until 1995, Temple University Hospital was an unincorporated division of Temple University, and hospital employees were employed by the University. During that time period,

the PERA governed collective-bargaining rights at the hospital.[1]

In 1995, the University incorporated a subsidiary, Temple University Health Systems ("TUHS"), as a shell corporation to hold the University's health-care related assets and separately incorporated Temple University Hospital as a non-profit subsidiary of TUHS. Those acts of incorporation did not impact the applicable legal regime; throughout the 22 years since they occurred, the collective-bargaining relationships between the Hospital and its unionized employees continued to be governed by the PERA rather than by the National Labor Relations Act ("the NLRA").[2]

At present, the Hospital and the University (over which the Board does not assert jurisdiction) remain substantially intertwined, structurally and operationally, as detailed in the Regional Director's Decision and Direction of Election. For example, the University, the Hospital, and TUHS all have interlocking boards of directors, and University officials are involved in the Hospital's day-to-day operations to varying degrees. Additionally, the Hospital's budget must be approved by the TUHS board, which includes the Hospital's

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[1] See, e.g., *Temple University*, 6 Penn. Pub. Employee Rep. ¶ 06087 (1975) (rejecting claim that the National Labor Relations Act governed Temple University Hospital).

[2] See, e.g., *Temple University Hospital Nurses Association*, 42 Penn. Pub. Employee Rep. ¶ 55 (2011) (finding that Hospital unlawfully implemented a policy restricting employees from wearing buttons critical of the Hospital and its quality of care); *Temple University Hospital Nurses Association*, 41 Penn. Pub. Employee Rep. ¶ 174 (2010) (finding that Hospital violated its bargaining obligation when it unilaterally ceased deducting union dues for unit members who continued to work during a work stoppage).

budget as a component of its own. In turn, the University's board of directors must approve the TUHS budget. Further, Hospital employees work side-by-side with medical staff employed directly by the University, and the latter routinely direct the former.[3]

In short, collective bargaining at the Hospital has for a half-century been governed by Pennsylvania statute rather than by the NLRA. Longstanding, stable bargaining relationships have formed and flourished at the Hospital under the state law regime. In fact, the unit of professional and technical employees at issue in this case dates back to 1975. The Hospital and the various unions representing the Hospital's employees are familiar with bargaining against the backdrop of the PERA, which is protective of collective-bargaining rights but which differs from the NLRA in some of its contours.[4] In light of circumstances pre-

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[3] While the Hospital and the University have a close relationship, the majority notes that the parties stipulated that the Hospital and the University are not a "single employer" under the Act, and my colleagues observe that the Board has never before found that the University is an exempt political subdivision under Sec. 2(2) of the Act. However, the Board's discretion to decline jurisdiction in a particular case does not depend on whether an employer and an exempt government entity constitute a single employer. See, e.g., *Northwestern University*, 362 NLRB No. 167 (2015) (declining, as matter of discretion, to exercise jurisdiction in representation proceeding involving private university's grant-in-aid scholarship football players notwithstanding absence of a single-employer relationship with an exempt government entity).

[4] See, e.g., *Philadelphia Housing Authority*, 22 Penn. Pub. Employee Rep. ¶ 22227 (1991) (an employer governed by the PERA may unilaterally implement new terms and conditions of employment only if the parties have reached impasse on the subjects to be implemented *and* the employees are engaged in a work stoppage), affd. *Philadelphia Housing Authority v. PLRB*,

sented (including the Board's declination of jurisdiction over Temple University, the continued interconnectedness between the University and the Hospital, the long history of the PERA governing the Hospital's bargaining relationships, and the Hospital's willingness to add the two classifications to the existing unit under PLRB procedures), I see no persuasive reason for the Board to step in now, fully displace the governing legal regime, and thereby potentially disrupt existing bargaining relationships.[5]

Management Training Corp., 317 NLRB 1355 (1995), cited by the majority, does not preclude, or even weigh against, declining jurisdiction as a discretionary matter in this case. *Management Training* involved a run-of-the-mill federal government contractor. Applying *Res-Care, Inc.*, 280 NLRB 670 (1986), the Regional Director in *Management Training* declined to exercise jurisdiction over the contractor because the United States Department of Labor (DOL) exerted significant control over the contractor's employees' economic terms and conditions of employment, rendering the contractor incapable of engaging in meaningful bargaining. On review, a Board majority overruled *Res-Care* and held that "jurisdiction should no longer be determined on the basis of whether the employer or

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620 A.3d 594 (Pa. Cmwlth. 1993), cited with approval in *Temple University Hospital Nurses Association*, supra, 41 Penn. Pub. Employee Rep. ¶ 174.

