Nos. 18-1150 & 18-1164

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TEMPLE UNIVERSITY HOSPITAL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

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

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Temple University Hospital, Inc. was the respondent before the NLRB and is the petitioner/cross-respondent before the Court.

2. The NLRB is the respondent and cross-petitioner before the Court; the NLRB's General Counsel was a party before the NLRB.

3. The labor union Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals, was the charging party before the NLRB and has intervened on behalf of the NLRB.

B. Rulings Under Review: This case is before the Court on the Hospital's petition for review and the NLRB's cross-application for enforcement of a Decision and Order issued by the Board on May 11, 2018, and reported at 366 NLRB No. 88.

C. Related Cases: This case has not previously been before the Court.

/s/ Linda Dreeben

Linda Dreeben
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Dated at Washington, D.C.
This 9th day of January 2019

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FINAL BRIEF GLOSSARY

National Labor Relations Act	the Act
National Labor Relations Board	NLRB
Pennsylvania Labor Relations Board	PLRB
Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals	The Union
Temple University	The University
Temple University Health System	The Health System
Temple University Hospital	The Hospital

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Temple University Hospital to review, and the cross-application of the National Labor Relations Board ("NLRB") to enforce, an NLRB Order issued against the Hospital. The NLRB's

Decision and Order is reported at 366 NLRB No. 88 (May 11, 2018). (JA 54-57.)[1] In its Order, the NLRB found that the Hospital unlawfully refused to bargain with its employees' duly elected collective-bargaining representative, Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals ("the Union"). Before the Court, the Union has intervened on the NLRB's behalf.

The NLRB had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 160(a), which authorizes the NLRB to prevent unfair labor practices affecting commerce. The NLRB's Order is final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of NLRB orders may be filed in this Court, and Section 10(e), 29 U.S.C. § 160(e), which allows the NLRB, in that circumstance, to cross-apply for enforcement. Both the Hospital's petition for review and the NLRB's cross-application for enforcement were timely filed.

Because the NLRB's Order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v.*

[1] References preceding a semicolon are to the NLRB's findings; those following are to the supporting evidence.

Greyhound Corp., 376 U.S. 473, 477-79 (1964). Section 9(d), however, does not give the Court general authority over the representation proceeding, but instead authorizes review of the NLRB's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the [NLRB]." 29 U.S.C. § 159(d). The NLRB retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUES

After the Union won a secret-ballot election to add employees to an existing unit, the Hospital refused to bargain. The ultimate issue is whether the NLRB properly found that the Hospital's refusal violated Section 8(a)(5) and (1) of the Act, which in turn depends on four issues relating to the NLRB's certification of the Union as representative of the unit in question:

1. Whether the NLRB reasonably rejected the Hospital's argument that it is a "political subdivision" of the Commonwealth of Pennsylvania exempt from the definition of "employer" under Section 2(2) of the Act.

2. Whether the NLRB properly exercised its discretion to assert jurisdiction over the Hospital.

3. Whether the NLRB properly exercised discretion to grant comity to the unit determined to be appropriate by the Pennsylvania Labor Relations Board more than 40 years ago.

4. Whether the NLRB properly exercised its discretion to find that the Union was not estopped from filing its representation petition with the NLRB.

RELEVANT STATUTORY AND REGULATORY ADDENDUM

The addendum attached to this brief contains all applicable statutory and regulatory provisions.

STATEMENT OF THE CASE

This case involves the Hospital's refusal to bargain with the Union after the Hospital's professional medical interpreters and transplant financial coordinators voted in an NLRB-conducted secret-ballot election to join an existing unit of professional and technical employees. The NLRB found that the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1), and ordered the Hospital to bargain with the Union. (JA 54-57.) The Hospital does not dispute that it has refused to bargain. Instead, it claims that the NLRB lacks jurisdiction over the Hospital because of its relationship to Temple University, which, the Hospital argues, is a "political subdivision" of the Commonwealth of Pennsylvania and therefore exempt from coverage under Section 2(2) of the Act. In alternative arguments, the Hospital contends that the

NLRB should have exercised its discretion to decline jurisdiction over the Hospital, that the NLRB erred by granting comity to the Pennsylvania Labor Relations Board's ("PLRB") 40-year-old unit certification, and that judicial estoppel bars the Union from arguing that the NLRB has jurisdiction. The NLRB's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

I. THE NLRB'S FINDINGS OF FACT

A. Facts Underlying the NLRB's Assertion of Jurisdiction over the Hospital

Temple University, founded in 1888, acquired the Hospital in 1910. In 1965, the Commonwealth of Pennsylvania established the University as a "state-related institution in the Commonwealth system of higher education," the same designation it gave to the University of Pittsburgh and two other universities. (JA 217, 220.)

Before 1995, the Hospital operated as an unincorporated division of the University. In 1995, the University created Temple University Health System to hold the assets of the University's health care-related institutions, including the Hospital. The University is the Health System's sole shareholder. (JA 15; JA 79, 139.) Around the same time, the Hospital was incorporated as a private non-profit

charitable organization with the Health System as its sole shareholder. (JA 15; JA 79.)

The University, Health System, and Hospital each have their own boards of directors and bylaws. (JA 15; JA 1282-1301, 1364-1387, 1421-1442, 1541-45.) Under the Health System's bylaws, the University appoints, and can remove, the Health System's board of directors. Under the Hospital's bylaws, the Health System appoints, and can remove, the Hospital's board of directors. (JA 15; JA 1285-86, 1367-68.) The Hospital's bylaws specify that the president of the University, the chair of the University's board, and the chief executive officer of the Health System serve as voting ex officio members. Non-voting ex officio members include the dean of the University medical school and the chief operating officer of the Health System. (JA 16; JA 1367.) No public officials serve on the boards of either the Health System or the Hospital. (JA 16; JA 83.)

Both the Hospital and the University receive appropriations from the Commonwealth. (JA 16; JA 96.) Unlike the University, the Hospital is not required to report to the Pennsylvania governor or general assembly on its use of the appropriations. (JA 26; JA 221.) Also unlike the University, the Hospital is not subject to certain Pennsylvania laws, including the Right to Know Act (65 P.S. §§ 67.101, et seq.), the Adverse Interest Act (71 P.S. §§ 776.1, et seq., as

amended), and the Public Official and Employee Ethics Act (65 Pa.C.S.A. §§ 1101, et seq., as amended). (JA 16-17; JA 218-220, 222, 1176.)

