UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIPP ACADEMY CHARTER SCHOOL, Employer
and

NICOLE MANGIERE AND CHRISTOPHER DIAZ
Petitioner

Case 02-RD-191760

and
UNITED FEDERATION OF TEACHERS, LOCAL 2
AFT, AFL-CIO

Union

BRIEF OF READY COLORADO AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

BOARD DECISIONS

FEDERAL STATUTES

Mouk, B. *The Ludlow Massacre Still Matters*, THE NEW YORKER (April 18, 2014), http://www.newyorker.com/business/currency/the-ludlow-massacre-still-matters (accessed 5/26/2017) 4

NACSA, *Data In Depth Charter School Closures*, http://www.qualitycharters.org/policy-research/soca-2016/closures/ (accessed 9/29/2017) 11

NCLB Toolkit, https://www2.ed.gov/teachers/nclbguide/toolkit_pg6.html (accessed 2/18/2019) 3

Nonregulatory Guidance, https://www2.ed.gov/programs/charter/nonregulatory-guidance.html (accessed 2/18/2019) 3

Northwest Ordinance, https://www.ourdocuments.gov/doc.php?flash=true&doc=8 (accessed 2/18/2019) 1

Parker, Marjorie H. "Some Educational Activities of the Freedmen's Bureau," *The Journal of Negro Education* 23, no. 1 (1954) 2

Purdue Extension Srv., *Economic Impact of Horse Racing*, https://www.extension.purdue.edu/extmedia/ID/ID-445-W.pdf (accessed 2/19/2019) 1

Roosevelt, F.D. *Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service* (August 16, 1937), http://www.presidency.ucsb.edu/ws/?pid=15445 (accessed 5/26/2017) 16

Tyack, D. & Cuban, L. TINKERING TOWARD UTOPIA (1995) 9

Wilson, W. *Address at the Opera House (Marlow Theater), Helena, Montana*, September 11, 1919. http://www.presidency.ucsb.edu/ws/index.php?pid=117376 (accessed 5/26/2017) 16

ARGUMENT

I. Charter Schools Are Principally a State and Local Matter

This Board's Section 14(c)(1) doctrine is *not* an inquiry into whether the commerce clause reaches an activity. If it were, one could not explain how the paradigmatic exempt industry, horse racing, is other than an activity in interstate commerce.[1] Rather, the Board balances reasons to extend its jurisdiction toward the maximum — little short of a mountaintop hermit[2]— *against* the degree to which (1) a class of employers and employees exhibit a "special relationship"[3] to state and local concerns and (2) federal jurisdiction will or will not promote labor stability. That is, such entities are subject to state oversight, of special state interest, or unlikely to benefit from the National Labor Relations Act (NLRA). This balances jurisdiction in areas of limited NLRA concern against respect for the states: a form of federalism.

A. Public Education is Primarily a State and Local Matter

The federal government's role in public education has been debated since the Presidency of George Washington,[4] if not since the pre-constitutional Northwest Ordinance.[5] For most our

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[1] Horse racing creates a $39 Billion direct annual economic impact in the United States and supports 1.4 million full time jobs. Purdue Extension Srv., *Economic Impact of Horse Racing*, https://www.extension.purdue.edu/extmedia/ID/ID-445-W.pdf (accessed 2/19/2019).

[2] See *Wickard v. Filburn*, 317 U.S. 111 (1942) (decision of a farmer to grow *and consume* 11 acres of his own wheat subject to federal commerce clause power); *Taylor v. United States*, 579 U.S. ___, 136 S. Ct. 2074, 2079 (2016) (commerce power reaches "…activities … that 'substantially affect' commerce … in the aggregate, even if their individual impact on interstate commerce is minimal") (citing *Wickard* with approval).

[3] See the discussion in the dissenting and concurring opinion of member Hayes in *Chicago Math. & Sci. Academy Charter School*, 359 NLRB No. 41 at 466-469 (2012), *vacated on other grounds*, *National Labor Relations Board v. Noel Canning*, 573 U.S. ___ (2014).

[4] Washington, Jefferson, Madison and John Quincy Adams all advocated a national university. This project was abandoned with the Presidency of Andrew Jackson. See Daniel Walker Howe, WHAT HATH GOD WROUGHT (2007), pp. 455-456.

[5] See https://www.ourdocuments.gov/doc.php?flash=true&doc=8 (accessed 2/18/2019).

history education was *exclusively* a state and local matter. Federal involvement in education was briefly more prominent during and after the Civil War, but then receded.[6] The modern federal role in public education only began with the confluence of the Civil Rights Movement and the Cold War. The urgent need to address issues posed by *Brown v. Board of Education*[7] and concern arising from the Sputnik launch, each pushed the federal government into K-12 matters.[8] Ultimately a cabinet-level Department of Education was created in 1979.[9]

States and localities are no longer *exclusive* actors in public education. But the state role is predominant. In 2012-13 the Department of Education found 92 cents of the public education dollar came from state and local revenue. The federal role equaled 8 cents.[10] Of all cabinet departments, Education has the smallest staff.[11] The Supreme Court held that the core mission of public education belongs to states and localities.[12] The Department of Education agrees.[13]

Further, Congress approaches education, even when protecting the civil rights of students and others, principally through the spending power.[14] It largely created the modern field of

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[6] See, e.g., Parker, Marjorie H. "Some Educational Activities of the Freedmen's Bureau," *The Journal of Negro Education* 23, no. 1 (1954). The federal government also set aside "school lands" to give new states a head-start on school systems. And the 1862 Morrill Act, 7 U.S.C. § 301, gave birth to state agricultural and mechanical higher education.

