

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO MATHEMATICS AND SCIENCE
ACADEMY CHARTER SCHOOL, INC.,

Employer-Petitioner,

and

CHICAGO ALLIANCE OF CHARTER
TEACHERS & STAFF, IFT, AFT, AFL-CIO,

Union.

Case No. 13-RM-1768

**BRIEF AMICUS CURIAE OF THE NATIONAL EDUCATION ASSOCIATION,
THE CALIFORNIA TEACHERS ASSOCIATION, THE ILLINOIS EDUCATION ASSOCIATION,
AND THE NEW JERSEY EDUCATION ASSOCIATION**

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TABLE OF CONTENTS

INTRODUCTION..... 1

 A. STATEMENT OF INTEREST 1

 B. STATEMENT OF THE CASE 2

 1. The Public Charter School Concept..... 2

 2. The Illinois Charter Schools Law 5

 3. The Chicago Mathematics and Science Academy Charter School 7

ARGUMENT 9

 I. CMSA IS EXEMPT FROM THE BOARD’S JURISDICTION BECAUSE IT IS
 ADMINISTERED BY INDIVIDUALS WHO ARE RESPONSIBLE TO PUBLIC
 OFFICIALS OR THE ELECTORATE 10

 A. The Second Prong of Hawkins County Calls For a Fact-Intensive and
 Case-Specific Analysis of All Relevant Circumstances that Bear on the
 Question of Whether the Employer is Publicly Accountable..... 10

 B. On a Proper Understanding of Hawkins County’s Second Prong, CMSA is
 a Political Subdivision of the State of Illinois..... 20

 II. ALTERNATIVELY, THE BOARD SHOULD EXERCISE ITS DISCRETION
 TO DECLINE TO EXERCISE ITS JURISDICTION IN THE CIRCUMSTANCES
 PRESENT IN THIS CASE 23

 A. The Board Has Wide Discretion to Decline Jurisdiction..... 24

 B. The Board Should Exercise its Discretion to Decline Jurisdiction Over
 CMSA and Establish Criteria for Such Declination in Future Cases
 Involving Charter Schools 28

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Brown & Root, Inc., 51 NLRB 820 (1943)..... 24

Cape Girardeau care Center, Inc., 278 NLRB 1018 (1986)..... 14

Clayton-Dorris Co., 78 NLRB 859 (1948)..... 24

Cleveland v. City of Los Angeles, 420 F.3d 981 (9th Cir. 2005)..... 17

Charter Schools Administrative Services, Inc., 353 NLRB 394 (2008). 9,15,16,18

Chicago Mathematics & Science Academy Charter School, Inc.,
No. 13-RM-1768 (NLRB Region 13 Sept. 20, 2010)..... *passim*

Children’s Studio School Public Charter School, 343 NLRB 801 (2004)..... 9

County of Du Page v. Illinois Labor Relations Board, 900 N.E. 2d 1095 (Ill. 2008).8,31