Neither the Commonwealth nor the University is involved in the Hospital's day-to-day labor relations. (JA 16-17, 27; JA 84, 152, 1175.) As for the Health System, its staff, in consultation with the University counsel's office, develop human resources policies for the Hospital and its other subsidiaries. (JA 17; JA 1171.) In addition, a team composed of Health System and Hospital staff conduct collective-bargaining negotiations on behalf of the Hospital.[2] (JA 17; JA 1175.) While University and Health System labor relations personnel may confer on collective-bargaining matters when common issues are involved, University staff do not negotiate collective-bargaining agreements covering Hospital employees and cannot bind the Hospital to collective-bargaining agreements or grievance settlements. The University plays no day-to-day role in the Hospital's operations or labor relations. (JA 17-18; JA 152, 1174-75.) Collective-bargaining agreements covering the Hospital's employees are not submitted to the boards of the Hospital, Health System, or University for formal approval. (JA 18; JA 1174.)

[2] The Union and Hospital stipulated before the NLRB that they treat the Hospital and the Health System as interchangeable "for purposes of who is designated the employer for purposes of collective-bargaining." (JA 18 n.4; JA 1175.)

B. Bargaining History and Representation Proceedings

The PLRB originally certified a unit of the Hospital's professional and technical employees in 1975, when the Hospital was an unincorporated division of the University. (JA 15, 49.) The NLRB had, just three years prior, declined to exercise jurisdiction over the University because it was "a quasi-public" institution, and asserting jurisdiction "would not effectuate the policies of the Act." *See Temple Univ.*, 194 NLRB 1160, 1161 (1972). In 1995, however, the Hospital separated from the University and incorporated as a private, non-profit corporation. (JA 15.)

In 2005, the Union filed a petition with the PLRB to represent the Hospital's professional and technical employees. Those employees comprised a bargaining unit that had been previously certified by the PLRB and was then represented by a different union. (JA 1197-1201.) In that proceeding, both the Union and the Hospital stipulated, in opposition to the incumbent union, that the PLRB had jurisdiction rather than the NLRB. The PLRB agreed and conducted an election, which the Union won. In 2006, the PLRB certified the Union as the bargaining representative of the previously certified professional and technical unit. (JA 13, 18; JA 1176, 1198, 1201.) Thereafter, the parties engaged in collective-bargaining and entered a series of agreements, the most recent of which expired on September 30, 2016. (JA 19.)

On October 27, 2015, the Union petitioned the NLRB for an *Armour-Globe* election, seeking to include previously unrepresented professional medical interpreters and transplant financial coordinators in the existing unit of professional and technical employees. (JA 13; JA 9, 65.) 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 Rush Univ. Med. Ctr. v. NLRB*, 833 F.3d 202, 205 (D.C. Cir. 2016); *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Mach. & Stamping Co.*, 3 NLRB 294 (1937). Initially, the NLRB's Regional Director dismissed the petition, but after the Union requested review, he reinstated it and ordered a hearing. (JA 10-12.)

The Hospital objected to the proposed unit, arguing that it is exempt from the NLRB's jurisdiction as a "political subdivision" of the Commonwealth of Pennsylvania; that even if it were not exempt, the NLRB should decline to exercise its discretionary jurisdiction; that the NLRB should not grant comity to the PLRB's previous unit certification; and that judicial estoppel precluded the Union from asking the NLRB to invoke its jurisdiction. (JA 13-14.)

Following a hearing, the Acting Regional Director issued a Decision and Direction of Election finding that the NLRB had jurisdiction over the Hospital because it is an employer under the Act, rejecting the Hospital's other claims, and directing an election. (JA 14.) The Acting Regional Director applied the NLRB's

political subdivision test, endorsed by the Supreme Court, which requires the entity seeking the exemption to establish that it was "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB v. Natural Gas Util. Distr. of Hawkins Cty.*, 402 U.S. 600, 604-05 (1971). The Acting Regional Director noted the Hospital's admission that the first prong of *Hawkins County* did not apply and found that the Hospital had failed to prove it was a political subdivision under the second prong. (JA 25-27 & n.6.) Thereafter, the Union won a secret-ballot election by a vote of 11 to 1, and the Acting Regional Director certified the Union as the collective-bargaining representative of both voting groups, as part of the existing technical-professional unit. Thus, the certification brought the entire unit under the NLRB's jurisdiction. (Ballot tallies & cert. (JA 39-43.)

On December 29, 2016, the NLRB (Chairman Pearce and Member McFerran; Member Miscimarra dissenting) issued an order granting in part the Hospital's request for review of the Acting Regional Director's decision. (JA 44-45.) In its order, the NLRB agreed with the Acting Regional Director that the Hospital was not exempt as a political subdivision under either prong of the *Hawkins County* test, and that the Union was not estopped from filing the representation petition with the NLRB. (JA 44-45 n.2.) The NLRB, however,

granted review on two questions: (1) whether it should exercise its discretion to decline jurisdiction over the Hospital, and (2) whether it should extend comity to the PLRB's certification of the professional and technical unit. (JA 44.) The NLRB also invited the parties and interested *amici* to file briefs on these questions. (JA 44.) On December 12, 2017, the NLRB issued a Decision on Review and Order, finding "no compelling reasons to exercise our discretion to decline jurisdiction over the [Hospital]," and extending comity to the unit certified by the PLRB in 1975 and again in 2006. (JA 46.)

C. The Unfair Labor Practice Case

The Hospital contested the validity of the certification by refusing the Union's bargaining demand. In response, the Union filed an unfair-labor-practice charge, and the NLRB's General Counsel issued a complaint alleging that the Hospital's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1). The General Counsel subsequently filed a motion for summary judgment. The Hospital opposed, again arguing that the NLRB lacked jurisdiction over the Hospital, that the NLRB should have exercised its discretion to decline jurisdiction, that the PLRB unit did not warrant comity, and that the Union should have been estopped from arguing the NLRB has jurisdiction. (JA 54.)

On May 11, 2018, the NLRB (Members Pearce, McFerran, and Emanuel) issued a Decision and Order granting the General Counsel's motion for summary

judgment and finding that the Hospital violated the Act by refusing to bargain with the Union. The NLRB found that all representation issues raised by the Hospital in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding. (JA 54.)

The NLRB's Order requires the Hospital to cease and desist from the unfair labor practice found and from, 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, 29 U.S.C. § 157. Affirmatively, the Order directs the Hospital, on request, to bargain with the Union as the representative of the unit employees and to post a remedial notice. (JA 56-67.)

STANDARD OF REVIEW

The NLRB's interpretation of the Act must be upheld if it is reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). In reviewing the NLRB's interpretation of the Act, courts have long recognized that "the function of striking [a] balance to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the [Board], subject to limited judicial review." *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957).

This deferential standard of review applies to every interpretation of the Act by the NLRB; no exception exists for interpretations regarding "jurisdictional or legal questions[s] concerning the coverage of the Act." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984). The Supreme Court recently reaffirmed that courts must accord such deference to an agency's interpretation of a statute within its expertise, including on questions of agency jurisdiction. *City of Arlington v. FCC*, 529 U.S. 290, 307 (2013). Moreover, this Court has squarely held that it "will not disturb the [NLRB's] discretionary decision to assert its jurisdiction 'absent a showing that [the NLRB] acted unfairly and caused substantial prejudice to the affected employer.'" *Human Dev. Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991) (quoting *NLRB v. Parents & Friends of the Specialized Living Ctr.*, 879 F.2d 1442, 1448 (7th Cir. 1989)).

The NLRB's findings of fact are "conclusive" if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial if "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the NLRB's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Id.* at 488.

SUMMARY OF THE ARGUMENT

The Court should uphold the NLRB's finding that the Hospital violated the Act by refusing to bargain with the Union. Before the NLRB, the Hospital defended its conduct by claiming it is a "political subdivision" of the Commonwealth of Pennsylvania and therefore exempt from the NLRB's jurisdiction under Section 2(2) of the Act. The NLRB reasonably found that the Hospital failed to meet the Supreme Court-endorsed political-subdivision test, which required the Hospital to establish that it was either (1) created directly by the state 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 (1971).

The Hospital challenges only the NLRB's finding that it failed the second prong of the *Hawkins County* test. On that issue, the NLRB reasonably concluded that the Hospital is not administered by individuals who are accountable to any public officer or to the general electorate. The dispositive question in the second-prong analysis is whether the board members of the entity are selected or removed by public officials pursuant to state law. Here, the Hospital's bylaws and the stipulated facts establish that no board members are selected or subject to removal by any public official. Rather, the board is appointed and removed by the Health

System pursuant to the Hospital's corporate bylaws, and without the involvement of any public official. Nor does any public official have authority over the Hospital's collective-bargaining or labor relations. Thus, the Hospital fails to prove that it is exempt from the NLRB's jurisdiction.

The NLRB also properly rejected the Hospital's argument that it should exercise its discretion to decline jurisdiction over the Hospital. The NLRB may decline jurisdiction if it determines that asserting jurisdiction would not serve the purposes of the Act or that the effect of the dispute on commerce is not sufficiently substantial. Applying the court-approved standard set out in *Management Training*, 317 NLRB 1355 (1995), for determining whether to decline the exercise of its discretionary jurisdiction, the NLRB found "no compelling reasons" to do so here because the Hospital meets the definition of employer under the Act and the NLRB's established monetary jurisdictional standard. In making this finding, the NLRB determined that the Hospital possesses sufficient control over its employees' terms and conditions of employment to permit meaningful collective bargaining.

Finally, the NLRB reasonably rejected the Hospital's affirmative defenses that the NLRB erred by granting comity to the PLRB's 40-year-old certification and that the Union should have been judicially estopped from seeking NLRB jurisdiction. The NLRB cannot be faulted for granting comity to a certification

that comported with due process, met the requirements of the Act, and has been in place, with amendments, for more than 40 years. Nor has the Hospital cited any cases requiring the NLRB to decline jurisdiction simply because a union previously asked a state labor board to exercise its jurisdiction. In sum, the Hospital has failed to provide any reason for disturbing the NLRB's discretionary exercise of its own jurisdiction.

ARGUMENT

THE NLRB PROPERLY FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

A. The NLRB Reasonably Found that the Hospital Is Not a "Political Subdivision" Exempt from the NLRB's Jurisdiction

1. Applicable principles

Section 2(2) of the Act exempts "any State or political subdivision thereof" from the definition of statutory "employer[s]" that are within the NLRB's jurisdiction. 29 U.S.C. § 152(2). The term "political subdivision" is not defined in the Act or explained in the legislative history, and the [NLRB's] construction of that ambiguous statutory term is "entitled to great respect." *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 604-05 (1971). *Accord Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 716-17 (D.C. Cir. 2000) (the Court will defer to the NLRB's reasonable interpretation of the political-subdivision exemption).

Under well-established NLRB law, endorsed by the Supreme Court, the statutory exemption for political subdivisions is limited to entities that are either: "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Hawkins Cty.*, 402 U.S. at 604-05; *Midwest Div.-MMC, LLC v. NLRB*, 867 F.3d 1288, 1296 (D.C. Cir. 2017). In determining whether an entity meets the *Hawkins County* test, the NLRB may consider the extent of control exerted "by public officials or the polity more generally," with the "key" question being whether "ultimate authority over policymaking remains with the public." *Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 773-74 (5th Cir. 2018). Exemptions from the Act's coverage should be narrowly construed, and the NLRB and reviewing courts must take care to ensure that they "are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

The Hospital did not argue before the NLRB, and does not contend in its opening brief to the Court, that it is exempt as a political subdivision under *Hawkins County*'s first prong, which would require the Hospital to prove that it was "created directly by the state, so as to constitute [a] department[] or

administrative arm[] of the government." 402 U.S. at 604-05. (JA 27 n.10.)[3] As we now show, the Hospital also is not a political subdivision under *Hawkins County*'s second prong.

2. The Hospital is not administered by individuals who are responsible to public officials or the general electorate

The NLRB properly rejected the Hospital's claim that it is a "political subdivision" under the second prong of *Hawkins County*. (JA 25-27, 44 & n.2.) An entity is a "political subdivision" under the second prong only if it is "administered by individuals who are responsible to public officials or to the general electorate." *Hawkins Cty.*, 402 U.S. at 604-05. As this Court has held, the pertinent question in determining whether such responsibility exists 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. In answering this "dispositive question," the NLRB "examines whether the composition, selection, and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents."

[3] Because the Hospital did not argue to the Board that it was exempt under *Hawkins County's* first prong, that issue is not before the Court. *See* 29 U.S.C. §160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). In any event, even if the Hospital had made the argument below, it waived the issue by not raising it in the opening brief. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000).

Hyde Leadership, 364 NLRB No. 88, 2016 WL 4524108, at *9. This inquiry is relevant because the "latter indicate that appointment and removal are controlled by private individuals—as opposed to public officials—and the entity will be subject to the [NLRB's] jurisdiction." *Id. Accord Jefferson Cty. Cmty. Ctr. for Developmental Disabilities v. NLRB*, 732 F.2d 122, 125, n.3 (10th Cir. 1984), *overruled on other grounds*, *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999); *Crestline Mem'l Hosp. Ass'n, Inc. v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982).[4]

If a majority of the board "is *not* subject to selection or removal by public officials or the general electorate, then the entity *for that reason* fails the second alternative test for being a political subdivision." *Voices*, 905 F.3d at 776 (quoting *StarTran, Inc. v. Occupational Safety & Health Review Comm'n*, 608 F.3d 312,

[4] By contrast, in *NLRB v. Princeton Memorial Hospital*, 939 F.2d 174 (1991), the Fourth Circuit rejected the distinction drawn by its sister circuits between governing boards established via corporate bylaws and those created by law, finding it was not "a meaningful one based upon the record before us." *Id*. at 178. In *Princeton*, however, the employer was established and operated by an entity whose board members were selected from and approved by the board of another entity whose entire board was subject to ratification and removal by the city council. *Id*. at 178 n.5.

323 (5th Cir. 2010) (emphasis in original). *Accord The Pennsylvania Virtual Charter Sch.*, 364 NLRB No. 87, 2016 WL 4524109, at *13.

In the present case, the NLRB found that "no government entity has the authority to appoint or remove a Hospital board member, and no member of the board of directors is a government official or works for a government entity." (JA 26; JA 83.) Nor do the Hospital's bylaws require that its board of governors be public officials or appointed or removed by public officials. (JA 26; JA 1367, 1541.) Rather, the Hospital's bylaws specify that its board members are appointed and removed by the Health System. (JA 1367-68.) Thus, the NLRB reasonably concluded that "[t]he fact that the Hospital's governing board is subject solely to private appointment and removal is the critical and determinative factor in the second prong of the *Hawkins County* analysis." (JA 26.)

The Hospital nevertheless argues that it is a political subdivision because "courts have treated [the Hospital] as a state actor under federal law." (Br. 53.) As an initial matter, the Hospital's "state actor" argument is irrelevant to the NLRB's determination and, in any event, incorrect. Critically, "[a]n entity may be a state actor for some purposes but not for others." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 813 (9th Cir. 2010) (citation omitted). *Accord Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991) (explaining that, in certain circumstances, private parties may be found to have acted under color of state law for purposes of

discrimination claims under 42 U.S.C. § 1983). Similarly, entities may be treated as public for some purposes, but that "is not the same thing as saying they are political subdivisions of the state." *Voices*, 905 F.3d at 777. *See also Truman Med. Ctr., Inc. v. NLRB*, 641 F.2d 570, 573 n.2 (8th Cir. 1981) (noting that IRS ruling is "not determinative of the meaning of the section 2(2) exemption"). Thus, any finding that the Hospital has acted under color of state law for Section 1983 purposes is irrelevant to the NLRB's reasonable determination that it is not a political subdivision under Section 2(2) of the Act.[5]

Moreover, the Hospital fails to establish that its board is directly accountable to public officials "[b]y virtue of its relationship" with the University. (Br. 41.) In making this claim, the Hospital relies on the fact that a quorum of the University's board members (one-third) are appointed by public officials, and the University's board has the power to appoint and remove members of the Health System's board, which in turn has the power to appoint and remove members of the Hospital's board. (Br. 44 & n.5.) But the NLRB's test does not ask whether a *quorum* of the board is selected or subject to removal by public officials. Rather, it asks whether

[5] As the Hospital knows, the U.S. Department of Labor made the same well-settled point to a union representing University employees in rejecting that union's argument that it was not required to file annual financial reports under the Labor-Management Reporting and Disclosure Act because the University is a political subdivision. (JA 148.)

a *majority* is. *See Midwest Div.-MMC*, 867 F.3d at 1297 ("the pertinent question is whether a majority of the individuals who administer the entity . . . are appointed by and subject to removal by public officials"). *Accord Voices*, 905 F.3d at 776.

In any event, the Hospital's argument is premised on its erroneous claim that the University is a political subdivision—a finding the NLRB has never made—that controls the Hospital through the Health System. Indeed, as the Hospital conceded in the instant case (*see* JA 15 n.2), in 1972 the University admitted that it was an employer under Section 2(2) of the Act. *See Temple Univ.*, 194 NLRB 1160, 1161 (1972). Although the NLRB declined to exercise jurisdiction over the University at that time, it did so because of the University's "unique relationship" with the Commonwealth, not because it found the University to be a political subdivision under Section 2(2). *Id*.

Moreover, even assuming for the moment that the University was an exempt political subdivision, that would not automatically render the Hospital itself exempt. As the Court has explained, the fact that an exempt institution "shared in some degree the regulation of employment conditions would not ipso facto bar an assertion of jurisdiction over" a different, non-exempt, institution. *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 774 n.29 (D.C. Cir. 1969). What matters instead is whether the non-exempt institution, like the Hospital here, "is fully capable of bargaining effectively with the Union regarding the wages, hours, and

other conditions of employment of its employees." *Id*. at 775. The record clearly establishes that the Hospital, which has had a bargaining relationship with the Union for over a decade, is more than capable of bargaining.

Further, the question before the NLRB was not the University's status but the Hospital's. As the NLRB found, "even if" the University were a political subdivision, "the Hospital is not administered by individuals who are responsible to public officials or to the electorate," and "[t]here is no requirement in the Hospital's bylaws that the board of governors be public officials or appointed and removed by public officials." (JA 26.) These circumstances—where no hospital board member, let alone a majority of them, is subject to selection or removal by any public official—amply support the NLRB's finding that the Hospital fails prong two of the *Hawkins County* political-subdivision test under the Court's settled law.

3. Neither the Commonwealth nor the University is involved in the Hospital's day-to-day operations or labor relations

While there may be "some situations in which it is ambiguous whether an entity is subject to enough public control to make it a political subdivision of the state," *Voices*, 905 F.3d at 775-75, this is not that situation. *Cf. Aramark*, 179 F.3d at 875 (the NLRB "need not apply the governmental control test before exercising jurisdiction under § 2(2) of the Act"). Where the NLRB finds a private entity to be

a political subdivision, the state or municipality either created the entity or ultimately controlled it. *See Crestline Mem'l Hosp*., 668 F.2d at 245-46 & n.2 (collecting cases). The Hospital has provided no evidence that the Commonwealth controls its operations.

Indeed, the Hospital's bylaws establish that its board, which is appointed by the Health System, "has the duty and responsibility for the ultimate conduct of the Corporation." (JA 1369.) Further, while the Hospital was previously an unincorporated division of the University, in 1995 it incorporated as a private, nonprofit corporation with no direct oversight by the University. (JA 15; JA 139.) The Hospital's evidence of control "cannot override the significance of the entirely private selection of [hospital] policymakers, a feature at odds with the ordinary conception of a political subdivision of a state." *Voices*, 905 F.3d at 777.

In any event, any control by the University over the Hospital is at best "indirect, dilute, and remote," as the NLRB stated in *Children's Hospital of Pittsburgh*, 222 NLRB 588, 589 (1976), a case that is directly analogous to the situation here. Like the University here, the University of Pittsburgh is a state-related institution partially funded by the Commonwealth, which also appoints one-third of its trustees. *See Children's*, 222 NLRB at 589. (JA 220.) The NLRB nevertheless asserted jurisdiction over Children's Hospital because neither the

University of Pittsburgh nor the Commonwealth exerted any direct control over that hospital. *Children's*, 222 NLRB at 589.

Similarly, as the Hospital stipulated here, neither the University nor the Commonwealth controls labor relations, collective-bargaining, or day-to-day operations of the Hospital. (JA 18; JA 152, 1173-75.) Instead, the Hospital's collective-bargaining agreements with various unions are negotiated by its administrators and are not submitted to the boards of the Hospital, the Health System, the University, or any public official. (JA 17-18; JA 1171.) Moreover, Hospital managers in the employees' departments make decisions regarding hiring, discipline, discharge, assignment, promotions, and transfers. (JA 18; JA 1173.) Under these circumstances, the NLRB reasonably determined that "the Hospital itself controls significant matters relating to its employees' employment relationship, [and] is an employer within the meaning of Section 2(2) of the Act." (JA 27.)

Thus, contrary to the Hospital's claims (Br. 40-42), this case is not analogous to a memorandum issued by the NLRB's Division of Advice in *Northern Diagnostic Services, Inc.*, Case 18-CA-60338, 2011 WL 6960025 (Dec. 13, 2011). As an initial matter, an Advice memorandum is not NLRB law. *See, e.g.*, *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting as "rather silly" the employer's argument that the NLRB's decision was

unreasonable because it conflicted with a General Counsel advice memorandum). In any event, the facts of *Northern Diagnostic* provide a marked contrast to those at issue here. In that case, the local hospital commission—a political subdivision under the first prong of *Hawkins County*—operated the local hospital and created Northern Diagnostic to take over some of the hospital's operations. *Northern Diagnostic*, 2011 WL 6960025, at *1-2, 4. Unlike the Hospital here, Northern Diagnostic was required to follow several state laws governing public entities, the commission approved its budget, and the hospital made significant employment decisions for it. *Id*. at *5. There is no similar degree of control by a Commonwealth-created entity here, and the Hospital stipulated that the University is not involved in labor relations or employment decisions.

The Hospital's other myriad arguments and claims do not establish that the University controls the Hospital to such an extent as to make it a political subdivision. For example, while the Hospital claims it was created "to support" the University's mission (Br. 43), that is not enough to establish the Section 2(2) exemption. Otherwise, as the Seventh Circuit explained, "seeking to accomplish something that the state wants accomplished" would transform every "subsidized farmer [into] a political subdivision." *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 663 (7th Cir. 1990).

Nor is the Hospital helped by its argument that a "significant overlap" of personnel with the University, including senior managers and doctors, renders it a political subdivision. (Br. 45.) Such a relationship does not indicate that the University, much less the Commonwealth, controls the Hospital's personnel. *See Children's*, 222 NLRB at 588-89 (hospital not a political subdivision despite overlap of personnel with state-related university); *Sw. Texas Pub. Broad. Council*, 227 NLRB 1560, 1562 (1977) (broadcaster affiliated with state university not a political subdivision despite overlap of personnel). Thus, the NLRB properly asserted jurisdiction over this nonprofit hospital because the overwhelming weight of the evidence shows that the Hospital is not administered by individuals who are responsible to public officials or the general electorate.

B. The NLRB Properly Exercised Its Discretion To Assert Jurisdiction Over the Hospital

While the NLRB's statutory jurisdiction measures to "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause," *NLRB v. Reliance Fuel Oil Corp*., 371 U.S. 224, 226 (1963), it is nonetheless within the NLRB's discretion to decline to assert jurisdiction over employers in certain circumstances. Thus, the NLRB has declined jurisdiction where it determines the assertion of jurisdiction would not serve the purposes of the Act or where the effect of the dispute on commerce is not sufficiently substantial. *See*

NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 684 (1951); 29 U.S.C. § 164(c)(1). The Court will not reverse the NLRB's decision to exercise its discretionary jurisdiction "absent a showing that [it] acted unfairly and caused substantial prejudice to the affected employer." *Human Dev. Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991) (citation omitted). The Hospital failed to make this showing.

In *Management Training*, 317 NLRB 1355 (1995), the NLRB announced that in determining whether to exercise its discretion to decline jurisdiction over an employer, it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." 317 NLRB at 1458. *Management Training* has been approved by every court that has considered it. *See Aramark Corp. v. NLRB*, 179 F.3d 872, 877-82 (10th Cir. 1999) *(en banc*); *NLRB v. Young Women's Christian Ass'n*, 192 F.3d 1111, 1117-18 (8th Cir. 1999); *Pikeville United Meth. Hosp. v. NLRB*, 109 F.3d 1146, 1152-1153 (6th Cir. 1997); *NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 755 (7th Cir. 1998); *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56, 59 (4th Cir. 1997); and *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994, 998 (9th Cir. 1997). The NLRB's decision here comports with the judicially-approved standard.

Applying that standard, the NLRB found "no compelling reasons to exercise [its] discretion to decline jurisdiction over the [Hospital]." (JA 46.) First, the Hospital stipulated that it meets the monetary jurisdictional standards. (JA 46.) Next, as explained above, the NLRB found that the Hospital meets the definition of employer under Section 2(2) of the Act. (JA 27 n.10, JA 47.) Specifically, the NLRB noted that even assuming the University to be an exempt political subdivision, the Hospital "possesses sufficient control over its employees' terms and conditions of employment . . . to permit meaningful collective bargaining." (JA 47.) As shown above (p. 5), the Hospital has operated as a separate nonprofit organization since 1995. It is not a joint employer with the University, and neither the University nor the Commonwealth is involved in the Hospital's day-to-day labor relations or collective bargaining. (JA 47-48 & n.3.) Because the Hospital clearly is an employer within the meaning of Section 2(2) of the Act, the NLRB's decision to assert jurisdiction is "essentially unreviewable." *Human Dev.*, 937 F.2d at 661.

Nevertheless, the Hospital continues to press its claim that the Hospital and University are "functionally and operationally intertwined . . . such that there is no rational basis to treat [them] differently." (Br. 55.) As the NLRB explained, however, the Hospital is not significantly different from other non-profit hospitals over which it has asserted jurisdiction, and the Commonwealth is not involved in

its operations except to the extent that it regulates any nonprofit hospital in Pennsylvania. (JA 27, JA 48.) Nor is operating a hospital the type of function found to be "so basic or traditional a governmental function as to warrant the [NLRB's] declining to assert jurisdiction." (JA 27.) *See also Truman Med.*, 641 F.2d at 572 (hospital that "assumed the statutory responsibilities" of city and county to care for indigent patients is not transformed into a political subdivision). Thus, the NLRB reasonably found that, unlike the situation involving the University in 1972, no special circumstances exist here that would warrant declining jurisdiction over the Hospital. (JA 48.) *See Temple Univ.*, 194 NLRB at 1161 & n.5 (special circumstances, including the University's status as a "quasi-public" institution, Commonwealth funding, and "extensive, direct state controls of the University's activities," warranted declining jurisdiction).

Contrary to the Hospital's claim, the NLRB's decision will not disrupt existing bargaining relationships. (Br. 55-56.) As the NLRB explained, the extant bargaining relationships are between the Hospital and the unions, not between the unions and the PLRB. (JA 48.) *See MCAR, Inc.*, 333 NLRB 1089, 1104 (2001) (explaining that the "stable bargaining relationship" at issue existed between the employer and union, not the employer and the PLRB). Nothing in the NLRB's decision uproots those relationships or disturbs the employees' represented status, and "[t]here is every expectation that the stable bargaining relationship can

continue regardless of which agency exercises jurisdiction over the [Hospital]." *MCAR*, 333 NLRB at 1104. Although the Hospital professes concern for the other unions that have bargaining relationships overseen by the PLRB (Br. 56), those unions expressed no complaints about the NLRB's exercise of jurisdiction here. To the contrary, responding to the NLRB's invitation (OGR), the AFL-CIO, the umbrella organization with which the other unions are affiliated, filed an amicus brief arguing in favor of NLRB jurisdiction. (AFL br.) Indeed, some employees at Jeanes Hospital, another Health System subsidiary, are already under NLRB jurisdiction. (JA 63, 1539-1540.)

Finally, the Court should not entertain the Hospital's irrelevant argument that the Union's motivation for filing its representation petition should have compelled the NLRB to decline jurisdiction in this case. (Br. 57.) A petitioner's motive, even its "[d]ubious character, evil or unlawful motives, or bad faith . . . cannot deprive[] the [NLRB] of its jurisdiction." *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 18 (1943). *Accord IBEW Local 1316 (Superior Contractors)*, 271 NLRB 338, 341 (1984).

C. The NLRB Properly Exercised Its Discretion To Grant Comity to the 40-year-old PLRB Certification

The Hospital further attacks the NLRB's decision by complaining that it should not have extended comity to the unit certified by the PLRB in 2006. (Br.

33-40.) Whether a unit is appropriate for bargaining under the Act "lies largely within the discretion of the [NLRB], whose decision, if not final, is rarely to be disturbed." *S. Prairie Constr. Co. v. Operating Eng'rs, Local 627*, 425 U.S. 800, 805 (1976) (internal quotation marks omitted). *Accord Randell Warehouse of Ariz., Inc. v. NLRB*, 252 F.3d 445, 447-48 (D.C. Cir. 2001). Because the Hospital fails to show that the NLRB abused its discretion, this challenge fails.

Comity, as used in this context, refers to the NLRB's decision to recognize a union certified by a state labor board, rather than after an NLRB-conducted election. Given the nature of the NLRB's jurisdiction, circumstances in which a state agency will have certified a union in the first place are limited. A state labor board may gain jurisdiction over an employer that would ordinarily come under NLRB jurisdiction if the NLRB either declines to exercise its jurisdiction in a certain area, or expressly cedes jurisdiction. 29 U.S.C. § 160(a); 29 U.S.C. § 164(c). *See also Cornell Univ.*, 183 NLRB 329, 331 (1970). But if the NLRB in its discretion finds it appropriate to exercise its jurisdiction, then under preemption principles that jurisdiction becomes exclusive. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959); *Sears, Roebuck & Co. v. Carpenter's Dist. Council (San Diego)*, 436 U.S. 180, 202 (1978).

The NLRB traditionally extends comity to state labor board certifications where the state proceedings reflect the "true desires" of the employees, there were

no election irregularities, and the proceedings comported with due process. *Doctors Osteopathic Hosp*., 242 NLRB 447, 448 (1979), *enforced*, 624 F.2d 1089 (3d Cir. 1980) (table). The Hospital makes no claim that the state election proceedings failed to reflect the employees' true desires, involved election irregularities, or denied the Hospital due process. In fact, at the hearing in this case, the Hospital conceded that the PLRB's election procedures met each of those requirements. (JA 121-22.)

The Hospital nevertheless argues that the NLRB should not have granted comity to the PLRB certification because the unit is nonconforming under the NLRB's Health Care Rule ("the Rule") governing hospital bargaining units. The Hospital also claims that comity is inappropriate because the PLRB lacked jurisdiction when it issued the 2006 certification, rendering that certification void. As we now show, the NLRB reasonably rejected both arguments.

1. The NLRB reasonably found that the unit is appropriate for bargaining because it comports with the Health Care Rule

In 1974, Congress extended coverage of the Act to all acute-care hospitals, including nonprofit hospitals. *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 614-15 (1991); Pub. Law 93-360, 88 Stat. 395 (1974). In 1989, in light of Congress's admonition "to avoid the undue proliferation of bargaining units in the health care industry," the NLRB engaged in notice-and-comment rulemaking. *Am. Hosp.*

Ass'n, 499 U.S. at 608-09. The resulting Rule provides that eight specified units (nurses, physicians, other professionals, technical employees, skilled maintenance employees, business office clericals, guards, other nonprofessionals) are appropriate in acute-care hospitals, with three exceptions for extraordinary circumstances, extant nonconforming units, and combinations of two or more of the specified units. 29 C.F.R. §103.30; *Am. Hosp. Ass'n*, 499 U.S. at 608.

First, as the NLRB reasonably found, because the unit at issue here combined two of the specified units—professional and technical employees—it is appropriate under the Rule. (JA 49.) The Rule itself expressly states that in addition to the specified eight appropriate units, "various combinations of units may also be appropriate." 29 C.F.R. §103.30(a). *Accord San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1185 (D.C. Cir. 2012). Moreover, the PLRB accorded professional employees the opportunity to vote on whether to be included in the unit, as required by Section 9(b)(1) of the Act, 29 U.S.C. §159(b)(1).[6] (JA 49.) *See Doctors Osteopathic Hosp.*, 242 NLRB at 448 n.6 (granting comity where parties stipulated to unit appropriateness and professionals voted separately for

[6] Section 9(b)(1) of the Act specifies that professional employees may be included in a unit with nonprofessional employees only if "a majority of such professional employees vote for inclusion in such unit." *See generally Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950).

inclusion in the unit). Thus, as the NLRB found, the unit certified by the PLRB fully conforms to the Rule and the proscriptions of the Act. (JA 49.)

Second, the NLRB reasonably found that even if, as the Hospital claims (Br. 34-35), the combined unit was "nonconforming" under the Rule, it was a preexisting nonconforming unit, which the Rule explicitly contemplates. (JA 49.) As the NLRB noted, the PLRB originally certified the combined professional and technical unit in 1975, when the Hospital was an unincorporated division of the University, an entity over which the NLRB had declined jurisdiction. (JA 15, 49.) Moreover, the representation petition that the Union filed with the PLRB in 2006 sought an election to represent the previously certified unit, which was then represented by another union. (JA 1197.) Additionally, in the instant proceeding before the NLRB, "there [was] no contention or indication that the 2006 certified unit included any newly organized employees." (JA 49.) Accordingly, the NLRB appropriately concluded here that even if the unit was "non-conforming" under the Rule, it was an existing nonconforming unit and therefore appropriate under the Rule. (JA 49.) *See* 29 C.F.R. §103.30(a); *Rush Univ. Med. Ctr. v. NLRB*, 833 F.3d 202, 205 (D.C. Cir. 2016) (noting exception from Health Care Rule for preexisting nonconforming units).

Despite its concession that the petitioned-for job classifications share a community of interest with the existing unit and with each other, the Hospital

nevertheless complains about the composition of the unit. (Br. 34-35.) None of these complaints show the NLRB abused its discretion by granting comity to a unit the Hospital concedes is appropriate for bargaining.

For example, the Hospital's bare assertion that another unit represented by a different union includes "some technical employees" (Br. 34) is hardly evidence that a particular job classification belongs in a technical or professional unit under the Rule. *See, e.g.*, *St. Vincent Hosp., LLC*, 344 NLRB 586 (2005) (unit of nonprofessionals included some "technician" classifications); *Rhode Island Hosp*., 313 NLRB 343, 354-55 (1993) ("burn and rehabilitation medicine technicians" properly belonged in nonprofessional unit rather than technical unit). Moreover, the NLRB—with the Court's approval—has exempted *Armour-Globe* elections, like the one here, from the Rule's requirement that any additional units include all previously unrepresented employees who "would fit within the same standardized unit under the Rule." *Rush Univ.*, 833 F.3d at 205, 207. Thus, there is no requirement that the Union, which sought a self-determination election to add employees to a preexisting unit, was required to include all unrepresented employees belonging to that unit. *Id.* at 208.

Nor is there any basis for the Hospital's argument that the NLRB erred in granting comity to the PLRB certification because the unit previously included employees from the University. (Br. 35.) As the Court has explained, a subset of a

previously recognized bargaining unit has the relevant bargaining history and is entitled to the presumption of appropriateness. *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1085 (D.C. Cir. 2003).

2. The PLRB's original unit determination is not void

The Hospital next argues that the PLRB lacked jurisdiction when it issued the unit certification in 2006, and therefore that the certification is void. (Br. 36-39.) But the NLRB has not limited its discretion to extend comity only to situations where the state labor board had jurisdiction at the time of the certification. For example, in *The West Indian Co., Ltd.*, 129 NLRB 1203 (1961), the NLRB extended comity to an election conducted by the Virgin Island's labor board at a time when the territory lacked jurisdiction. In granting comity, the NLRB noted that the parties had voluntarily participated in the election and the election "was conducted without substantial deviation from due process requirements." *Id*. at 1203-04. Similarly, where a state certified a health care unit after the 1974 health care amendments went into effect (and thus after the NLRB acquired jurisdiction over hospitals), the NLRB has considered whether the state "election procedure was free of irregularities and reflected the true desires of the employees," not whether the state had jurisdiction to certify the unit. *Malcom X Ctr. for Mental Health, Inc*., 222 NLRB 944, 944 (1976) (comity not extended because professional employees were not given the opportunity to vote separately

for inclusion in the unit, as required by Section 9(b)(1) of the Act). *See also Mental Health Ctr. of Boulder Cty., Inc.*, 222 NLRB 901, 901-02 (1976) (same). *Cf. Corporacion De Servicios Legales*, 289 NLRB 612, 614 n.2 (1988) (dismissing rival union's election petition where Territory originally certified the unit in question, without inquiring as to the circumstances under which the parties became subject to the NLRB's jurisdiction).

The Hospital does not help its cause by citing (Br. 36-39) *Summer's Living Systems, Inc.*, 332 NLRB 275 (2000), *enf'd. sub nom. Michigan Community Services, Inc. v. NLRB*, 309 F.3d 348 (6th Cir. 2002). As the NLRB explained here (JA 49 n.7), although it declined to extend comity to the state representation proceedings in *Summer's Living*, the circumstances were wholly distinguishable from the instant case. Thus, in *Summer's Living*, the employers never consented to the elections or bargained with the unions, and the state elections were ultimately vacated by a state court. *Summer's Living*, 332 NLRB at 283, 286. By contrast, here the Hospital and the Union agreed to the PLRB election, stipulated to its jurisdiction, and bargained for more than a decade. Further, in the instant case there was no intervening state court ruling clarifying that the state lacked jurisdiction. And as explained above, the combined unit of professional and technical employees comports with the NLRB's Health Care Rule, which allows that combination. Moreover, the Hospital conceded that the PLRB election

procedures reflected the employees' true desires, there were no election irregularities, and the proceedings comported with due process. Under these circumstances, the Hospital fails to prove the NLRB abused its discretion in granting comity to this 40-year-old unit.

D. The NLRB Properly Exercised Its Discretion To Find that the Union Was Not Estopped from Seeking NLRB Jurisdiction

The Hospital next argues (Br. 24-32) that the Union should have been estopped from filing a representation petition with the NLRB because 12 years ago it took the same position as the Hospital and argued that the PLRB had jurisdiction over the Hospital's employees. But the Hospital fails to explain why the Union's claim before the PLRB in 2006 should restrict the NLRB's ability to assert its own exclusive statutory jurisdiction in this case.[7]

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). *Accord Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 899–900 (D.C. Cir. 2015). The doctrine is distinct from other estoppel doctrines such as claim and issue preclusion; it is equitable, and its invocation by a court is discretionary. *New*

[7] As noted above (p. 31), the Hospital's argument regarding the Union's motivation (Br. 29) is simply irrelevant and cannot support a finding of estoppel.

Hampshire, 532 U.S. at 748-50. *Accord Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 928 (D.C. Cir. 2016). The factors typically considered by courts in deciding whether to apply judicial estoppel include whether a party's later position is "clearly inconsistent with its earlier position"; whether the party asserting the inconsistent position prevailed in the earlier case, so that a court's acceptance of the inconsistent position "would create the perception that either the first or the second court was misled"; and whether the party asserting an inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 750-51 (internal quotation marks and citations omitted). The NLRB properly exercised its discretion and determined that none of these factors support the application of judicial estoppel.

But first, as the NLRB noted (JA 45 n.2), it is not clear whether the doctrine of judicial estoppel applies to it. *See generally Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51,60 (1984) (leaving unanswered whether estoppel applies against government agencies); *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980) ("judicial estoppel focuses on the integrity of the judicial process"). Further, courts have rejected claims that judicial estoppel applies to jurisdictional questions. *See Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227-28 (10th Cir. 2011) (rejecting defendant's argument that would "allow judicial estoppel to substitute for subject-matter jurisdiction"). *Accord Gray v.*

City of Valley Park, Mo., 567 F.3d 976, 982 (8th Cir. 2009) (rejecting judicial estoppel defense and concluding that the court had jurisdiction to entertain plaintiff's claim despite its change in tactics).

Moreover, although the Union and the Hospital previously agreed to have their case heard by the PLRB, that should not prevent the NLRB—an independent federal adjudicatory agency—from asserting its own statutorily-granted jurisdiction. After all, the PLRB proceedings did not involve the NLRB and so cannot be considered a prior phase of this case to which judicial estoppel would apply. *See Abtew*, 808 F.3d at 899-900 (declining to apply judicial estoppel against federal agency where the agency determinations complained of by the plaintiff were not a prior phase of his case). *Accord Galaxy Towers Condo. Ass'n*, 361 NLRB 364, 367 n.3 (2014) (adhering to "general rule not to apply judicial estoppel where the Government was not a party to the prior proceeding"). *See also We Transport, Inc.*, 215 NLRB 497, 498 (1974) (rejecting argument that election petition filed with the NLRB was a continuation of prior election proceeding before the state labor board). In addition, the NLRB has rejected arguments that it is precluded from asserting its own jurisdiction, even where it had previously declined jurisdiction over the same employer. *Fayette Elec. Coop., Inc.*, 316 NLRB 1118, 1119-20 (1995).

At bottom, the Hospital ignores fundamental preemption principles by seeking to prevent the NLRB from asserting its own jurisdiction based on the incorrect premise that once parties decide to petition a state labor board, the federal agency is forever foreclosed from asserting its jurisdiction over those employees. But the NLRB bears the "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Moreover, the NLRB "does not exist for the adjudication of private rights; it acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (internal quotation marks omitted). For these reasons, judicial estoppel should not be used to render the NLRB unable to enforce the Act. *See Heckler*, 467 U.S. at 60 ("it is well settled that the Government may not be estopped on the same terms as any other litigant" because to do so would undermine the rule of law).

In any event, even assuming arguendo that the doctrine does apply, the NLRB agreed with the Acting Regional Director that the Union was not estopped from filing a representation petition with the NLRB. Thus, as the NLRB reasonably concluded, although the Union took inconsistent positions in the two forums, there was "no evidence" it misled the PLRB. (JA 24, 45 n.2.) The Hospital does not argue that the Union made any misrepresentations to the PLRB,

only that the Union asserted it was "quite confident that the NLRB would decline jurisdiction," a position with which the Hospital evidently agreed (Br. 28). (JA 18; JA 1176.) The Union's confidence about the NLRB's position on a question that had never been put to it is not the kind of misrepresentation to which the Court applies judicial estoppel. *See Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) (affirming application of judicial estoppel where plaintiff failed to disclose all other lawsuits as required by bankruptcy court and falsely held himself out as a proper party in a discrimination claim). In addition, the Hospital provides no basis for speculating that "the PLRB would have reached a different conclusion" if the Union had argued for NLRB jurisdiction in the state proceeding. (Br. 30.) The record shows otherwise, as the incumbent union did argue for NLRB jurisdiction, but the PLRB rejected that view. *In the Matter of the Employees of Temple Univ. Health Sys.*, 39 PPER ¶ 49, 2006 WL 6824746 (Apr. 21, 2006).

Finally, the NLRB properly rejected the Hospital's claims that the Union, by arguing in favor of PLRB jurisdiction in 2006, gained unfair advantages, resulting in unfair detriment to the Hospital. (Br. 30-31.) The Hospital's argument fails to acknowledge that the Union and Hospital were on the same side, both arguing that the PLRB had jurisdiction. *See* JA 1176 (in proceedings leading up to PLRB certification in 2006, "the parties stipulated that [the Hospital and Health System] were employers within the meaning of the Pennsylvania Employe Relations Act.")

Thus, the Hospital itself sought whatever advantages and detriments accrued to either party under the PLRB's jurisdiction. Indeed, the specific examples cited by the Hospital show that *the Hospital* will gain advantages under the Act that it did not have under Pennsylvania's labor statute: advance notice of any strike action and the ability to implement final contract offers following impasse. (Br. 30-31.) The Hospital should not now be heard to complain that it received the benefit of the bargain it sought.

CONCLUSION

For the foregoing reasons, the NLRB respectfully requests that the Court deny the Hospital's petition for review and enforce the NLRB's Order in full.

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January 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TEMPLE UNIVERSITY HOSPITAL, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
v.	)	
	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 18-1150 &
	)	18-1164
Respondent/Cross-Petitioner	)	
and	)	
	)	
TEMPLE ALLIED PROFESSIONALS,	)	
PENNSYLVANIA ASSOCIATION OF STAFF	)	
NURSES AND ALLIED PROFESSIONALS	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,893 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 9th day of January 2019

UNITED STATES COURT OF APPEALS
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PENNSYLVANIA ASSOCIATION OF STAFF	)	
NURSES AND ALLIED PROFESSIONALS	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 9th day of January 2019

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 2 of the Act (29 U.S.C. §152) provides in relevant part:

When used in this Act [subchapter]--

***

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for

> an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such

temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board

with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 14 of the Act (29 U.S.C. § 164) provides in relevant part:

***

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act [to subchapter II of chapter 5 of title 5], 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: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act [subchapter] shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

THE NLRB'S HEALTH CARE RULE

29 C.F.R. § 103.30, Appropriate Bargaining Units in the Health Care Industry, provides:

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.

(2) All physicians.

(3) All professionals except for registered nurses and physicians.

(4) All technical employees.

(5) All skilled maintenance employees.

(6) All business office clerical employees.

(7) All guards.

(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

1) "Hospital" is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) "Acute care hospital" is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3) "Psychiatric hospital" is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term "rehabilitation hospital" includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(5) A "non-conforming unit" is defined as a unit other than those described in paragraphs (a) (1) through (8) of this section or a combination among those eight units.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended, by adjudication.