[5] *St. Christopher's Hospital for Children,* 223 NLRB 166 (1976), cited by the majority, is readily distinguishable. There, the Board asserted jurisdiction over a nonprofit hospital that held a contract to serve as the pediatrics department of Temple's school of medicine. That hospital was governed by its own trustees and, unlike TUHS and the Hospital, was not related to the University structurally or operationally.

the Government controls most of the employee's [sic] terms and conditions of employment." *Management Training*, 317 NLRB at 1357.

The holding of *Management Training* is inapplicable here, and the facts of that case are distinguishable from those in the instant case. My basis for declining jurisdiction over Temple University Hospital, detailed above, is *not* that most of the employees' terms and conditions of employment are government-controlled or that bargaining between the Hospital and the Petitioner would be meaningless. Unlike here, the contractor in *Management Training* did not have a long history of bargaining with its represented employees under a state labor relations statute. Unlike here, the contractor in that case was not separately incorporated by an entity outside the Board's jurisdiction, it did not remain structurally and operationally intertwined with an exempt entity, and it did not thereafter, for decades, remain governed by state labor relations law. And, unlike here, the petitioner in *Management Training* did not seek to invoke the Board's jurisdiction for the first time to make a modest change to an enormous existing bargaining unit, previously certified by a state labor relations agency, and the employer there did not consent to such a change under state law procedures. In short, *Management Training* does not support the majority's assertion of jurisdiction over Temple University Hospital here.[6]

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[6] While *Management Training* is distinguishable, I agree with the views expressed by former Member Cohen, who dissented in that case. See *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 3 fn. 8 (2016) (Member Miscimarra, concurring).

Further, I disagree with the majority's assertion that the Act's policy of encouraging the practice and procedure of collective

For these reasons, as a matter of discretion, I would decline jurisdiction over Temple University Hospital at this time and dismiss the Petitioner's election petition.[7]

PHILIP A. MISCIMARRA, CHAIRMAN

Dated, Washington, D.C., December 12, 2017.

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bargaining to eliminate industrial strife, cited in *Management Training,* counsels against declining jurisdiction over Temple University Hospital as a discretionary matter under the unique circumstances presented. As described above, employees at the Hospital have a long and productive history of collective bargaining under Pennsylvania statute. Thus, declining jurisdiction as a discretionary matter and maintaining the longstanding status quo would not serve to discourage collective bargaining. To the contrary, it would promote labor stability.

[7] Consequently, I need not and do not reach the issue of whether the Board should extend comity to the existing unit certified by the Pennsylvania Labor Relations Board. Likewise, while I, unlike my colleagues, would have granted the Employer's request for review of the Regional Director's decisions that the Hospital is not a political subdivision exempt from the Board's jurisdiction under Sec. 2(2) of the Act and that the Petitioner is not estopped from urging the Board to assert jurisdiction over the Hospital, see unpublished Order dated December 29, 2016, my conclusion that the Board should not assert jurisdiction over the Hospital as a matter of discretion renders it unnecessary to address those two issues.

APPENDIX F

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

Case 04-RC-162716

TEMPLE UNIVERSITY HOSPITAL, INC.