D. T. Watson Home for Crippled Children, 242 NLRB 1368 (1979). 26

Duke Power Co., 77 NLRB 652 (1948)..... 24

Education for Change, Case No. 32-RM-801 (NLRB Region 32, May 9, 2006)..... 9

Enrichment Servs. Program, Inc, 325 NLRB 818 (1998)..... 14

F. G. Congdon, 74 NLRB 1081 (1947). 24

FiveCAP, Inc., 331 NLRB 1165 (2000)..... 15

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957)..... 24,25

Hialeah Race Course, Inc., 125 NLRB 388 (1959). 26,27

Hinds County Resource Agency, 331 NLRB 1404 (2000)..... 26

Jefferson Downs, Inc., 125 NLRB 386 (1959). 26

Johns-Manville Corp., 61 NLRB 1 (1945). 24

Lawrence v. City of Philadelphia, 527 F.3d 299 (3d Cir. 2008) 17

<i>Leadership Public Schools, Inc.</i> , No. 32-RM-800 (NLRB Region 32, May 5, 2006)	9
<i>Los Angeles Turf Club</i> , 90 NLRB 20 (1950).....	26
<i>Management Training Corp.</i> , 317 NLRB 1355 (1995)	26
<i>Natural Gas Utility District of Hawkins County</i> , 167 NLRB 691 (1967)).	11
<i>New Process Steel v. NLRB</i> , 130 S. Ct. 2635 (2010).....	9, 15
<i>NLRB v. Fullerton Publishing Co.</i> , 283 F.2d 545 (9th Cir.1960)	17
<i>NLRB v. Natural Gas Utility District of Hawkins County</i> , 402 U.S. 600 (1971).....	<i>passim</i>
<i>NLRB v. Southeast Ass'n for Retarded Citizens, Inc.</i> , 666 F.2d 428 (9th Cir. 1982).	26
<i>Okahoma Zoological Trust</i> , 325 NLRB 171 (1974).....	14
<i>Ohio Power Co. v. NLRB</i> , 176 F.2d 385 (6th Cir. 1949).....	17
<i>Overbrook Sch. For the Blind</i> , 213 NLRB 511 (1974).....	26
<i>Pari Mutuel Clerks Union of Louisiana v. Fair Grounds Corp.</i> , 703 F.3d 913 (2d Cir. 1983) ...	26
<i>Regional Medical Center at Memphis</i> , 343 NLRB 346 (1986).....	14
<i>Retail, Wholesale and Dep't Store Union AFL-CIO, Local 310 v. NLRB</i> , 745 F.2d 358 (6th Cir. 1984)	27
<i>Res-Care, Inc.</i> , 280 NLRB 670 (1986).....	26
<i>Rosenberg Library Ass'n</i> , 269 NLRB 1173 (1984).....	14,22,23
<i>Rural Fire Protection Co.</i> , 216 NLRB 584 (1975)	26
<i>Spentonbush/Red Star Cos. v. NLRB</i> , 106 F.3d 484 (2d Cir. 1997).....	17
<i>St. Paul Ramsey Medical Center</i> , 291 NLRB 755 (1988)	23
<i>State Bar of New Mexico</i> , 346 NLRB 674 (2006).....	21
<i>University of Vermont</i> , 297 NLRB 291 (1989).....	21
<i>Wilson v. State Bd. of Educ.</i> , 89 Cal. Rptr. 2d 745 (Cal. App. 1999).....	4

TABLE OF AUTHORITIES

Federal Statutes and Regulations

29 C.F.R. § 103.3..... 27

38 Fed. Reg. 9537 (April 17, 1973)..... 27

29 U.S.C. § 152(2)..... 25

29 U.S.C. § 164(c)..... 25

29 U.S.C. § 402(e)..... 18

State Statutes

5 Ill. Comp. Stat. § 120/1.02..... 7

5 Ill. Comp. Stat. § 120/2..... 7

5 Ill. Comp. Stat. § 140/3..... 7

5 Ill. Comp. Stat. § 140/4..... 7

40 Ill. Comp. Stat. § 5/17-132..... 7

105 Ill Comp. St. § 5/27A-2, 21

105 Ill. Comp. Stat. § 5/27A-5 5

105 Ill. Comp. Stat. 5/27A-9..... 22

115 Ill. Comp. Stat. § 5/2 7, 23

115 Ill. Comp. St. § 5/5..... 31

115 Ill. Comp. St. § 5/13 31

Other Authorities

Brief for the NLRB in *NLRB v. Natural Gas Utility District of Hawkins County*,
Case No. 70-785 at 11, 1971 WL 133402 12

TABLE OF AUTHORITIES

Other Authorities, Cont'd

National Labor Relations Board, <i>An Outline of Law and Procedure in Representation Cases</i> (Rev. 2008).....	25
Daniel S. Greenspahn, <i>A Constitutional Right To Learn: The Uncertain Allure Of Making A Federal Case Out Of Education</i> , 59 S.C. L. Rev. 755, 784 (Summer 2008)	29
United States Department of Labor Office of Labor-Management Standards, <i>LMRDA Interpretative Manual</i> (1962).....	19
Note, <i>Discretionary Administrative Jurisdiction of the NLRB Under Taft-Hartley Act</i> , 62 Yale L.J. 116, 118 (1952).....	25

INTRODUCTION

A. STATEMENT OF INTEREST

The National Education Association (“NEA”), the California Teachers Association (“CTA”), the Florida Education Association (“FEA”), the Illinois Education Association (“IEA”), and the New Jersey Education Association (“NJEA”) submit this brief in response to the invitation issued by the National Labor Relations Board (“Board”) to file briefs *amicus curiae* on the question “whether the Employer-Petitioner, a charter school, is a political subdivision within the meaning of Section 2(2) of the [National Labor Relations] Act, and therefore exempt from the Board’s jurisdiction.”

NEA is a national labor organization with more than 3.2 million members. NEA has 50 state affiliates—including *amici* CTA, FEA, IEA, and NJEA—as well as some 15,000 local affiliates. In approximate terms, CTA has 325,000 members, FEA has 140,000 members, IEA has 133,000 members, and NJEA has 200,000 members. The vast majority of the employees represented by *amici* are employed in primary and secondary public schools, including public charter schools and other non-traditional public schools.

Amici support innovation in public education, including education reform initiatives that promote decentralized and shared decision-making, diverse educational offerings, and the removal of onerous administrative requirements. *Amici* believe that public charter schools have the potential to facilitate such reforms by developing new and creative methods of teaching and learning that can be replicated in mainstream public schools—provided that charter schools are properly designed and operated.

At the same time, *amici* are strongly committed to preserving the collective bargaining rights of education employees in public school systems—including those who work at public charter schools. Consistent with these principles, it is the policy of *amici* that charter schools, as public schools, should be subject to the same state public-sector labor relations laws as traditional public schools and that charter school employees should have the same collective bargaining rights as their counterparts in traditional public schools. In states that both authorize the creation of public charter schools and provide for collective bargaining by public school employees, *amici* believe that due regard for the proper allocation of authority as between the state and federal governments militates in favor of state jurisdiction over labor relations at public charter schools. Local affiliates of *amici* in California, Florida, Illinois, and New Jersey have been certified or recognized as bargaining representatives of charter school employees under their respective state public sector labor relations statutes for years, and have accordingly established stable bargaining relationships in the charter school setting under state bargaining laws.

B. STATEMENT OF THE CASE

In order to provide a broader context for the legal analysis of the question presented in this case, we begin with an overview of the public charter school concept, before examining the particulars of the Illinois Charter Schools Law and the the charter school at issue here.

1. The Public Charter School Concept

Public charter schools are a relatively recent phenomenon. Minnesota passed the first charter school law 1991, and California followed in 1992. *See* Minn. Laws 1991, c. 265,

art. 3, § 38; Cal. Stats. 1992, ch. 781, § 1, pp. 3756-3761. Today, 40 states and the District of Columbia have enacted charter school enabling legislation.

Inasmuch as charter schools are creatures of state law, their precise characteristics and operations vary from state to state. Certain broad features, however, are common to all charter school schemes. Charter school enabling statutes typically permit certain public entities (*e.g.*, local school boards and/or state education agencies), on application by an interested non-profit organization or group of individuals, to grant a “charter” authorizing the applicant to operate a charter school within the public school system for a period of time fixed by state law and the charter. The charter school law specifies the content of the application as well as the basic elements to be included in the charter, which in turn spells out the applicant’s plans and obligations for the charter’s duration. As public schools, charter schools receive federal, state, and local education funds, and they are prohibited from charging tuition. State charter laws typically exempt charter schools from many, but by no means all, of the regulations governing traditional public schools (particularly with regard to matters concerning curriculum and textbooks), while the charter, which is subject to revocation or non-renewal after its initial term, spells out the specific educational goals that the school must meet. The operation and management of the school are thus regulated by the terms of the charter, the state charter law, and any other provisions of law that the state charter law specifies.

Implicit in the foregoing is the overriding principle that charter schools in any given state are—like other non-traditional public schools, such as magnet schools—integral components of the state’s public school system, which are authorized, created, and

regulated in order to carry out the state's education policy objectives. One of the principal policy ideas underlying the charter school movement is that charter schools can serve as laboratories for education innovations that, when successful, can be emulated by traditional public schools, thus creating a synergy that benefits all students, parents, and communities served by the public school system. Thus, the fact that charter schools are freed from some of the regulations that govern other public schools is not to be taken as an indication that the state has no interest in overseeing the operations of charter schools or ensuring accountability; instead, the central concept behind charters is to allow charter schools to innovate and experiment with pedagogical approaches within the public school system as a means of fostering system-wide improvements in public education.

In this regard, the California Court of Appeal—in one of the few judicial decisions addressing the policy premises underlying charter schools—has cogently explained the nature and role of charter schools in a way that is instructive beyond its immediate context. *See generally Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 752-54 (Cal. App. 1999). As the *Wilson* court explained, “charter schools are part of [the state’s] single, statewide public school system.” *Id.* at 752. “Although they have operational independence, an overarching purpose of the charter school approach” is that charters can “stimulate continuous improvement in all schools.” *Id.* at 755. Thus, by creating charter schools, the legislature does not “create a dual system. Rather, while loosening the apron strings of bureaucracy, the [charter school law] places charter schools within the system of common public schools” by ensuring adherence to the basic features of a public school system: Charter schools (1) must be “free, non-sectarian and open to all students,” (2) must hire

credentialed teachers, (3) must refrain from discrimination, (4) “must meet statewide standards and conduct pupil assessments applicable to students in noncharter public schools,” and (5) “are subject to state and local supervision and inspection.” *Id.* at 752-53. As the court stressed, “the very destiny of charter schools lies solely in the hands of public agencies and officers,” given the rules for granting, renewing, and revoking charters, and as a result “charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts.” *Id.* at 755.

2 . The Illinois Charter Schools Law

The Illinois Charter Schools Law begins with a set of policy declarations that are typical of charter laws generally. After stating a number of education policy goals—*e.g.*, increasing student learning and educational opportunities, encouraging innovative teaching methods, and increasing parental and community involvement—the legislation declares that it is intended “to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating children within the public school system” and further “to advance a renewed commitment by the State of Illinois to the mission, goals, and diversity of public education.” 105 Ill. Comp. Stat. § 5/27A-2(b), (c).

The law defines a charter school as a “public, nonsectarian, nonreligious, non-home based, and non-profit school.” *Id.* § 5/27A-5(a). The law requires that a charter school be open to any pupil residing within the area served by a local school board and prohibits a charter school from charging tuition. *Id.* §§ 5/27A-4(d), 5/27A-5(e). And, the law

prohibits the conversion of “any existing private, parochial, or non-public school to a charter school.” *Id.* § 5/27A-5(c).

The charter law authorizes local school boards to grant a charter that complies with the law’s extensive content requirements, only after it is submitted to, and certified by, the State Board of Education. *Id.* §§ 5/27A-6, 5/27A-7. A charter is valid for a fixed term of not less than five or more than ten years, after which the charter may be renewed for five-year periods only upon submission of a detailed progress report and “[a] financial statement that discloses the costs of administration, instruction, and other spending categories for the charter school that is understandable to the general public and that will allow comparison of those costs to other schools or other comparable organizations, in a format required by the State Board.” *Id.* § 5/27A-9(a) and (b).

A charter may be revoked by the authorizing local school board or the State Board of Education upon a demonstration that the charter school materially violated the terms of the charter, failed to satisfy the student achievement or performance standards specified in the charter, failed “to meet generally accepted standards of fiscal management,” or “[v]iolated any provision of law from which the charter school was not exempted.” *Id.* § 5/27A-9(c).

The statute specifies that charter schools must comply with a host of regulations that apply to all public bodies within the state—including regulations concerning personnel and labor relations—as well as several charter-law specific requirements. *See id.* § 27A-5. Of particular relevance here are the following:

- Charter schools must comply with the Illinois Educational Labor Relations Act (“IELRA”), the state collective bargaining statute that governs labor relations

throughout the Illinois public school system. *Id.* § 5/27A-5(g). The IELRA itself contains an amendment providing that the “governing body of a charter school” is an “educational employer” subject to the IERLA. 115 Ill. Comp. Stat. § 5/2(a).

- Charter schools must comply with the Illinois Freedom of Information and Open Meetings Acts. 105 Ill. Comp. Stat. § 5/27A-5(c). Those statutes require “public bodies” to make their records available to, and open their meetings to, the public. 5 Ill. Comp. Stat. §§ 140/3 and 4; 120/1.02 and 2.
- Charter schools are required to engage outside, independent auditors to conduct annual audits of their finances, and they are further required to submit their annual audits, along with copies of the Form 990 that the charter schools file with the Internal Revenue Service, to the State Board of Education. 105 Ill. Comp. Stat. § 5/27A-5(c).
- Charter schools are bound by the Illinois Local Governmental and Governmental Employees Tort Immunity Act. *Id.* § 5/27A-5(g)(3).
- Charter school employees participate in public pension funds, and charter schools are required to make contributions to the relevant pension funds. *See* 40 Ill. Comp. Stat. 5/16-106(9). The State Board of Education “has the authority to conduct payroll audits of a charter school to determine the existence of any delinquencies in [pension] contributions” and “is also authorized to collect delinquent contributions from charter schools.” 40 Ill. Comp. Stat. § 5/17-132.

3. The Chicago Mathematics and Science Academy Charter School

The Chicago Mathematics and Science Academy Charter School (“CMSA”) is an Illinois charter school operating pursuant to a charter that the Chicago Public Schools granted in 2004 and renewed for a five-year term in 2009. *Chicago Mathematics & Science Academy Charter School, Inc.*, No. 13-RM-1768 Decision & Order at 2 (NLRB Region 13 Sept. 20, 2010) (hereinafter “D&O”). CMSA operates on an annual budget of approximately \$5.5 million. It receives the overwhelming majority of its funds from the Chicago Public Schools and from federal and state public education funding sources, based on statutory formulas. CMSA also receives a small amount of funding—less than 2% of the total—from private

fundraising and grants. D&O at 5-6. It employs about 50 teachers, administrators, and education support professionals. D&O at 3.

In addition to complying with all the laws and regulations that apply to charter schools generally (some of which are summarized above), CMSA also is obligated by its charter to adhere to a raft of additional reporting requirements spelled out in its charter. CMSA must file with the Chicago Public Schools, *inter alia*, the minutes of its board meetings, its student disciplinary policies and attendance data, a detailed annual budget and quarterly budget reports, quarterly financial statements, a list of employees and results of statutorily required criminal background checks, and information on teacher qualifications. D&O at 5.

The Chicago Alliance of Charter Teachers and Staff, a local affiliate of the Illinois Federation of Teachers and the American Federation of Teachers, filed a petition with the Illinois Education Labor Relations Board (“IELRB”) seeking certification as the bargaining representative of CMSA’s teachers.¹ In response, CMSA filed a petition with Region 13 of the Board, seeking a Board-supervised election, based on its contention that CMSA is a statutory “employer” under the Act, and not an exempt political subdivision of the state, and that the IELRA is pre-empted insofar as it regulates CMSA’s labor relations. After a hearing, the Acting Regional Director for Region 13 issued a detailed Decision and Order concluding that CMSA is a political subdivision of the State of Illinois and dismissing CMSA’s petition. D&O at 1, 13-14. This review proceeding followed.

¹ Under the IELRA, a union may be certified, without an election, upon showing that a majority of unit employees executed union authorization cards. *See* 115 Ill. Comp. Stat. § 5/5(c-5); *County of Du Page v. Illinois Labor Relations Board*, 900 N.E. 2d 1095, 1104-05 (Ill. 2008).

ARGUMENT

This case raises an issue of first impression for the Board: Whether, under Section 2(2) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 152(2), a public charter school organized under and governed by state law is exempt from the Board’s jurisdiction as a “political subdivision” of the state.²

In the following, we show in Part I that—on a proper understanding of the applicable standard—CMSA is a political subdivision of the State of Illinois and is therefore

² The Board has issued two published decisions in the charter school context, but in neither one did the Board have occasion to address the jurisdictional question presented here. In *Children’s Studio School Public Charter School*, 343 NLRB 801 (2004), the Board affirmed an administrative law judge’s finding that a District of Columbia charter school had engaged in unfair labor practices, but the decision did not address whether the charter school was a political subdivision of the state, as the charter school admitted that it was a statutory employer. *Id.* at 801. And in *Charter Schools Administrative Services, Inc.*, 353 NLRB 394 (2008), two members of the Board issued a decision concluding that a private, for-profit corporation that operated a Michigan charter school pursuant to a contract with the charter school was not a political subdivision of the State of Michigan. That decision thus did not address whether the charter school itself was a political subdivision of the state, as it was undisputed that the private, for-profit corporation was the sole employer. *Id.* at 394 n.2. And, because the Board had only two members serving when the decision was rendered, the Board had no authority to act as it lacked a statutory quorum. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010).

The Board has, however, issued two significant unpublished orders denying review in representation cases in which California charter schools sought Board elections in order to defeat the jurisdiction exercised by the California Public Employment Relations Board pursuant to California’s Educational Employment Relations Act. In those cases, the Regional Director for Region 32 dismissed the charter schools’ petitions, concluding that California charter schools are exempt political subdivisions of the state. *Education for Change*, Case No. 32-RM-801, Slip Op. at 26 (NLRB Region 32, May 9, 2006); *Leadership Public Schools, Inc.*, No. 32-RM-800 (NLRB Region 32, May 5, 2006). The charter schools sought review, which the Board denied, *see Education for Change*, Case No. 32-RM-801, Order (NLRB July 19, 2006); *Leadership Public Schools, Inc.*, No. 32-RM-800 Order (NLRB July 19, 2006), thereby affirming the Regional Director’s decisions, *see* 29 C.F.R. § 102.67(f).

exempt from the Act’s coverage. In Part II, we urge in the alternative that, in the event the Board were to conclude that it has statutory jurisdiction over charter schools such as CMSA, the Board should exercise its discretion to decline to take jurisdiction in these circumstances.

I. CMSA IS EXEMPT FROM THE BOARD’S JURISDICTION BECAUSE IT IS ADMINISTERED BY INDIVIDUALS WHO ARE RESPONSIBLE TO PUBLIC OFFICIALS OR THE ELECTORATE

Analysis of the jurisdictional question presented here is guided by the Supreme Court’s seminal decision in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (“*Hawkins County*”). The *Hawkins County* decision established two alternative tests for determining whether an entity is an exempt political subdivision, *viz.*, that an entity will be considered a political subdivision if it is “either (1) created directly by the State so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” *Id.* at 604-05. Although the Regional Director—in our view correctly—determined that the charter school at issue here meets both prongs of the test, we confine our discussion to the second prong of the *Hawkins County* analysis in order to address the confusion and inconsistency that has marked the Board’s case law with regard that prong of the test and urge that the Board correct its course.

A. The Second Prong of *Hawkins County* Calls For a Fact-Intensive and Case-Specific Analysis of All Relevant Circumstances that Bear on the Question of Whether the Employer is Publicly Accountable

The starting point for analyzing whether a charter school is “administered by individuals who are responsible to public officials or to the general electorate” is of course

Hawkins County itself. At issue in that case was whether an entity formed by citizens of a rural community, pursuant to a state enabling statute for the purpose of supplying natural gas service to community residents, was a political subdivision of the State of Tennessee. The Board concluded that the utility district was “an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act.” 402 U.S. at 605 (quoting *Natural Gas Utility District of Hawkins County*, 167 NLRB 691, 691 (1967)). The Board based this conclusion on its finding that the utility district was “neither directly created by the state, nor administered by State-appointed or elected officials.” *Id.* (quoting 167 NLRB at 691-92).

The Supreme Court disagreed, holding that the utility district was in fact a political subdivision of the State of Tennessee and therefore exempt from the Board’s jurisdiction. In so doing, the Court agreed with the Board that the relevant inquiry looks to “the actual operations and characteristics” of the entity in question, and it also agreed with the Board that although the ultimate jurisdictional question is one of federal law, “State law declarations and interpretations” concerning the public or private character of an entity are “given careful consideration” in the analysis. *Id.* at 602 (quoting 167 NLRB at 691-92).

The Court, however, disagreed with the Board in two important respects:

First, the Court faulted the Board for failing to properly apply the second prong of its own test, as articulated in the Board’s own brief to the Court: “[T]he Board test is not whether the entity is administered by ‘State-appointed or elected officials.’ Rather, alternative (2) of the test is whether the entity is ‘administered *by individuals who are*

responsible to public officials or the general electorate.” *Id.* at 605 (first quotation from 167 NLRB at 691-92; second quotation from Brief for the NLRB in *NLRB v. Natural Gas Utility District of Hawkins County*, Case No. 70-785 at 11, 1971 WL 133402) (emphasis supplied by the Court).

Second, the Court held that the Board had “erred in its reading of [the Tennessee utility-district enabling statute] in light of” that test. Instead of focusing narrowly on whether the utility district’s governing board was composed of “State-appointed or elected officials”—as the Board had done—the Court engaged in a more global analysis of the “operations and characteristics” of the entity pursuant to its enabling legislation. Based on its close reading of that enabling legislation, the Court found that the following characteristics demonstrated that the utility district was “administered by individuals who are responsible to public officials or the general public”:

- The district was created as a result of a petition by residents of the county to incorporate as a utility district, pursuant to the statute, which was approved by a county judge. *Id.* at 606, 607.
- The district was administered by a three-member board of commissioners of residents who were nominated in the petition and appointed by the county judge upon approval of the petition; the commissioners were subject to removal under the state’s general ouster law. *Id.*
- The district was organized as a non-profit corporation with the “powers necessary for the accomplishment of the purposes for which [the] district was created.” *Id.* at 606, 608.
- The district was granted the power to subpoena witnesses and exercise eminent domain. *Id.*
- The district’s records were statutorily designated as “public records” subject to public inspection. *Id.* at 607, 608.
- The district was required to publish its annual financial statement in a general-circulation newspaper. *Id.* at 607.

- The district’s property, revenue, and bonds were exempt from taxation. *Id.* at 607, 608-09.

The Court, in sum, concluded that the totality of these facts and circumstances “betoken a state, rather than private, instrumentality” and “suggest the public character of the District” and therefore sufficed to show “that [the district’s] relationship to the State is such that [it] is a ‘political subdivision’ within the meaning of § 2(2) of the Act.” *Id.* at 609.

Hawkins County thus establishes two critical propositions: (1) whether an entity “is administered by individuals who are responsible to public officials or the general electorate” turns on a fact-intensive and case-specific analysis of the degree of public accountability to which the entity is subject; and (2) that analysis turns in large measure on the relevant state law governing the entity’s operations.

In the 40 years following the decision, the Board has applied the *Hawkins County* criteria in a wide variety of settings. In keeping with the Court’s teaching, many of the Board’s cases applying the second *Hawkins County* criterion employ an appropriately fact-intensive analysis, weighing all the circumstances that go to the question of whether those who administer the entity in question are sufficiently accountable to government officials or the electorate to warrant a finding that the entity is a political subdivision of the state. Those circumstances have included: whether the entity was created by legislation; whether members of the entity’s governing body are appointed by government officials or elected by the public; whether the entity is publicly or privately funded; whether the entity’s budget is subject to approval by any public officials; whether the entity is subject to any public financial reporting or auditing strictures; whether the entity’s employees are treated as public employees under state law; whether the entity operates on public land;

and whether the entity is subject to public disclosure and open meeting requirements.³