[7] 347 U.S. 483 (1954).

[8] *DOE Overview*, https://www2.ed.gov/about/overview/fed/role.html (accessed 2/18/2019).

[9] Public Law 96-88.

[10] Above n. 8.

[11] *Id.*

[12] See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973). See also *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972).

[13] Above n. 8 ("Education is primarily a State and local responsibility in the United States.").

[14] See, e.g., 42 U.S.C. §§ 2000d, et seq. (Title VI of the Civil Rights Act of 1964); 20 U.S.C. §§ 1681, et seq. (Title IX of the Education Amendments of 1972), 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973).

special education within public schools through a specialized spending power enactment (fully applicable to charter schools)[15] and similarly created expectations for English language learners.[16] It attached to No Child Left Behind, but then withdrew, a requirement that all teachers be "highly qualified."[17] It created a federal public charter school grant program[18] with detailed rules.[19] And Congress now funds grants supporting state-or-local *employment* policy activities,[20] without a whisper of intention to render labor relations other than state-and-local. This statute requires that states receiving grants "meaningfully consult" with, among others, "organizations representing" school employees *and* "charter schools" while enacting local policies affecting terms and conditions of employment.[21] One cannot read these sections of the federal education code and sensibly conclude that Congress's glaring silence and meet-and-confer instruction contemplated an NLRB takeover of labor law in charter schools.

We do not need to gild the lily: the federal role in education is genuine, legitimate, has increased from almost nothing — and remains a far, far distant third to the essentially state-and-

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[15] See the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401-1487. Charter school are either a "local educational agency" (LEA) directly obligated under IDEA (See 20 U.S.C. § 1413) or part of an LEA with co-equal supports and responsibilities. 20 U.S.C. § 1413(a)(5). Notably, IDEA does *not* entangle private schools in a remotely similar way. See, e.g., *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993) (private school for special education students securing tuition under IDEA not required to comply with IDEA). Thus, far more explicitly and intimately than in *Overlook School for the Blind*, 213 NLRB 511 (1974) or *Laurel Haven School for Exceptional Children, Inc.*, 230 NLRB 1197 (1977), charter schools are intertwined with state and local special education systems (more below).

[16] See, e.g., *Lau v. Nichols,* 414 U.S. 563 (1974) (upholding administrative interpretation of Title VI to require school district actions to address education of non-English-speaking students).

[17] See *NCLB Toolkit*, https://www2.ed.gov/teachers/nclbguide/toolkit_pg6.html (accessed 2/18/2019) (archived DOE description of NCLB "highly qualified" rule).

[18] 20 U.S.C. §§ 7221, et seq.

[19] *Nonregulatory Guidance*, https://www2.ed.gov/programs/charter/nonregulatory-guidance.html (accessed 2/18/2019) (2014 nonregulatory guidance).

[20] See 20 U.S.C. § 6613.

[21] 20 U.S.C. § 6612(3)(a).

local nature of this activity. And Congress, specifically, has acted as if labor relations in local schools, including charters, was *not* a subject of federal concern.

B. The Potential for Harmful Entanglement Between State and Federal Regulation is Substantial

Charter schools in Denver, Colorado, have just emerged, as this is written, from a strike by the Denver Classroom Teachers' Association (DCTA) against the Denver Public Schools (DPS). DPS is also the local charter school authorizer. The DPS-authorized charter schools are separate employers from DPS and each other. Their teachers are not part of the DCTA-represented bargaining unit (though employees of those schools are free, under Colorado law, to organize one or more charter employers).[22] In the lead up to the strike, DPS charter schools sought to understand how the strike might affect them. Discussion of this issue made clear that NLRA jurisdiction, if it existed in Colorado, could interfere with local labor relations. As an illustration, the line between the DCTA-DPS professional educator bargaining unit and non-unit educators in DPS charter schools runs all the way down to, and then through, the center of charter school classrooms. Understanding this requires some background.

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[22] Colorado public sector labor law traces its roots to the notorious Ludlow massacre of 1914. For a brief recent account, see B. Mouk, *The Ludlow Massacre Still Matters*, THE NEW YORKER (April 18, 2014), http://www.newyorker.com/business/currency/the-ludlow-massacre-still-matters (accessed 5/26/2017). That extraordinarily violent event arose from the mining industry. Legislation intended to promote the peaceful resolution of labor disputes passed the next year and covered public and private employees, in part because this law preceded the split between private and public labor relations law. See n. 50 below. See also Ch. 180, sec. 4, 1915 COLO. SESS. LAWS 562, 563, now codified at COLO. REV. STAT. §§ 8-1-101(6) & (7) & 8-1-123 — 8-1-128. Subsequent Depression-era legislation superseded this Act in the private sector, leaving it only applicable to public employees. Beginning in the 1970s, the Colorado Supreme Court found collective bargaining permitted in the public sector (*Littleton Educ. Ass'n v. Arapahoe Cty. Sch. Dist.*, 191 Colo. 411, 553 P.2d 793 (1976)); then approved binding grievance arbitration (*Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032 (Colo. 1983)); then acknowledged the qualified statutory right to strike granted in 1915 (*Martin v. Montezuma-Cortez Sch. Dist.*, 841 P.2d 237 (Colo. 1992)); and, finally, upheld carefully structured schemes of binding interest arbitration. *Reg'l Transp. Dist. v. Colo. Dep't of Labor & Emp't, Div. of Labor*, 830 P.2d 942 (Colo. 1992); *FOP v. City of Commerce City*, 996 P.2d 133 (Colo. 2000).

One of the financial equity-and-adequacy policy puzzles in establishing and maintaining charter schools in Colorado (and, in one way or another, every state) begins with the underfunding of special education. Congress, in passing the Individuals with Disabilities Education Act (IDEA)[23] set a goal of funding 40% of the cost of special education, now restated as the (lower) amount equal to 40% of average per pupil expenditures times the number of special education students.[24] It has never met either goal. Typically, federal IDEA funding has run at less than half, sometimes much less, of the lower amount.[25] In Colorado, this meant that a substantial (though variable) share of the cost of special education falls on the basic state-equalized per student funding (referred to in state law as both "Total Program" and "Per Pupil Revenue" funding, or "PPR").[26] This in turn means that a portion of each PPR allocation is set aside locally in a pool for certain special education costs.[27] Charter school funding is also principally based on PPR. Thus, a large share of the cost of special education lies *within* the PPR allocated to charter schools. And many charter schools, especially the smallest, have no capacity to aggregate these funds to support even one moderately expensive student. Thus, the Charter

[23] 20 U.S.C. §§ 1401-1487.

[24] See 20 U.S.C. § 1411(a)(2).

[25] See, e.g., EdNote, *Short Changing Spec. Ed.,* https://ednote.ecs.org/is-the-federal-government-short-changing-special-education-students/ (accessed 2/19/2019) (calculating 2015-16 expenditures as equal to 15.3% of the average-per-pupil figure). In Colorado less than 10% of the cost of special education is covered with federal funding, and less than 20% with state categorical funding, leaving roughly 70%+ to be funded locally. Colo. Dept. Educ., *Special Education Funding*, http://www.cde.state.co.us/cdechart/guidebook/sped/funding (accessed 2/19/2019). Thus, "[c]harter schools should plan on subsidizing special education services out of their general fund by at least 70%." *Id*.

[26] See COLO. REV. STAT. § 22-54-103(6) & (9.3).

[27] As noted above, Colorado also has specialized or "categorical" funding for special education, divided into three tiers. See, e.g., COLO. REV. STAT. §§ 22-20-114. The highest tier funds the most expensive students in the state. Students whose education costs something less than $40,000-$50,000 per year must be paid out of categorical funds and PPR, but even the second-highest tier of funding, with IDEA funds added, may increase an $8,000-9,000 per year PPR base by $3,000-$5,000. This means students who cost anything from $40,000 per year down to perhaps $14,000 must be funded largely by aggregating money taken from PPR.

Schools Act creates what is colloquially known as the "full insurance model." This presumptive funding system allows charter authorizers to withhold from school PPR the full "average" cost of special education and then obligates the authorizer to deploy the special education services, most frequently through district employees, needed by the charter school.[28] DPS and its charter schools have developed permitted variations under this statute. Thus, DPS special educators and related service providers[29] are found every school day inside DPS charter school classrooms delivering services to students, consulting or co-instructing with charter school teachers, participating in meetings concerning individual special education students, or overseeing and providing technical assistance on special education issues.

DPS special educators and related services providers were part of the unit that went on strike. Their charter school counterparts were not. Had the strike lasted more than three days one can easily imagine disputes and allegations of unfair practices involving these teachers. If Colorado charter schools were found to be under the NLRB's jurisdiction,[30] a complaint that involved both a DPS special educator (for example) *and* a charter school educator in a single incident would go beyond a bargaining unit boundary issue. The complaint itself would be split in half: one teacher's allegations subject to state law and state dispute resolution, but another caught up in the same dispute siphoned into the NLRB process. Inconsistent substantive rules, inconsistent processes and timelines, and decisionmakers isolated from each other would then

[28] COLO. REV. STAT. § 22-30.5-112(2)(a.8).

[29] "Related services" is an IDEA term of art referring to those individuals who do not provide traditional academic instruction but whose work is necessary to enable students with disabilities to access instruction. This includes physical therapists, occupational therapists, nurses, speech-language pathologists, psychologists and others.

[30] Colorado has two separate provisions for removal-and-replacement of charter school board members for "cause" (and perhaps a third — more below). These are more narrowly defined and procedurally constrained than was the case with open-enrollment charter schools in Texas, leaving uncertainty on whether Colorado charter schools are exempt under current rulings. The constraints in Colorado law, of course, are part of Colorado *education* policy and with respect, should not be second-guessed by this Board (more below).

separately wrestle with resolving some fraction of a dispute — with no assurance these processes would even agree on basic evidentiary facts.

If this was not one dispute at one school, but a series of disputes, the jurisdictional complications could easily mean a school-district teachers' strike was extended due to secondary issues partially tied up in in the NLRB. More profound and unjustified interference in state regulation of unmistakably public entities (*school districts*) and their employees — through the side-show of jurisdiction over charter school employees — is difficult to imagine.[31]

Examples like this could easily be multiplied. Public charter schools do not exist in splendid isolation from the rest of the public-school system. They sometimes occupy public school buildings owned by school districts (sometimes with traditional public schools). They interact with state and local school employees and/or regulations related to special education, English-language education, student discipline, parent engagement, teacher evaluation, financial transparency, financial audits, public meetings obligations, public records obligations, student privacy laws, truancy and drop-out prevention requirements, health-and-sex education, character education, regulation of technology providers, gifted-and-talented education, school food programs, student transportation programs, student journalists and advisors,[32] and every other

[31] While we offer this in support of a discretionary decision to decline jurisdiction under Section 14(c)(1), it also resonates with this Board's ruling in *Northwestern University and College Athletes Players Association,* 362 NLRB No. 167 (2015), and the concern there for NLRB jurisdiction that does not "serve to promote stability in labor relations."

[32] See, e.g., COLO. REV. STAT. §§ 22-20-101, et seq; 22-24-101, et seq.; 22-33-105, et seq; 22-11-401; 22-9-106; 22-44-301, et seq; 22-30.5-112(7); 24-6-402; 24-72-201, et seq.; 22-1-123; 22-33-107, et seq.; 22-1-128; 22-29-101 et seq.; 22-16-101, et seq.; 22-20-201, et seq.; 22-30.5-517; 22-30.5-112.5; and 22-1-120, respectively. A list double this length could be supplied. Colorado charter schools may apply to "waive" certain statutes. Many of those listed above are not waivable or have never been waived. And when a charter school secures a waiver from the State Board of Education its own "replacement" policies must serve the same policy ends as the waived statute. See, e.g., COLO. REV. STAT. § 22-30.5-106(1)(o). That is, waiver practice complicates the web of state-defined rules applicable to charter schools.

concern embodied in state law or policy on public education. This Board has neither expertise, nor a policy mandate over public education. Carving off part of this interactive system for federal regulation of labor relations invites interference, complexity, and incoherence.

II. Jurisdiction Should be Declined to Respect Federalism

This Board's principal effort to acknowledge and respect federalism runs through its "political subdivision" test. We believe that test has short-circuited when applied to charter schools. Rather than confront what appear to be irreconcilable differences between a long-standing test and the very core of charter school policy fashioned by the states, this Board should exercise its discretion to return an issue that belongs in state jurisdiction to those authorities.

A. Summarizing the Charter Policy Context.

Charter schools arose from several strands of thought. First, there is a well-grounded American tradition of reposing in parents the responsibility and right to, within broad bounds, direct the upbringing and education of their children.[33] This idea has always been present in public education, often overshadowed by standardized, if not production-line schooling. Charter schools are in part an effort to support "parent choice" in the public sector.

A second, and closely related, critique begins with the recognition that "education is not a one-size-fits-all" endeavor.[34] Human development is variable; each child is unique, and no one approach to education is best for all. Developments in the cognitive sciences, the spread of distinct pedagogies, the "individualization" called for by disability-rights advocates, and,

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[33] See, e.g., *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). This doctrine ultimately traces to the dissenting opinion of the first Justice Harlan in *Berea College v. Kentucky*, 211 U.S. 45, 58-70 (1908) — where Berea College's attempt to maintain racial integration in a private school fell victim to Jim Crow legislation.

[34] *United States v. Virginia*, 518 U.S. 515, 542 (1996).

ultimately, a recognition that distinctly different and even incompatible educational methods may be highly beneficial to different children have all reinforced this insight. Each of these impulses views excessive standardization as an attempt to force certain children into a Procrustean system that demands they not follow a natural and appropriate course of personal development. Charter schools allow creation of pedagogically distinct public schools in a kind of ecology or portfolio[35] allowing parents and educators to better match child to school.

A third inspiration entails a closely observed history of the standardized system. On this view, for at least 130 years American public schools have been continuously on the receiving end of demands for pedagogical change. One such movement has barely crested before another begins. These movements enjoy electoral success and become part of an enthusiastic campaign. Polices are adopted, teachers trained, administrators drilled, central offices dedicated to the effort. The system is defined for some time by the latest educational theory. But, soon enough, new criticisms emerge, previous enthusiasms fade, and a residue of polices, chastened believers, habits, and perhaps a slimmed-down central office remains.

When a system is subjected to successive cycles of this process what is left are conflicting internal impulses, fragments of various practices, and a lack of unitary vision or consistency.[36] Traditional American public schools still serve many students well and many adequately, but many are served poorly. Charters are in part intended to counter the resulting policy entropy by creating mission-driven, coherent and intentional educational institutions given significant independence from election-cycle-driven politics — but still accountable, at the price of their existence, to the public. This not only means that charters are supposed to provide a

[35] See, e.g., CRPE, *Portfolio Strategy*, https://www.crpe.org/research/portfolio-strategy (accessed 2/19/2019).

[36] Tyack, D. & Cuban, L. TINKERING TOWARD UTOPIA (1995).

haven from the endless electoral cycle, it also means that believers in a theory of education can practice their views within charter schools. Indeed, the pedagogical pluralism of charter schools can free the larger system to more successfully pursue intentional and coherent practices.

A fourth element was implicit in original charter school acts and became attached to charters early on: a concern for deeply entrenched systemic inequality in education. Use of schools designed and dedicated to closing race-class-gender-and-other achievement gaps is a natural outgrowth of charter policy. Charter schools thus became a strong (though not exclusive) locus for efforts to break patterns of unacceptably poor service to certain students.

Taking these four elements as a fair summary of the bundle of concepts that inspired charter schools, what emerged as the rough outline of charter school policy can be stated simply:

- *Independent operation:* charter schools are separate organizations with their own governing boards and are not subject to direct and detailed supervision by existing systems of public-school governance;
- *Schools of choice:* charter schools are responsive to and depend upon parent choice and participation in their programs;
- *Accountability:* charter schools are reviewed to assure their behavior and performance and its consistency with the original approval and the public interest;
- *High stakes review*: charter schools, unlike most public and private organizations, do not enjoy perpetual existence but are periodically reviewed by duly constituted authorities who can close a charter school whose existence is no longer justified.

It is easy to state this framework in about 100 words. It is more challenging to enact and then implement a policy framework faithful to this vision. Despite that, the charter sector on a whole maintains fidelity to this basic outline. Charter schools operate with independence and

mission focus — and rely on these features to attract students. Charter schools are closely reviewed for governing, financial and academic performance. And the principal policy response to a poor or improperly performing school is to shut it down. During the 2015-16 school year, for example, 7.3% of charter schools facing renewal were closed nationwide.[37] Many authorizers use closure to police quality. For example, the District of Columbia independent chartering board closed 21 schools from 2012 to 2017; 15 closures were due to performance. [38]

These remain policies in motion. How to measure educational achievement, in all its varieties, is a subject of vigorous debate. Standards, policies, and decisionmakers to guide school closure vary widely. Developing a usable portfolio of schools and then matching students to schools in a way that is fair remains a work in progress. But the underlying policy structure is robust, and the sector is gradually developing "best practices."

Decentralized bottom-up pressures make charters responsive to local input and knowledge, even as the top-down threat of closure, to paraphrase Dr. Johnson, "concentrates the mind wonderfully."[39] That is, the tool of school closure creates a deterrent to poor performance or behavior and a solution for those not deterred. And when school autonomy meets school closure, the last word belongs to closure.

B. The NLRA "Political Subdivision" Test Fails to Account for the Charter School Policy Framework

Defining the exact line between public and private endeavor in the United States is a perennial challenge — one that has more than once troubled the Supreme Court. This Board's

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[37] NACSA, *Data In Depth Charter School Closure*, http://www.qualitycharters.org/policy-research/soca-2016/closures/ (accessed 9/29/2017).

[38] DCPSB, *Charter School Growth and Closures*, http://www.dcpcsb.org/report/charter-school-growth-closures (accessed 9/29/2017).

[39] Boswell, LIFE OF JOHNSON, September 19, 1777 ("Depend on it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully").

test — sometimes mistakenly attributed to the Supreme Court and then called the *Hawkins*[40] test — was reviewed by the Supreme Court 47 years ago and pointedly ***not*** endorsed.[41] It has not been endorsed since and given the attention of the current Court to federalism issues the chances for it surviving a second visit to the Court are, frankly, doubtful. As just one example, the Court since *Hawkins* has jettisoned a test focused on "traditional" public criteria, stating:

> The essence of our federal system is that, within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be. Any rule … that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.[42]

The Court's caution that traditional "functions" are not a proper guide is equally salient with the use of traditional structures of governance. Indeed, this Board's order inviting amici is already being read as telegraphing not labor relations issues, but Board member views of charter schools.

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[40] *NLRB v. Natural Gas Utility District of Hawkins County,* 402 U.S. 600 (1971).

[41] See, e.g., *Halttunen v. City of Livonia*, 664 F. App'x 510, 512 (6th Cir. 2016) (in *Hawkins* "the Supreme Court did not announce a test. In fact, it expressly declined to consider whether an entity must fall within the two categories" defined by the NLRB); *Nobles v. Metro. Transit Auth.*, No. 92-2931, 1994 U.S. App. LEXIS 43192, at *10 (5th Cir. Jan. 11, 1994) (*Hawkins* "emphasized that this test did not necessarily define the boundaries of the political subdivision exemption"); *NLRB v. Princeton Mem'l Hosp.*, 939 F.2d 174, 177 (4th Cir. 1991) (*Hawkins* "emphasized that the test did not necessarily define the boundaries of the political subdivision exemption"); *Museum Assocs. v. NLRB*, 688 F.2d 1278 (9th Cir. 1982) (same); *Bd. of Trs of Mem. Hospital. v. NLRB*, 624 F.2d 177, 184 (10th Cir. 1980) ("As in" *Hawkins* "we need not decide whether these limitations mark the bounds of the exemption"). *NLRB v. Austin Developmental Ctr., Inc.*, 606 F.2d 785, 789 (7th Cir. 1979) ("The Supreme Court has acknowledged this two-part test but has indicated that it does not necessarily define the boundaries of the political subdivision exclusion").

[42] *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546 (1995). In *Garcia* the court was considering a Congressional direction to extend federal power to state and local entities. Here the Board faces the opposite problem: a Congressional direction to keep hands off of state and local entities. What makes the Board's test troubling is that its narrowness likely *fails* to match the scope of entities created as "creatures of the state." See n. 41, above.

The longer this Board worries charter school issues, the more that belief will grow. More important, until recently the Board had never encountered a charter-school-like policy structure.

The Board test assumes the best marker of public status is electoral control over a governing body. Boards that are elected or at least subject to removal through public authority, and so on, mark public institutions. Charter school policy, in contrast, assumes that the one way to create *effective* public schools is give them independence from direct exposure to the political process; but make their existence dependent upon their capacity to attract parents *and* performance under standards and procedures defined by *state* law. The Board's test and charter policy do not deploy the same policy tools. The result is not a clean definition, as some may think, of whether charter schools are "public." It is, rather, a confusion between two visions of how to control (for this Board) or make effective (for charter schools) a public institution.

Here it is necessary to respond, with respect, to a suggestion made in dissent to the order inviting *amici* that it is "easy" to solve this problem: just popularly elect, politically appoint or otherwise make charter board members more directly responsive the ebb and flood tides of electoral politics. That *sounds* easy. For example, a Montessori charter school just gets a locally elected board. What's wrong with that? Well, since Montessori education is only preferred by a small minority, that Board will invariably become, sooner or later, hostile-to-indifferent to the mission of the school it governs. The original vision will not survive the first significant political breeze. In the end, there will be no Montessori school in place, regardless of how it performed.[43]

To be clear, acting on this "easy solution" would be a decision by this Board to tell dozens of legislatures that have created charter schools that *their* view of how to address the

[43] Compare *Baltimore City Board v. City Neighbors Charter School*, 929 A.2d 113, 115 (Md. 2007) (charter schools created "conflict with … school boards, administrators, teacher unions, and local fiscal authorities — which mostly and often vehemently opposed the effort").

complex of state-and-local educational concerns in public education briefly outlined above is invalid (unless those legislatures desire federal labor jurisdiction — but, of course, to state that proposition is to refute it). It will also be a decision to weaponize this Board's "political subdivision" test for use in state political battles over charter policy. More precisely, it is to say that charter schools can only be "public" if they so compromise the policy pillars outlined above that they risk no longer being charter schools. This "solution" invites an effort to repeal core charter policies, turning federal labor law jurisdiction into a sword against state education policy.

This issue, in short, is not "easy" at all. It involves the incommensurability of a more-than-a-half-century old, never validated — and we think failed — attempt to define public bodies, on the one hand, with an entirely new species of public body designed on new premises, on the other. The NLRA's test was not designed with charter schools in mind: they did not exist and neither did anything like them. Charter schools were not designed with the NLRA test in mind; their inspiration was exclusively a product of state educational frustrations. We might offer a mirror-image suggestion: in relation to the new phenomenon of charter schools the NLRB test should be viewed as archaic — and rethought from scratch. But given that no body we know of has fully cracked the code for defining the public/private line with both precision and lasting effect, that too may be a challenging task. More neutrally, the existing NLRB test and the premises of charter school legislation do not speak to each other. That suggests that the Board should consider whether its discretion is wisely exercised in by declining jurisdiction.

C. The NLRB Test Does Not Have Reliable and Predictable Results

KIPP Academy Charter School argues that application of the NLRB test to charter schools is simple. This is incorrect. To give two brief examples, Colorado law permits authorizers to impose "unilateral conditions" on charter schools (subject to a system for appeal to

the State Board of Education),[44] while South Carolina law permits authorizers to impose "sanctions short of revocation" on misbehaving or mis-performing schools.[45] In both states, these general terms may enable authorizers to remove board members and direct replacement. In both states, charter advocates dispute this view. In neither case is there any resolution of this issue as a matter of law. In Colorado the uncertainty has now continued for 26 years.[46] Should South Carolina or Colorado come before this Board, how will it rule? There is no "evidence" of what is correct as a matter of *law*. There is no mechanism for a party before this Board to obtain a definitive ruling from a state court of final resort. There is no right of this Board to pronounce the meaning of ambiguous or general terms of state law. And to generalize: almost all express or possible board director "removal" provisions related to charters are underdeveloped in practice as well as in law because school closure is the primary authorizer response to problems of a severity that might warrant removal.

Beyond that, the NLRB test remains (47 years after *Hawkins*) vulnerable as an inadequate fulfillment of Congress' support for federalism. The Board's charter rulings have yielded exactly one circuit court decision, which produced a divided panel *and* an opinion whose logic turns on Justice Brennan's careful decision in *Hawkins County* being riddled with needless dicta.[47] Simply, this is a set of issues posed for years, if not a decade or more, of litigation and confusion. It is not a case of bright lines and sunny days naively projected by KIPP.

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[44] See, e.g., COLO. REV. STAT. § 22-30.5-108(2).

[45] S.C. CODE ANN. § 59-40-55(B)(8).

[46] The issue does not reach maturity because schools potentially subject to such action are invariably at severe risk of closure and, at least in Colorado, often closed.

[47] *Voices for International Business & Educ. v. NLRB*, 905 F.3d 770 (5th Cir. 2018) (*Voices)*. According to *Voices*, the utility districts there were public, meaning the *Hawkins* Court's entire discussion of removal was needless.

D. States Should Be Permitted to Continue the Process of Adapting Charter School Policy to State Labor Relations Policy and *Vice Versa*

At least 22 states have adopted legislation as part of their public sector labor relations statutes, their charter school statutes, or both, articulating just how charter schools are supposed to fit into the state's scheme of public sector labor law.[48] In many other states, the scoping sections of public sector labor law reach charter schools without need for any amendment or redefinition.[49] The "political subdivision" issue is one of federal law that does not turn on such state enactments. Yet the "political subdivision" exemption in the Wagner Act was meant to be plenary — a codification of the distinction between all private employees and *all* public employees that swept across America and the political spectrum (including the future President who would sign the Wagner Act, Franklin Delano Roosevelt) in the wake of the Boston Police Strike of 1919 — an event that remained a vivid living memory in 1935.[50]

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[48] ALA. CODE §§ 16-6F-7(8)(t) & 16-6F-9(e)(3); ALASKA STAT. § 14.03.270(b); CAL. EDUC. CODE § 47611.5(d); CONN. GEN. STAT. § 10-66dd(b)(4); DEL. CODE ANN. tit. 14, § 507(c); FLA. STAT. ANN. § 1002.33(12)(b); HAW. REV. STAT. ANN. §§ 89-10.55 & 89-6(d); IDAHO CODE § 33-5205(3)(q); 115 ILL. COMP. STAT. ANN. 5/2(a); MD. CODE ANN., EDUC. § 9-108(a)(3) & (b); MASS. ANN. LAWS ch. 71, § 89(y); MICH. COMP. LAWS § 423.201(f) & (h); MINN. STAT. ANN. § 124E.12; NEV. REV. STAT. ANN. § 288.060; N.H. REV. STAT. ANN. § 194-B:14(I); N.J. STAT. § 18A:36A-14; N.Y. EDUC. LAW § 2854; OHIO REV. CODE ANN. § 4117.01; OKLA. STAT. tit. 70, § 3-135(B); OR. REV. STAT. ANN. § 338.135(8); 16 R.I. GEN. LAWS § 77.2-2 (a)(12) (district charter schools); 16 R.I. GEN. LAWS § 77.3-2 (independent charter schools); WASH. REV. CODE ANN. § 41.59.031. See also See *El Centro de la Raza v Washington,* 192 Wn.2d 103 (2018) (altering which state labor relations statute applies to charter schools under state law).

[49] See, e.g., BURNS IND. CODE §§ 20-29-6-1 & 20-29-2-15(B); MISS. CODE ANN. § 37-28-47(2). See also n. 22 on applicable Colorado public sector labor law. Many other states could be added to this list.

[50] Governor Coolidge and President Wilson roundly condemned the strike, a position with overwhelming public support. Wilson, for example, referred to the police officers this way: "He is a public servant, not a private employee, and the whole honor and safety of the community is in his hands.…" Wilson, W. *Address at the Opera House (Marlow Theater), Helena, Montana*, September 11, 1919. http://www.presidency.ucsb.edu/ws/index.php?pid=117376 (accessed 5/26/2017). President Roosevelt, who had been a part of the Wilson administration, took this point to heart. In 1937 he wrote: "… [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of

Simply, state legislatures thought they were creating charters as public institutions and believed they could coordinate such enactments with policy on labor relations for public employees. This unforced effort by many states should be considered by this Board when it is making a discretionary decision on whether to displace such efforts with a federal law not designed to regulate public employees *and* not capable of coordination with state-by-state policies governing public education. That coordination can ***only*** occur if it is left to state policy-making. This Board's efforts cannot be meshed with educational polices in dozens of states and can only be, as a result, sand in the gears of an already complex educational enterprise.

To be sure, members of this Board, like members of society at large, like legislators in each state, are entitled to have differing opinions on the wisdom of having charter schools. But that debate should not be played out before, nor should charter policy enactments be driven by, this Board. The proper venue for debates about charter school policy — educational, labor or otherwise —is in each state legislature that considers having or not having charter schools.

III. The Board Can Properly Reach This Issue

Charter schools are entirely public. Let us be clear: any state legislature that created charter schools is empowered to repeal its charter school law and dis-establish charter schools *en masse*. And every charter school statute limits creation of charter schools to an act of authorization under public standards, using public processes, defined in state law. Finally, every

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Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable." *Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service* (August 16, 1937), http://www.presidency.ucsb.edu/ws/?pid=15445 (accessed 5/26/2017). While focused on the right to strike, this moment split American labor law in half: one part private, the other public. 29 U.S.C. § 152(2) was but one enactment in which Congress embodied this division. See, e.g., 41 STAT. 363, 364 & 396, 398 (1919 & 1920) (forbidding police and firefighter strikes in the District of Columbia); 5 U.S.C. § 7311 (forbidding all federal employee strikes).

act of authorization can itself be undone. Unlike private (and many public) bodies, charter school existence is highly contingent. Each is a "creature of the state" — a fully public school — subject to disestablishment through standards and procedures in state public education policy.

Because they are fully public, these schools are subject to a raft of statutes governing public education. Sorting out which statutes apply can be complex because many state statutes, like the NLRB test itself, were adopted before anyone contemplated "charter schools." But it is typically easy to compose a list (similar to that documented at n. 32 above) of dozens of statutory sections, composed of thousands of words, that regulate aspects of educational and organizational policy in charter schools. And while some tests used by an adjudicator *may* require factual resolution, other tests can be applied simply by evaluating a web of statutes, such as one reflecting the entanglement of charter schools with a state education system. And that it can be proper to use state law as the exclusive facts needed to apply a federal standard is demonstrated by none other than *Hawkins County*, where the Supreme Court did just that.

Whether each state's body of charter school law, or only some states, or only some class of charters within states, properly come within a ruling by this Board depends, of course, on the ruling. To be sure, a ruling *could* turn on evidentiary facts and a factual record. But there is no principle of law that tells one in advance that this Board is incapable of crafting a decision that covers a class of charter schools *based on matters evident from the face of state law.*

IV. Only the States Can Provide Stability in Charter School Labor Relations

KIPP claims it is improper for change in membership of this Board to affect its rulings. Yet commentators on this Board commonly refer to "the Clinton Board," "the Bush II Board," etc., precisely because, by design, every President puts a stamp on Board rulings. As a result, Board law is variable. An example is a decision by the Carter Board, overruled by the Reagan

Board, in turn overruled by the Clinton board, yet again overruled by the Bush II Board, which ruling no doubt would have been a victim of the Obama Board had not the Republican Senate done its best to prevent an Obama Board from existing.[51] One commentator put it this way: "[t]he political dimension of [NLRB] decisions is capable of affecting not only the actual resolution of cases at the margin, but also the substance of rules of law that guide parties' planning and behavior at the level of primary activity."[52] Simply, KIPP's decision to place a bet on stability in this Board's previous rulings has left it, like Captain Renault, "shocked, shocked," to find gambling at the casino.[53]

No doubt some states have designed similar politically-sensitive labor relations systems. With equal certainty some states have had long stability in public sector labor relations. With respect, given limited stability in labor relations *law* before this Board states should not have their public bodies subjected to the designed instability of this system. The only chance of genuine stability for charter schools in relation to *these* issues lies in the states.

CONCLUSION

In education the states are pre-eminently Justice Brandeis's "laboratories of democracy."[54] And charter schools are laboratories created by states. Whether each school is doing something valuable is judged, continuously, by the states. Beyond that, the charter laboratory in each state exists at the sufferance of a state legislature. No principle of law or

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[51] *Materials Research Corp*, 262 N.L.R.B. 1010 (1982) (Carter Board); *overruled by*, *Sears Roebuck & Co.,* 274 N.L.R.B. 230 (1985) (Reagan Board); *overruled by Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. (2000) (Clinton Board), *enforced in part,* 268 F.3d 1095 (D.C.Cir. 2001); *overruled by IMB Corp.*, 341 N.R.R.B. 1288 (2004) (G. W. Bush Board).

[52] K. Lopatka, NLRA RIGHTS IN THE NONUNION WORKPLACE (2010) p. 14.

[53] *Casablanca* (1942).

[54] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion).

politics compels a state to create, continue, or fund charter schools. Charter school laws should stand or fall on their merits; not because federal labor law complicates or undermines those policies.

The integrity of this Board as a safeguard of the rights of private employees in labor relations is not materially damaged by finding charter schools outside the Board's regulatory gaze. The integrity of charter school policy, as a body of law that should be created, developed, maintained, or repealed in each state that allows this policy laboratory is materially damaged by a body of law going to core operational issues — labor relations — removed entirely from the control of the creator of these institutions: the states; [55] and, instead, subject to an institution ***so*** sensitive to political developments that it does not promise these schools a stable body of applicable law even for a term allowing a kindergarten student to reach high school graduation.

The Board should decline to exercise jurisdiction.

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[55] *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."). Here, of course, Congress has not been silent. It has expressed a desire that this Board *not* reach into state affairs.

STATEMENT OF SERVICE

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