Employer

and

TEMPLE ALLIED PROFESSIONALS,
PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND
ALLIED PROFESSIONALS (PASNAP)

Petitioner

ORDER GRANTING REVIEW IN PART AND
INVITATION TO FILE BRIEFS

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is granted with respect to the following issues, which the parties and interested *amici* are invited to address:

1. Should the Board exercise its discretion to decline jurisdiction over the Employer Temple University Hospital, Inc.?
2. Should the Board extend comity to the unit of the Employer's professional and technical employees certified by the Pennsylvania Labor Relations Board (PLRB) in 2006?[1]

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[1] See generally *Summer's Living Systems, Inc.*, 332 NLRB 275 (2000), enfd. sub nom. *Michigan Community Services, Inc. v. NLRB*, 309 F.3d 348 (6th Cir. 2002); *Standby One Associates*, 274 NLRB 952 (1985); *Albert Einstein Medical Center*, 248 NLRB 63

The Request for Review is denied in all other respects.[2]

(1980); *Doctors Osteopathic Hospital*, 242 NLRB 447 (1979), enfd. 624 F.2d 1089 (3d Cir. 1980) (Table); *Allegheny General Hospital*, 230 NLRB 954 (1977), enf. denied on other grounds 608 F.2d 965 (3d Cir. 1979); *Mental Health Center of Boulder County, Inc.*, 222 NLRB 901 (1976); *St. Joseph's Hospital*, 221 NLRB 1253 (1975), enfd. 542 F.2d 495 (8th Cir. 1976). In its Request for Review, the Employer argues that if the Board asserts jurisdiction over it in this proceeding, then the certification issued by the PLRB in 2006 is void for want of jurisdiction at the time of issuance. We do not decide the merits of that argument here, but see *Mental Health Center of Boulder County*, above, 222 NLRB at 901-902. Cf. *Summer's Living Systems*, above, 332 NLRB at 277, 286; *Doctors Osteopathic Hospital*, above, 242 NLRB at 450.

[2] In this connection, we find that the Acting Regional Director correctly applied the test in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), in finding that that the Employer Temple University Hospital, Inc. is not exempt as a political subdivision under Sec. 2(2) of the National Labor Relations Act because the Employer was neither created directly by the state so as to constitute a department or administrative arm of the government nor administered by individuals who are responsible to public officials or the general electorate. We do not, however, rely on the Acting Regional Director's citation to *Chicago Mathematics & Science Academy Charter School*, 359 NLRB 455 (2012), as the Board's decision there was subsequently invalidated by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Instead, we find that the Acting Regional Director's analysis is consistent with *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 1–16 (2016). As stated in that case: "Where an examination of the appointment-and-removal method yields a clear answer to whether an entity is 'administered by individuals who are responsible to public officials or to the general electorate,' the Board's analysis properly ends." *Id.*, slip op. at 9.

Further, assuming arguendo that the doctrine of judicial estoppel, as elucidated by the Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742 (2001), applies in Board proceedings, we affirm the Acting Regional Director's conclusion that the Petitioner is not estopped from bringing the instant petition. "[J]udicial

Briefs by the parties not exceeding 50 pages in length and conforming to the requirements of Board Rule 102.67(i) and briefs by *amici* not exceeding 20 pages shall be filed with the Board in Washington, D.C., on or before January 12, 2017. The parties may file responsive briefs on or before January 26, 2017, which may not exceed 25 pages in length. The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/04-RC-162716 under the heading "Service Documents." If assistance is needed in E-Filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or the Executive Secretary Gary Shinners at 202-273-3737.

MARK GASTON PEARCE, CHAIRMAN
PHILIP A. MISCIMARRA, MEMBER
LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., December 29, 2016.

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estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. at 750 (internal quotation and citation omitted). We agree with the Acting Regional Director's findings that processing the petition will not confer an unfair advantage on the Petitioner or impose an unfair detriment on the Employer; there is no evidence that the Petitioner misled the PLRB, and there is an inadequate basis to believe the PLRB would have reached a different result had the Petitioner taken some contrary position before the PLRB.

Member Miscimarra would grant the Employer's Request for Review with respect to all of the issues raised therein. While he concurs in granting review with respect to whether the Board should exercise its discretion to decline jurisdiction and whether the Board should extend comity to the unit certified by the PLRB, Member Miscimarra finds it unnecessary at this time to pass on the precedent cited by his colleagues in fn. 1, supra.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-1111
Consolidated with 21-1124
NLRB-04CA174336

TEMPLE UNIVERSITY HOSPITAL, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

TEMPLE ALLIED PROFESSIONALS,
PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND
ALLIED PROFESSIONALS,

Intervenor

September Term, 2022

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker and Childs, Circuit Judges

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ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

September 6, 2022

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk