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I. INTRODUCTION

Respondent Temple University Hospital, Inc. (“TUH” or the “Hospital”) submits this statement of position in response to the invitation of the National Labor Relations Board (the “Board” or “NLRB”) following its acceptance of the remand from the United States Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) in *Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729 (D.C. Cir. 2019). This test-of-certification case arises from the efforts of the Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (“PASNAP” or the “Union”) to supplant the jurisdiction of the Pennsylvania Labor Relations Board (“PLRB”) that has governed labor relations between TUH and thousands of unionized employees at the Hospital for decades and to replace it with NLRB jurisdiction.

To accomplish this goal, the Union filed a petition for representation with the Board in 2015 seeking to add 11 employees to the Union’s existing bargaining unit of 665 technical and professional employees through an *Armour-Globe* self-determination election. The Acting Regional Director for Region Four determined NLRB jurisdiction was appropriate, extended comity to the 665-employee unit previously certified by the PLRB, and ordered an election among the 11 petitioned-for employees, in which the Union prevailed. Despite granting review on several grounds, the Board ultimately refused to disturb the Region’s decision. The D.C. Circuit, however, held that the Board, after assuming *arguendo* that judicial estoppel applied to Board proceedings, had misapplied the teachings of the U.S. Supreme Court’s *New Hampshire v. Maine* decision regarding judicial estoppel. The D.C. Circuit therefore remanded the case for the Board to consider, as an issue of first impression, whether judicial estoppel is available in NLRB proceedings and, if so, whether to invoke it on the facts of this case.

As discussed more fully below, the Board should determine that the judicial estoppel doctrine is available in Board proceedings and that judicial estoppel is appropriate in

this case under the *New Hampshire v. Maine* factors because the Union has engaged in blatant and unjustified forum shopping and manipulation of the legal system by seeking to avail itself of NLRB jurisdiction. The Union successfully argued to the PLRB in 2006 that the PLRB, rather than the NLRB, had jurisdiction over this bargaining unit. In the ten years that followed, the Union also affirmatively invoked the jurisdiction of the PLRB in more than two dozen cases the Union brought in that forum, including an unfair labor practice case the Union continued pursuing for almost a year after the Acting Regional Director directed an election in the underlying representation case here. TUH reasonably relied on the Union's consistent assertions of the PLRB's jurisdiction over a period of many years, which materially affected the way TUH approached collective bargaining and strike disputes, among other topics. Yet, perhaps the most staggering aspect of the Union's conduct in this case is the Union's written admission to TUH in 2015 that its motivation for seeking NLRB jurisdiction was to avoid the anticipated U.S. Supreme Court ruling that mandatory agency fees for public employees are unconstitutional and its apparent belief that the ruling would only apply to its members if it remained under the PLRB's jurisdiction. Given that the Union's behavior and motive both undermine the integrity of the legal system, the balance of the equities strongly favors the Board applying the doctrine of judicial estoppel to dismiss the unfair labor practice charge, revoke the certification in the underlying representation case, and allow the PLRB to continue its jurisdiction over labor relations at TUH.

Finally, TUH renews its request that the Board permit the parties to submit briefs addressing the three additional errors raised by TUH's petition for review to the D.C. Circuit, but which the court did not reach on the merits due to its finding on the judicial estoppel issue. In particular, the other issues TUH raised in its petition for review were that the Board erred by:

(1) failing to find that TUH is exempt from coverage of the Act as a political subdivision; (2) refusing to exercise its discretion to decline jurisdiction over TUH because such jurisdiction does not effectuate the purposes of the Act; and (3) improperly extending comity to the PLRB certification. As addressed more fully at the end of this statement of position, the Board has the discretion to reconsider these issues even if they go beyond the scope of issues the court identified for remand.¹

II. FACTUAL BACKGROUND

A. Temple University Hospital

TUH is an acute care hospital located in Philadelphia. TUH became a part of Temple University—Of The Commonwealth System of Higher Education (“TU” or the “University”) in 1910 and its relationship with TU is recognized by the Pennsylvania General Assembly in TU’s charter. B-6, ¶ 1. Given TU’s status as a state-related university and its close relationship to the Commonwealth of Pennsylvania, the Board has declined to exercise jurisdiction over TU since 1972. *See Temple Univ.*, 194 N.L.R.B. 1160 (1972). TUH was an unincorporated division of TU for more than 80 years, but became a separate nonprofit corporation in 1995 whose sole member is Temple University Health System, Inc. (“TUHS”), an entity TU created to hold its healthcare-related assets and which is wholly-owned by TU. Tr. 12/16/15 at 77-78, 80-82; E-5, ¶ 3. The parties stipulated in the representation proceedings that

¹ TUH reasserts and preserves all arguments that it presented in Case No. 04-RC-162716 and incorporates by reference: (1) TUH’s brief on review dated January 26, 2017; (2) TUH’s request for review dated March 10, 2016; (3) TUH’s post-hearing brief dated January 6, 2016; (4) TUH’s responsive or reply briefs in support of the foregoing briefs; (5) the hearing transcripts and documentary evidence before the Acting Regional Director for Region Four; and (6) TUH’s briefs to the D.C. Circuit in Case Nos. 18-1150 and 18-1164.

TUHS and TUH can be referred to interchangeably for collective bargaining purposes. B-7, ¶ 23.

While TUH and TU are separate corporate entities, they retain close operational ties with one another. In keeping with its purpose of supporting TU's School of Medicine and associated research programs, TUH serves as the clinical arm of TU's medical school and the primary site of service for all TU physician practices. B-7, ¶ 4; Tr. 12/16/15 at 79, 105-06. Given the important role that TUH plays in the educational and research missions of TU, TU maintains extensive reserved powers over both TUH and TUHS. *See* E-3; E-6; Tr. 12/16/15 at 93-95. The structural and operational interrelationship between TU, TUHS, and TUH has been addressed at length in TUH's prior briefs. *See, e.g.*, TUH Br. on Review at 5-10; TUH Final App. Br. at 2-11.

Labor relations at TU have always been covered by the Public Employee Relations Act ("PERA") and subject to the jurisdiction of the PLRB. *See* B-6, ¶ 23. At the time of the petition, TUH and TUHS had approximately 3,500 unionized employees in 11 bargaining units. *See* B-2, ¶ 5. These bargaining relationships, like TU's relationships with its bargaining units, have always been governed by the PLRB.

B. The Union

The Union came to represent TAP after petitioning the PLRB in 2005 for an election in the 1975 Unit, a technical and professional employees unit at TU and TUH represented by 1199C that had been certified by the PLRB in 1975. *In re Employees of Temple Univ. Health Sys.*, Case No. PERA-R-05-498-E, 39 PPER ¶ 49, 2006 PA PED LEXIS 69, *4, *10 (PLRB Order Directing Submission of Eligibility List, April 21, 2006). 1199C asserted that the PLRB lacked jurisdiction over TUH if, as a then-recent PLRB decision had found, TUH and TU were separate employers for the purposes of collective bargaining. *Id.* at *6.

The PLRB invited briefing on the jurisdiction issue. *Id.* at *10. The Union asserted that the PLRB, rather than the NLRB, had jurisdiction over TUH. E-1. Counsel for the Union, who is counsel for the Union in these proceedings, wrote to the PLRB:

In suggesting that there is would be [sic] jurisdictional significance to a determination of the PLRB that the University and TUHS are separate employers, the Intervenor [1199C] has ignored one salient point, to wit, that the record adduced at the hearing in this matter, (which incorporates a great deal of the record in Case No. PERA-U-03-318-E) [demonstrates that] TUHS is a wholly owned subsidiary of the University. Indeed, the *University* is the sole member of the TUHS corporation. Given that [1199C] does not appear to contest that the University is indeed a public employer within the meaning of Section 301(1) of PERA, [1199C]’s argument must be fail [sic].

E-1 (emphasis in original). Relying on the Board’s 1972 *Temple University* decision and *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), , the Union concluded, “PASNAP is quite confident that the NLRB would decline jurisdiction over TUHS.” E-1.

The PLRB agreed and ordered an election among the TUH employees from the 1975 Unit. *In re Employes of Temple Univ. Health Sys.*, 2006 PA PED LEXIS 69, *12. PASNAP prevailed in the election and has represented TAP since then. At the time the Union filed the representation petition, the TAP unit contained approximately 665 employees. B-2, ¶ 5.

Before the 2015 petition to the NLRB, TUH and the Union treated their relationship as falling under the PLRB’s jurisdiction. PASNAP filed at least 26 ULP complaints with the PLRB alleging violations of PERA. *See* B-2, ¶ 12. The parties collectively bargained in accordance with PERA. B-2, ¶ 6. Additional classifications were added to TAP by the Union through the PLRB’s consent process. B-2, ¶ 12 (listing unit clarification petitions involving PASNAP since 2005); *PASNAP v. Temple Univ. Health Sys.*, PERA-C-14-259-E, 48 PPER ¶ 54, 2016 PA PED LEXIS 84, *13 (PLRB Proposed Decision & Order, Nov. 30, 2016) (noting four classifications were added to TAP with TUH’s agreement in 2014).

In August 2015, Bill Cruice, then-Executive Director of the Union, sent the following message:

I would like to meet with you for an hour or so fairly soon to discuss the strong possibility that PASNAP will soon take the position that Temple University Hospital is, in fact, subject to the jurisdiction of the NLRB rather than the PLRB...A key part of the context of this move by the union is the coming politically motivated US Supreme Court *Freiderichs* [sic] decision, which will deem unconstitutional agency fee (fair share) provisions for those employers considered “state actors” under the 1st and 14th amendments.

E-14. At the time of the 2015 petition to the NLRB, the Union had a ULP charge pending in front of the PLRB in which it asserted that TUH was a public employer under PERA. B-2, ¶ 12. The Union never withdrew that ULP, pursuing the action before the PLRB at the same time that it pursued the representation petition before the NLRB until the PLRB issued an order in TUH’s favor in November 2016—more than a year after the petition was first filed with the NLRB and 10 months after the Regional Director found that the NLRB should exercise jurisdiction here. *Temple Univ. Health Sys.*, 2016 PA PED LEXIS 84 (finding no unfair labor practice).

III. PROCEDURAL HISTORY

A. The Representation Case

1. The Petition and Hearing

The Union filed the representation petition on October 27, 2015, seeking to represent two unrepresented classifications of TUH employees: professional medical interpreters and transplant coordinators. The Regional Director initially dismissed the petition in November 2015, stating that the purposes of the Act would not be effectuated based on the Board’s 1972 *Temple University* decision and the relationship between TU, TUHS, and TUH. The Regional Director then reversed himself, concluding that the NLRB should exercise jurisdiction over

TUH, notwithstanding the Board's declination of jurisdiction over TU, and by extension TUH, in 1972.

A hearing was held on December 16-17, 2015. As the Hearing Officer recognized, the petition sought representation of 11 employees in a stand-alone unit. Tr. 12/16/15 at 21 (“[A]s a preliminary matter, the only unit before us are the 11 or so employees and is the only unit that would be certified. The unit that was certified by the [PLRB], we can’t have an *Armour-Globe* addition to a unit that we haven’t certified.”). The Union orally amended its petition on January 5, 2016 to request comity to TAP and an *Armour-Globe* self-determination election. TUH repeatedly offered to add the petitioned-for classifications to TAP under the PLRB’s procedures, which did not require an election, but the Union refused. *See* Tr. 12/16/15 at 58; Decision on Review and Order (“DRO”) at 7.

2. The Region’s Decision and Direction of Election

The Acting Regional Director for Region 4 issued the Decision and Direction of Election (“DDE”) on January 22, 2016, concluding the Board should exercise jurisdiction over TUH and ordering an election among the 11 employees covered by the petition. The Acting Regional Director found that the Union was not judicially estopped from bringing the petition based on its repeated jurisdictional statements to the PLRB. DDE at 11-13. In addition, the Acting Regional Director determined that TUH was not an exempt political subdivision and that policy reasons did not justify declining jurisdiction over TUH. *Id.* at 14-16. Finally, the Acting Regional Director concluded that comity should be extended to TAP. *Id.* at 16.

3. The Election and TUH’s Request for Review

The Union prevailed in the self-determination election and the certification issued on February 18, 2016. After TUH filed a timely request for review, the Board issued a December 29, 2016 order (the “RFR Order”) granting review on two issues: (1) whether the

Board should exercise its discretion to decline jurisdiction over TUH; and (2) whether the Board should extend comity to the TAP unit. RFR Order at 1.

The Board denied the request for review in all other respects. *Id.* at 1. It found TUH was not exempt as a political subdivision because TUH was neither created directly by the state nor administered by individuals who are responsible to public officials or the general electorate. *Id.* at n.2. The Board also found that the Union was not estopped from bringing the petition and processing the petition would not confer an unfair advantage on the Union or impose an unfair detriment on TUH. *Id.* This analysis within a footnote of the RFR Order was the only analysis that the Board provided on the judicial estoppel issue.

Then-Member Miscimarra would have granted the request for review in all respects. *Id.* at n.3.

4. The Board's Decision On Review

On December 12, 2017, the Board issued its decision affirming the DDE. The Board found it would effectuate the policies of the Act to assert jurisdiction over TUH under *Management Training*, 317 N.L.R.B. 1355 (1995). DRO at 2. The Board found that TUH exercised sufficient control over the employees' terms and conditions to permit meaningful bargaining and that it met the monetary jurisdictional standards. *Id.* While it assumed that TUH could be analogized to an exempt political subdivision for the purpose of its analysis under *Management Training*, the Board did not find the existence of any analogous "special circumstances" that would justify declining jurisdiction over TUH. DRO at 2-3. Nor did the Board agree that extending NLRB jurisdiction would destabilize TUH's decades-long bargaining relationship with PASNAP and other unions covering multiple bargaining units. DRO at 2.

The Board determined that comity should be extended to TAP because the state certification met its standard under *Doctors Osteopathic Hospital*, 242 N.L.R.B. 447, 448

(1979), 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.” DRO at 3 (internal quotation marks omitted). The Board found that TAP was not non-conforming under the Health Care Rule because the Rule allows combinations of the specified units. *Id.* at 4. Alternatively, the Board concluded that TAP qualified as an “existing non-conforming unit” because it remained largely the same as the 1975 certification (albeit under a different bargaining representative). *Id.* The Board also found it did not matter if the PLRB had jurisdiction when it issued the TAP certification in 2006.

Then-Chairman Miscimarra dissented, finding that the Board should decline jurisdiction over TUH. *Id.* at 8.

B. The Test-of-Certification Case

The Union filed a refusal-to-bargain charge against TUH on April 15, 2016 and an amended charge on April 25, 2016, which was held in abeyance while the Board considered TUH’s request for review. The Office of the General Counsel of the NLRB (“General Counsel”) issued a complaint on January 19, 2018, alleging that TUH violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union, and the Board issued the Final Order granting the General Counsel’s Motion for Summary Judgment on May 11, 2018.

C. Appellate Review and the D.C. Circuit’s Decision Remanding the Case

TUH filed a petition for review with the D.C. Circuit on May 30, 2018. The General Counsel filed the NLRB’s cross-application for enforcement on June 13, 2018. On July 9, 2019, the Court issued a decision remanding the case to the Board. TUH raised four issues on appeal to challenge the Union certification: (1) that the Union should have been judicially estopped from bringing the petition; (2) that TUH is exempt from coverage of the Act as a political subdivision; (3) that the Board should have declined jurisdiction over TUH because

jurisdiction would not effectuate the purposes of the Act; and (4) that the Board should not have extended comity to the unit certification issued by the PLRB. TUH Final App. Br. at 18-21 (summary of argument section). The Court’s decision granting TUH’s petition for review and remanding the case to the Board for further proceedings characterized TUH’s arguments as ultimately raising two issues: (1) whether the NLRB properly asserted jurisdiction over the Hospital; and (2) whether the NLRB properly granted comity to the PLRB’s certification of the technical-professional unit.² See *Temple Univ. Hosp.*, 929 F.3d at 733. Because the Court determined the Board erred with respect to judicial estoppel, it remanded the case without deciding the comity issue. *Id.*

On September 26, 2019, the Board notified TUH, the Union and the Regional Director of Region 4 that the Board accepted the remand from the D.C. Circuit and that all parties were permitted to file statements of position with respect to the issues raised by the remand.

IV. LEGAL ARGUMENT

The specific error analyzed by the D.C. Circuit on appeal was the Board’s misapplication of the judicial estoppel doctrine as set forth in *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). *Temple Univ. Hosp.*, 929 F.3d at 735. While noting that the Board’s decision of whether to invoke judicial estoppel is discretionary, the court proceeded to evaluate the merits of the Board’s analysis because the Board had “held that even ‘assuming arguendo that the doctrine of judicial estoppel . . . applies in Board proceedings,’ the *New Hampshire v. Maine*

² This first category regarding jurisdiction appears to include the first three grounds of appeal raised by TUH—namely, the judicial estoppel, political subdivision and discretionary jurisdiction issues. However, as with comity, the Court did not analyze the political subdivision or discretionary jurisdiction issues once it concluded the Board erred with respect to judicial estoppel.

factors did not counsel applying it in this case.” *Id.* at 734 (quoting RFR Order at 2 n.2). The D.C. Circuit determined that the Board had misapplied the Supreme Court’s teachings with respect to the second factor under *New Hampshire v. Maine* and had also failed to adequately explain its reasoning for why the third factor was not met. *Id.* at 735-36. As a result, the D.C. Circuit ultimately explained the decision to remand the case as follows:

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.

Id. at 736-37.

A. The Board Should Decide That the Doctrine of Judicial Estoppel May Be Applied Within NLRB Proceedings in Appropriate Circumstances

The U.S. Supreme Court describes judicial estoppel as the idea that “[w]here 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. 742, 749 (2001). The purpose of the doctrine is to “protect the integrity of the judicial process” by “prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Id.* at 749-50. In other words, judicial estoppel is “a doctrine intended to prevent the perversion of the judicial process.” *Id.* at 743, 749-50. Another important function of judicial estoppel is to avoid circumstances in which a court accepts a later inconsistent position after another court accepted an earlier inconsistent position from the same party, which “would create ‘the perception that either the first or the second court

was misled.’” *Id.* at 750 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). These concerns are equally applicable in the administrative context, and the Board should find that judicial estoppel applies in administrative proceedings.

1. Judicial Estoppel Is an Equitable Doctrine That Makes Sense in the Administrative Context.

The reasons for applying judicial estoppel in court proceedings are equally attractive reasons to apply the doctrine to administrative proceedings – e.g., ensuring the “integrity of the [administrative] process” by “prohibiting parties from deliberately changing positions according to the exigencies of the moment,” preventing parties from “playing fast and loose with the [agencies],” and preventing “improper use of [administrative] machinery.” *See New Hampshire*, 532 U.S. 749-50 (internal quotation marks and citations omitted). Since the same types of rationales apply in the agency context, it would make sense for the Board to accept judicial estoppel as a permissible equitable doctrine for it to invoke within NLRB proceedings. Board precedent reveals that similar values have long guided NLRB decisions even without formal adoption of the judicial estoppel doctrine described in *New Hampshire v. Maine*.³ For example, the Board disfavors attempts by parties to manipulate the administrative process. *See, e.g., We Transport, Inc.*, 198 N.L.R.B. 949, 949 (1972) (“[W]e would not be inclined to encourage forum shopping by permitting parties who have already initiated a proceeding before a state agency subsequently to institute a like proceeding in the same matter before our agency”); *Don Burgess Construction*, 227 N.L.R.B. 765, 766 (1977) (finding equitable doctrine of fraudulent concealment tolled the statute of limitations); *see also Precoat Metals*, 341 N.L.R.B.

³ As discussed in Section IV.A.2 below, the Board has occasionally referred to the term “judicial estoppel” or purported to apply the doctrine in past decisions, but such instances do not reflect the judicial estoppel doctrine as set forth in *New Hampshire v. Maine*. Instead, the Board in such cases was actually applying a different doctrine, such as issue preclusion. *See Temple Univ. Hosp.*, 929 F.3d at 735 n.† (footnote symbol in original).

1137, 1138-40 (2004) (finding employee forfeited right to backpay or reinstatement by deliberating lying to the Board). The Board's willingness to rely on these other traditional equitable doctrines reinforces that adopting the judicial estoppel doctrine is consistent with the Board's practices.

While the D.C. Circuit noted that whether a non-judicial tribunal may itself invoke judicial estoppel appears to be an issue of first impression, other administrative agencies have applied judicial estoppel in adjudications. *See, e.g., Doe v. Dep't of Justice*, 123 M.S.P.R. 90, 94-96 (2015) (judicial estoppel applied by the Merit Systems Protection Board); *In re Time Warner Cable*, 21 FCC Rcd. 9016, 9020 (2006) (judicial estoppel applied by the Federal Communications Commission). Likewise, at least some courts that have considered the issue have assumed that administrative agencies may rely on judicial estoppel principles, *see, e.g., Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996), and courts are similarly willing to invoke judicial estoppel even where the first proceeding was before an agency. *See Temple Univ. Hosp.*, 929 F.3d at 734 (citing cases); *see also Konstantinidis v. Chen*, 626 F.2d 933, 938-39 (D.C. Cir. 1980) (treating the Maryland Workmen's Compensation Commission as a "judicial body" for judicial estoppel purposes when analyzing whether the Commission had issued a decision in the plaintiff's favor).

2. Judicial Estoppel Only Binds the Parties and Does Not Operate By Binding the Board To Decisions by Other Tribunals.

"[J]udicial estoppel is a doctrine distinct from the res judicata doctrines of claim and issue preclusion." *New Hampshire*, 532 U.S. at 742-43. While judicial estoppel applies to the *parties* and prevents them from taking inconsistent legal positions whenever they deem it appropriate, issue preclusion refers to the effect of a prior judgment in foreclosing successive litigation of an issue or fact that has been previously resolved. *Id.* at 748-50. The impact of

issue preclusion—giving full weight to another tribunal’s decision—is evident in Board decisions that caution against applying that principle where the Board was not a party to the underlying proceedings. *See, e.g., Field Bridge Assocs.*, 306 N.L.R.B. 322, 323 (1992). Judicial estoppel does not implicate similar concerns because the doctrine does not require the Board to accept the determination of another tribunal in lieu of its own or to treat another tribunal’s determination as binding. Some NLRB decisions, including the Acting Regional Director’s DDE in this case, erroneously suggest that judicial estoppel does not apply unless the Board was a party to the other proceeding. *See, e.g., DDE* at 12 (noting “as the Board was not a party to the prior proceeding, it is not precluded from determining jurisdiction”). The D.C. Circuit noted this was an incorrect formulation of the doctrine because judicial estoppel does not include the “forum” as one of the relevant “parties” for analysis. *Temple Univ. Hosp.*, 929 F.3d at 735.

Likewise, TUH’s judicial estoppel argument has never involved an assertion that the Board was estopped or precluded from determining jurisdiction because the PLRB found it had jurisdiction over TUH in 2006. *See DDE* at 12 (finding the Board should not be precluded by the resolution of jurisdiction issues by state-court findings). Rather, TUH asserts that the *Union* is precluded from bringing the representation petition to bring TUH under the Board’s jurisdiction based on its own prior inconsistent statements to the PLRB. Moreover, because judicial estoppel is an equitable doctrine, incorporating this principle into the Board’s arsenal of interpretative tools would not constrain the Board’s decision-making. Indeed, as the D.C. Circuit noted, a lower court’s decision to invoke or not to invoke judicial estoppel in a case is only subject to abuse of discretion review by an appellate court. *See Temple Univ. Hosp.*, 929 F.3d at 734 (citing *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 927 (D.C. Cir. 2016)).

B. The Board Should Apply Judicial Estoppel Because All Three *New Hampshire v. Maine* Factors Are Met.

The Supreme Court has “set forth three key factors that ‘inform the decision’ whether ‘the balance of equities’ favors applying the doctrine in a particular case.” *Temple University Hosp.*, 929 F.3d at 733 (citing *New Hampshire*, 532 U.S. at 750-51). Those factors are:

(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. (quoting *New Hampshire*, 532 U.S. at 750-51). While acknowledging that “additional considerations may inform the doctrine’s application in specific factual contexts,” the Supreme Court found these three factors “firmly tip[ped] the balance of equities” in the *New Hampshire v. Maine* decision in favor of barring New Hampshire claim. *New Hampshire*, 532 U.S. at 752.⁴

Here, the Union should be judicially estopped from invoking the NLRB’s jurisdiction, including by bringing the petition in the underlying representation case because, as set forth below, all three *New Hampshire v. Maine* factors are met. Accordingly, the Board should determine that TUH did not violate Section 8(a)(1) and (5) of the Act as alleged in the

⁴ New Hampshire sought to change its position regarding the meaning of “Middle of the River,” a key phrase for determining the proper marine boundaries between New Hampshire and Maine. *New Hampshire*, 532 U.S. at 748. Both states had previously reached an agreement about the phrase’s meaning and obtained a consent decree from the Court ratifying that meaning during a legal dispute twenty-five years earlier. *Id.* at 746-47. When New Hampshire sought to interpret the term differently in 2001 as part of an attempt to expand its boundary closer to Maine’s shoreline, the Court held that New Hampshire was judicially estopped from making that argument. *See id.* at 749.

unfair labor practice charge, should revoke the certification in the representation case and should preclude PASNAP from invoking the NLRB's jurisdiction.

1. The Union's Position Regarding NLRB Jurisdiction Is Clearly Inconsistent With Its Position in Prior Proceedings.

The first judicial estoppel factor—that the Union's current position is “clearly inconsistent” with its earlier position—has been met here. The Acting Regional Director specifically found that the Union had previously taken the opposite position before the PLRB regarding NLRB jurisdiction: “The Hospital is correct that [the Union] argued to the PLRB that the Board did not have jurisdiction, that the PLRB accepted this argument, and that [the Union] currently contends that the Board has jurisdiction over the Hospital.” DDE at 12. The Union never objected to that finding. The D.C. Circuit likewise found that this first factor had been satisfied, explaining:

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.

Temple Univ. Hosp., 929 F.3d at 735. The Union's 2006 letter brief to the PLRB discussing the NLRB's lack of jurisdiction, which is in the record, more than amply demonstrates its about face. *See* E-1.

Moreover, the parties' stipulations from the representation proceedings reflect that the Union invoked the jurisdiction of the PLRB in more than two dozen other cases since 2005, affirmatively asserting that TUH is a public employer within the meaning of PERA. B-2, ¶ 5. One of those PLRB cases was pending at the time the Union filed the petition and was pursued by the Union to decision in November 2016, 10 months after the DDE in the representation case, even as the Union was claiming before the Board that the NLRB, rather than the PLRB, had

jurisdiction. B-2, ¶12; *PASNAP v. Temple Univ. Health Sys.*, PERA-C-14-259-E, 48 PPER ¶ 54, 2016 PA PED LEXIS 84 (PLRB Proposed Decision & Order, Nov. 30, 2016) (finding no unfair labor practice). By claiming the PLRB had jurisdiction over the parties in these cases, the Union was telling the PLRB that the NLRB lacked jurisdiction, because jurisdiction under PERA and the NLRA is mutually exclusive. *See* 43 P.S. § 1101.301(1) (excluding employers covered by the NLRA from the definition of “public employer”).⁵

The first factor under *New Hampshire v. Maine* therefore supports applying judicial estoppel.

2. The Union Succeeded on Its Prior Position Before the PLRB.

The second *New Hampshire v. Maine* factor – that the first tribunal adopted the prior position – is also satisfied. The D.C. Circuit agreed with TUH that the Board imposed too high a standard when evaluating the second judicial estoppel factor. *See Temple Univ. Hosp.*, 929 F.3d at 735. The Board held in the order granting review on other grounds that there was no evidence that the Union misled the PLRB and “in inadequate basis to believe the PLRB would have reached a different result had [the Union] taken some contrary position.” RFR Order at 2 n.2. However, as explained by the D.C. Circuit, judicial estoppel does not require that the party’s advocacy of the earlier position be the but-for cause of the adoption of that position by the first tribunal. *Temple Univ. Hosp.*, 929 F.3d at 735. Nor is there an “independent

⁵ That the inconsistent statements were made to different entities – with the earlier statements being made to the PLRB and the later inconsistent statements being made to the NLRB – is irrelevant to the application of the factor. For example, various Courts of Appeals have applied judicial estoppel to litigation based on clearly inconsistent positions that were previously made to administrative agencies. *See Temple Univ. Hosp.*, 929 F.3d at 734 (citing cases). Likewise, federal courts have applied judicial estoppel in cases where the earlier inconsistent position was originally raised in state court. *See, e.g., Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167-68 (4th Cir. 1982).

requirement of evidence that the party changing its position had actively misled the first tribunal.” *Id.*

Instead, it is sufficient if the first tribunal adopts the position that the party advocated, which is admittedly what happened here. *Id.* The mere fact that a tribunal has adopted the party’s position can be sufficient to create a perception of one tribunal being misled when the party later reverses its position. *See New Hampshire*, 532 U.S. at 750 (“[C]ourts regularly inquire 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.’”); *see also Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) (“[J]udicial acceptance of an inconsistent position in a later proceeding . . . create[s] the perception that either the first or the second court was misled,’ thus posing a threat to judicial integrity.”).

Since there is no dispute that the PLRB adopted the position that the Union advocated in 2006 – i.e., that the PLRB has jurisdiction over labor relations between TUH and the Union – this is sufficient to satisfy the second *New Hampshire v. Maine* factor consistent with the D.C. Circuit’s decision. *See In re Employees of Temple Univ. Health Sys.*, 2006 PA PED LEXIS 69, *12. It also comports with the Acting Regional Director’s finding, which the Board did not dispute in the RFR Order, that “[t]he Hospital is correct that [the Union] argued to the PLRB that the Board did not have jurisdiction . . . [and] **that the PLRB accepted this argument.**” DDE at 12 (emphasis added). In fact, this finding cannot seriously be disputed because the PLRB was adjudicating a petition for representation by the Union. If the Union had not gone to the PLRB and invoked its jurisdiction, the PLRB would have had no reason to act. Similarly, if the Union had agreed with 1199 that jurisdiction was with the NLRB and the Union, therefore,

withdrew its petition before the PLRB, there would have been no basis for the PLRB to act and conduct the election that allowed the Union to represent this unit. Thus, there is no question that the second *New Hampshire v. Maine* factor is satisfied here.

3. Allowing the Union To Pursue Inconsistent Positions Creates an Unfair Detriment to TUH.

Another error identified by the D.C. Circuit in the Board’s judicial estoppel analysis related to the Board’s treatment of the third judicial estoppel factor. In particular, the Board failed to adequately explain the basis for its determination that there was no unfair advantage to the Union or unfair detriment to TUH from processing the petition in the underlying representation case. *Temple Univ. Hosp.*, 929 F.3d at 736; *see also* RFR Order at 2, n.2 (stating that “processing the petition will not confer an unfair advantage on the [Union] or impose an unfair detriment on [TUH]”). Instead, the Board merely adopted the Acting Regional Director’s unsupported conclusion that the detriment alleged by TUH was “not the type of detriment or advantage about which the Supreme Court was concerned in *New Hampshire v. Maine.*” *See Temple Univ. Hosp.*, 929 F.3d at 736 (quoting DDE at 12). However, neither the Acting Regional Director nor the Board explained why TUH’s “proffer fell short” or “what ‘type’ of detriment would suffice” to meet this third factor. *Id.*

In evaluating this issue on remand, the Board should credit ample evidence in the factual record that shows TUH will suffer an unfair detriment if the certification is permitted to stand and labor relations at TUH cease to be governed by the PLRB.

a. Switching to NLRB Jurisdiction Is an Unfair Detriment to TUH With Respect to Its Relationship With the Union.

As previously raised by TUH, switching to NLRB jurisdiction would be an unfair detriment to TUH in multiple ways. TUH has continuously relied on the Union’s position that the PLRB, not the NLRB, has jurisdiction over TUH employees. For example, when the parties

reached impasse during collective bargaining negotiations in 2009, TUH made a last best offer to the Union. Tr. 12/16/15 at 142. Yet, for months, TUH was unable to impose contract terms on the Union based on the state of the law under PERA, which prohibits implementation at impasse in the absence of a work stoppage by employees. *See* Tr. 12/16/15 at 142-44. If the parties had been under the jurisdiction of the NLRB, TUH would have been entitled to impose its last best offer and it may have been possible to avoid a 30-day strike. *See id.* Moreover, the Union has repeatedly asserted that it had no obligation to provide the strike notice TUH would be entitled to under the National Labor Relations Act. 29 U.S.C. § 158(g). For example, Bill Cruice, then-Executive Director of the Union, wrote to TUHS, “As you know, unlike the National Labor Relations Act, Pennsylvania’s PERA contains no legal requirement that the nurses provide this 10-day notice.” E-12. For that very reason, TUH has had to bargain a 10-day strike notice into its CBAs with the Union, meaning that it has given something of value to the Union for that concession.

Likewise, the Union’s extensive history of invoking the jurisdiction of the PLRB and the Pennsylvania courts is evidence of the unfair advantage to the Union and corresponding disadvantage to TUH. The Union filed at least 26 actions with the PLRB against TU/TUH/TUHS in the 10 years preceding the NLRB petition, repeatedly asserting that these entities were public employers. B-2, ¶12. Additionally, the Union treated TUH and TUHS as public employers before Commonwealth state courts for purposes of the exercise of the courts’ jurisdiction in multiple cases. *Id.* In 2014, the Union went to the PLRB—not the NLRB—to add similar positions to the bargaining unit as those covered by the 2015 petition. *See Temple Univ. Health Sys.*, 2016 PA PED LEXIS 84, *13 (discussing addition of classifications in 2014). By agreement of the parties, under the procedures set forth in PERA, several of those positions were

added to the unit without a hearing or an election, a procedure that is not available to the Union under the NLRA. *Id.*

Significantly, as discussed in TUH's Brief on Review regarding the comity issue, the Union may not have even been certified to represent this unit if NLRB jurisdiction applied at the time because it violates the Health Care Rule. *See* 29 C.F.R. § 103.30(a); TUH Br. on Review at 22-24; *see also* TUH Final App. Br. at 33-36.

Having benefited from the jurisdiction of the PLRB on each of these instances, the Union's assertion that the NLRB, not the PLRB, has jurisdiction is itself sufficient to show unfair advantage.⁶

b. Asserting NLRB Jurisdiction Will Negatively Affect TUH's Operations and Its Relationships with Other Unionized Employees.

The negative impacts on TUH's operations and other unionized employees, frequently cited by TUH as reasons why the Board should decline jurisdiction over TUH, *see, e.g.*, TUH RFR at 18-25; TUH Br. on Review at 5-16; TUH Resp. Br. on Review at 3-11; TUH Final App. Br. at 54-56, are also evidence of the unfair detriment that TUH will suffer if the Union is permitted to avail itself of NLRB jurisdiction and thereby change the applicable labor relations jurisdiction for the entire Hospital. As then-Chairman Miscimarra emphasized in his dissent to the Board's December 12, 2017 Decision on Review in the representation case, extending NLRB jurisdiction over PASNAP and TUH will not only be needlessly disruptive to that longstanding labor relationship, but also needlessly disruptive to the relationships between TUH and other employee unions and to the day-to-day operations of TUH. DRO at 6-7. If the

⁶ That both the Union and TUH have engaged in a protracted legal battle over this matter since the Union first filed the representation petition with the NLRB in 2015 is further evidence of the strength of the respective detriment to TUH and benefit to the Union.

Board permits the certification to stand, the Union's petition to add 11 employees to this single bargaining unit—which could have been accomplished under the PLRB process instead—will impact more than 3,400 employees in at least 11 different bargaining units, many of which are not even affiliated with PASNAP. *See* TUH Br. on Review at 12-14. NLRB jurisdiction is therefore inconsistent with the expectations of thousands of employees in those other TUH bargaining units whose collective bargaining relationships with TUH have always existed under state law. As with PASNAP, the collective bargaining agreements between TUH and these other units reflect the benefit of the bargain the parties have struck with one another under PERA, which will be undermined by the sudden imposition of NLRB jurisdiction. *See* TUH Br. on Review at 12-16; *see also* TUH Resp. Br. on Review at 9-10 (explaining inherently disruptive impact of federal jurisdiction on the other 10 bargaining units because PERA has traditionally governed issues such as what subjects are included in collective bargaining agreements, what notice is required for bargaining or a strike, what happens at impasse, what meet-and-discuss obligations apply to various managerial rights and changes to terms and conditions, and what economic weapons are available to each side).

Moreover, because the Board has appropriately continued to recognize TU as an exempt entity under the Act, extending NLRB jurisdiction over TUH/TUHS will mark the first time TU's wholly-owned subsidiaries are governed by different labor laws than TU. Because the record amply demonstrates that TU, TUHS, and TUH are so intertwined with one another on an operational level, with interlocking personnel, boards of directors and financial statements, the result would be an unworkable patchwork of federal and state labor laws applying to employees working side-by-side with one another on a daily basis with often complex and interrelated reporting relationships at all levels of authority. *See generally* TUH Request for Review at 28-35

(detailing the relationship between TU, TUHS, and TUH); TUH Br. on Review at 5-12 (same). For example, as TUH previously explained in its Responsive Brief on Review, a TU employee and a TUH employee could be working in the same location, at the same time, taking direction from the same manager, indefinitely, yet be subject to two different statutory labor schemes that have different rules for things like managerial rights and mandatory subjects of bargaining. TUH Resp. Br. at 8; see also B-7, ¶ 18. Such long-term practical difficulties are unduly burdensome for TUH.

Having successfully advocated for PLRB jurisdiction and reaped the benefits of repeatedly invoking PLRB jurisdiction, judicial estoppel bars the Union from taking a directly contrary legal and factual position merely because it now believes NLRB jurisdiction will be more favorable to it.

4. The Balance of Equities Favors Applying Judicial Estoppel Here.

Given how the *New Hampshire v. Maine* factors apply to the Union's conduct, the overall balance of equities heavily favors invoking judicial estoppel in this case. Other equitable considerations surrounding the Union's actions further support judicial estoppel. For example, while establishing the Union deliberately intended to mislead a tribunal is unnecessary to meet the second factor, the Union's irreconcilable positions before the PLRB and the NLRB are strong evidence that the Union did either successfully misled the PLRB in 2006 up through the issuance of the PLRB's 2016 decision, or that it successfully misled the NLRB in the representation case. The Union not only successfully argued to the PLRB that TUHS was a wholly-owned subsidiary of TU and that the Union was "quite confident that the NLRB would decline jurisdiction over TUHS," but the Union also continued to affirmatively represent to the PLRB that it had jurisdiction over TUH for a decade after the election. See E-1; B-2, ¶ 12 (stipulating that the Union filed at last 26 cases with the PLRB since 2006 in which it affirmatively represented that

the PLRB has proper jurisdiction over TUH, TUHS, or TU). Even as the Union argued that jurisdiction properly resided with the NLRB in the representation proceedings before the Acting Regional Director, it continued to pursue an unfair labor practice case before the PLRB for 10 months after the Acting Regional Director's direction of election in the underlying representation case here. B-2, ¶ 12; see *Temple Univ. Health Sys.*, 2016 PA PED LEXIS 84. This is exactly the kind of manipulation that undermines the integrity of the legal system and that judicial estoppel is intended to prevent.

Perhaps even more troubling is the Union's announced motivation for seeking to invoke the NLRB's jurisdiction in the first place—an attempt to avoid the expected Supreme Court decision invalidating mandatory agency fees for public sector employees and, therefore, to infringe on the constitutional rights of the employees it represents.⁷ See E-14.

The Union's bad faith conduct is therefore an additional consideration that tips the balance of the equities in favor of applying judicial estoppel to the Union.

5. This Case Does Not Involve Jurisdictional Issues For Which Judicial Estoppel Could Be Inappropriate.

Because the Board did not base its decision on the proposition, the D.C. Circuit rejected a new argument raised by the General Counsel and the Union during the appeal that

⁷ The Union's feared result in *Friedrichs v. California Teachers Ass'n*, 135 S. Ct. 2933 (2015), became a reality with the Supreme Court's decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). The NLRB's exercise of jurisdiction does not and would not change that TUH has been found a "state actor" under 42 U.S.C. § 1983 who can be sued for violations of constitutional rights and, therefore, subject to the *Janus* decision. See, e.g., *Jones v. Temple Univ.*, No. 14-3390, 2015 WL 4759669 (3d Cir. Aug. 13, 2015) (explaining, in the context of an employee termination, that TUH is part of TU which is undisputedly a state entity which acts under color of state law); *Fantazzi v. Temple Univ. Hosp.*, 2003 WL 23167247 (E.D. Pa. April 11, 2003) (holding that state action was implicated by a Section 1983 claim against TUH and citing a 2000 Third Circuit decision involving the University of Pittsburgh, which in turn cited *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) and *Molthan v. Temple Univ.*, 778 F.2d 955, 960 (3d Cir. 1985)).

“there is an exception to . . . judicial estoppel when it comes to jurisdictional facts or positions.” *Temple Univ. Hosp.*, 929 F.3d at 736 (citation and quotation marks omitted). To the extent the Union or the General Counsel attempts to raise this issue in their statements of position, the Board should not be swayed by this argument.⁸ The two cases the General Counsel cited in its brief on this point during the appeal are readily distinguishable. Both cases involve litigants attempting to use judicial estoppel to keep a case before a federal court when the court may otherwise have lacked subject matter jurisdiction. *See Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227-28 (10th Cir. 2011) (despite plaintiff’s success in a prior ERISA lawsuit, judicial estoppel did not prevent plaintiff from challenging existence of ERISA standing when his employer sought to remove plaintiff’s subsequent state law action to federal court on ERISA preemption grounds); *Gray v. City of Valley Park, Mo.*, 567 F.3d 976, 981-82 (8th Cir. 2009) (analyzing plaintiffs’ Article III standing rather than relying on judicial estoppel where plaintiffs asserted on appeal that they never had standing to bring their claims). The outcome of those cases is unsurprising. Subject matter jurisdiction goes to the heart of a federal court’s authority over a claim and cannot be waived, which is why federal courts retain inherent power to dismiss actions *sua sponte* for lacking subject matter jurisdiction. An analogous situation would arise in the administrative context if a party attempted to use judicial estoppel to keep a case before a federal agency where Congress did not intend the agency to have jurisdiction.⁹

⁸ The D.C. Circuit also rejected a new argument by the Union that “judicial estoppel applies only to assertions ‘of fact rather than law or legal theory’” because it did not factor into the Board’s decision below. *Temple Univ. Hosp.*, 929 F.3d at 736. However, the D.C. Circuit went further to note its “serious[] doubt [regarding] the correctness” of that argument as the *New Hampshire v. Maine* decision itself involved New Hampshire’s change in position on a legal issue. *Id.*

⁹ For example, regardless of previous positions taken by the parties, judicial estoppel would not be an appropriate mechanism for the Board to extend jurisdiction over a dispute covered by the Railway Labor Act.

In contrast, a court can rely on judicial estoppel to decline jurisdiction when its exercise of jurisdiction is discretionary. *See Vincent v. Money Store*, No. 01-cv-5694, 2014 WL 1087928, at *2-3 (S.D.N.Y. Mar. 19, 2014). In *Vincent v. Money Store*, the plaintiffs sought to reassert state law claims they had previously abandoned and argued that judicial estoppel could not deprive the court of jurisdiction. *Id.* at *2-3. The court rejected the request, noting:

[T]he Court plainly has jurisdiction to decide whether to exercise supplemental jurisdiction over the state law claims. The Court chooses not to exercise supplemental jurisdiction based on, among other grounds, judicial estoppel.

Id. at *3. *See also Mathison v. Berkebile*, 988 F. Supp. 2d 1091, 1102 (D.S.D. 2013) (judicial estoppel barred warden respondent from challenging personal jurisdiction).

Here, TUH is not seeking to use judicial estoppel to expand NLRB jurisdiction or authority beyond a legal limit. Nor is this a situation in which the Union has an absolute statutory right to Board jurisdiction because the NLRA gives the Board discretion to decline jurisdiction where it does not believe it would effectuate the policies of the Act. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684 (1951) (even when the Board has statutory authority to act, “the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case”); *see, e.g., Northwestern Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, *3 (2015); *Temple Univ.*, 194 N.L.R.B. 1160, 1161 (1972). Indeed, one of TUH’s other arguments in this case and the underlying representation case has been that the Board should decline to exercise jurisdiction over TUH because of its relationship to TU, over whom it has long declined jurisdiction. *See* TUH RFR at 18-25; TUH Br. on Review at 3-16; TUH Resp. Br. on Review at 3-8; TUH Final App. Br. at 54-56. Accordingly, even if there may be certain types of jurisdictional disputes in which it would be improper to invoke judicial estoppel, such circumstances do not exist in the instant case.

C. The Board May Properly Consider Alternative Grounds Raised By TUH.

Judicial estoppel is only one of four grounds that TUH pursued in opposing the Union's petition and certification, as well as the Board's extension of NLRB jurisdiction over TUH generally. *See* TUH Final App. Br. at 18-21 (summary of argument section). TUH incorporates by reference its prior briefs and its petition for review addressing the comity, political subdivision and discretionary jurisdiction issues and renews its request that the Board consider submissions from the parties on these issues in addition to judicial estoppel, as consideration of these issues is consistent with the purposes of the Act, furthers administrative efficiencies, and conserves both administrative and judicial resources.¹⁰ Declining to exercise jurisdiction, for example, would resolve all issues in this case, as well as other pending cases filed by the Union, and would avoid the need for the Board to decide whether judicial estoppel applies in administrative proceedings or whether comity was properly granted.

Contrary to the Union's position as articulated in its September 16, 2019 letter, the Board is not limited to only considering the judicial estoppel issue on remand. The D.C. Circuit's decision granting TUH's petition for review and remanding the case to the Board for further proceedings characterized TUH's arguments in the appeal as ultimately raising two issues: (1) whether the NLRB properly asserted jurisdiction over the Hospital; and (2) whether the NLRB properly granted comity to the PLRB's certification of the technical-professional unit. *See Temple Univ. Hosp.*, 929 F.3d at 733. Because the Court determined the Board erred in its analysis of judicial estoppel under the first question, it remanded the case without deciding the comity issue or the other two pieces of the jurisdiction question—namely, whether the Board

¹⁰ TUH submitted a letter to the Board on September 9, 2019 requesting briefing on these additional issues for the remand, which the Union opposed by letter on September 16, 2019.

erred in determining that TUH was not a political subdivision and whether the Board erred in failing to decline jurisdiction over TUH.

When accepting a case on remand from the Court of Appeals, the Board has authority to reconsider other alleged errors that the appellant raised during the appeal, but which the remanding court did not reach. *Cf. United Food & Commercial Workers Int'l Union, Local No. 150-A v. NLRB*, 1 F.3d 24, 36 (D.C. Cir. 1993) (rejecting the Board's overly narrow reading of a remand order where union presented all of its claims in the earlier appeal and the court did not dispose of one of the controversies at that time). The cases the Union cited in its September 16, 2019 letter regarding the Board's purportedly limited authority to consider issues outside the scope of a remand order are fundamentally distinguishable from the instant case, because those decisions do not involve a court that remanded a case on one appellate issue while leaving the remaining issues undecided.

In this context, the Board's right to consider additional issues on remand is analogous to the general rule regarding the Board's right to reconsider its own actions in the context of a test-of-certification case before the Board. In those cases, the Board generally prohibits a party's attempt to re-litigate "issues which were or could have been litigated in a prior representation proceeding" absent "newly discovered or previously unavailable evidence or special circumstances." *Warren Unilube, Inc. & Teamsters Local 667*, 357 N.L.R.B. 44, 44 n.3 (2011). This limitation, however, only addresses what the parties are entitled to litigate, not what the Board is entitled to decide. As the Board observed in *St. Francis Hospital*:

[T]his prohibition against relitigation of representation issues in a subsequent technical 8(a)(5) refusal-to-bargain situation applies to the *parties*—the employer and the union—and does not preclude the Board from reconsidering its own earlier action.

271 N.L.R.B. No. 160 at 949 (1984) (emphasis in original). Here, just as in that context, the Board remains free to correct erroneous conclusions from prior proceedings. If a majority of the Board no longer believes that the Board has jurisdiction, or is justified in exercising its jurisdiction, then it should reconsider the jurisdictional issue rather than rubber-stamping the prior decision and forcing TUH to pursue its appeal in court to correct the additional errors described in Parts I-III of the Argument Section of TUH's Opening Appellate Brief. *See* TUH Final App. Br. at 24-54 (discussing judicial estoppel, comity and political subdivision). *Cf. Sub-Zero Freezer Co.*, 271 N.L.R.B. 47, 47 (1984) (“[W]hile we share our dissenting colleague’s concern with stability in law and finality in litigation, at the same time we believe that the just resolution of questions presented to the Board is our primary duty. Therefore, while reconsideration of issues in technical refusal-to-bargain cases may, in some instances, cause delays or involve changes in Board law, we are not willing to grant a Motion for Summary Judgment [in this case].”). Indeed, the Board’s recent willingness to consider declining jurisdiction over charter schools in the pending *KIPP Academy Charter School* case evinces a potential evolution in the Board’s views on discretionary declination of jurisdiction that could be relevant to this case. *See* NLRB Order Granting Review and Invitation to File Briefs, *KIPP Acad. Charter Sch.*, 02-RD-191760 (Feb. 4, 2019).

In short, the Board should exercise its authority to reconsider the issues raised by TUH in its request for review and before the D.C. Circuit, and decline to exercise jurisdiction over TUH for the reasons detailed in TUH’s prior briefs. *See generally* TUH Post-Hearing Br.; TUH RFR; TUH Br. on Review; TUH Resp. Br. on Review; TUH Final App. Br.; TUH Final App. Reply Br. Not only would the Board’s reconsideration correct errors of law, particularly with respect to the grant of comity, but it also is an appropriate use of the Board’s discretion to

decline jurisdiction, consistent with the purposes of the Act. As the Board has previously recognized, resolution of issues before the Board is the primary duty. Here, resolving the other issues regarding the exercise of jurisdiction is critical, as it would provide additional finality to this dispute. The Union has filed a number of other cases (i.e., ULPs) before the Board, and if the Board declines to exercise jurisdiction under its discretionary powers, it would obviate the need for the Board to decide an issue of first impression – the application of judicial estoppel in Board proceedings – here and will avoid the need for further proceedings to address the applicability of judicial estoppel or the appropriateness of comity in other proceedings brought by the Union.

Therefore, a determination on these other issues, in particular whether the declination of jurisdiction is appropriate, is central to this case, warranted based on the history of the Board’s declination of jurisdiction over Temple University, and consistent with the long-recognized goal of administrative and judicial efficiency.

V. CONCLUSION

For the reasons discussed above, the Board should determine that judicial estoppel is available in NLRB proceedings and that it is properly invoked to prevent the Union’s egregious forum shopping in this case after years of the Union representing to the PLRB that TUH is a public employer within the PLRB’s jurisdiction and reaping the benefits of claiming state jurisdiction. In the alternative, the same considerations warrant the Board exercising its discretion to decline to exercise jurisdiction over TUH.

Accordingly, the Board should find that TUH did not violate the Act by refusing to bargain with the Union in 04-CA-174336 and should revoke the certification issued in 04-RC-162716 and preclude the Union from invoking the NLRB's jurisdiction.

Dated: November 7, 2019

Respectfully Submitted,

/s/ Shannon D. Farmer

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CERTIFICATE OF SERVICE

I, Shannon D. Farmer, hereby certify that on the 7th day of November, 2019, a true and correct copy of the foregoing Statement of Position of Temple University Hospital, Inc. was filed electronically on the National Labor Relations Board website and served via email on the following:

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