A number of Board decisions, however, have focused unduly on the method by which an entity's governing board is selected—at times to the exclusion of any other indicia of the “actual operations and character” of the entity that might support a finding that the entity is administered by individuals who are responsible to public officials or the electorate.⁴ This approach was featured most recently in the *Charter Schools*

³ See *Regional Medical Center at Memphis*, 343 NLRB 346, 360 (2004) (hospital a political subdivision where its directors were appointed by public official and hospital was required to seek county approval for its budget, to have public audit, to provide treatment to all county residents, and to comply with open meetings act); *Oklahoma Zoological Trust*, 325 NLRB 171, 172 (1997) (zoo a political subdivision where the mayor appointed its trustees, its operations were funded almost exclusively with public moneys, it was required to hold open meetings, and it was required to make its budget available to the public); *Cape Girardeau Care Center, Inc.*, 278 NLRB 1018, 1019 & n.5 (1986) (nursing home not a political subdivision where county's approval of directors was “purely ministerial” and the nursing home was not publicly funded, had no responsibility to submit its budget to government officials, the county had no authority over its labor relations policies, its employees were not public employees); *Rosenberg Library Ass'n*, 269 NLRB 1173, 1175 (1984) (library a political subdivision where it was subject to extensive regulation, was heavily dependent on public funds, was required to serve the needs of the public, and was subject to public standards for employee qualifications, staffing, hours, and funding).

⁴ In *Enrichment Servs. Program, Inc.*, 325 NLRB 818, 819 (1998), for example, the Board overruled prior decisions to hold that a private, non-profit corporation operating anti-poverty and Head Start programs is not “administered by individuals who are responsible to the general electorate” where one third of its board of directors consisted of public officials and another third consisted of “representatives of the poor” who were elected by low-income citizens within the organization's service area, and one third consisted of private citizens. While acknowledging that the directors appointed by public officials were “responsible to the general electorate,” the Board found that the third who were elected by “representatives of the poor” were not “responsible to the general electorate” because they were not elected by all voting-eligible citizens in the organization's service area. *Id.* The Board went on to state that “[f]or an entity to be deemed ‘administered by’ individuals responsible to public officials or the general electorate, those individuals must constitute a majority of the board. *Id.* Because, in the

Administrative Services, Inc., 353 NLRB 394 (2008), a decision that, as noted at n.2 above, issued at a time when the Board was without authority to act because it lacked a statutory quorum. See *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). Although *CSAS* is for that reason non-precedential, we address it in some detail here to illustrate the analytical error underlying some Board decisions in this area.

At issue in *CSAS* was whether a private, for-profit corporation that operated a Michigan charter school, pursuant to a contract with the charter holder, was a political subdivision of the State of Michigan.⁵ The *CSAS* decision treated “the relevant inquiry” as “whether the individuals who administer the entity are appointed by and subject to removal by public officials” and further asserted that “[t]he sole focus ... is on the composition of the Employer’s board of directors and to whom the members of Employer’s board are accountable.” 353 NLRB at 398. With this framing of the issue, the decision concluded that because no individual on the corporation’s executive board “is appointed by

Board’s view, the “representatives of the poor” were not elected by the *general* electorate, the Board concluded that no such publicly accountable majority existed. See also *FiveCAP, Inc.*, 331 NLRB 1165, 1167(2000) (following *Enrichment Services* in similar setting).

⁵ It bears emphasis that the instant case arises on markedly different facts and circumstances than *CSAS*: Here, the charter school itself, CMSA, is the employer of the instructional staff, whereas in *CSAS* the employer was a private, for-profit corporation that was, as a contractor, at a remove from the charter school. It was undisputed the charter school had contracted out the complete operation and management of the school to the private company, thus making that company the sole employer. See 353 NLRB at 395-96. (At the same time, the decision noted that the charter school “is considered a government agency under [Michigan law]” and is governed by directors who each “take an oath as public officials,” and thus the decision assumed that the charter school itself was an exempt political subdivision. 353 NLRB at 394, 397 n.15.)

and subject to removal by public officials,” the corporation was not an exempt political subdivision:

Simply stated, no person affiliated with [the charter school, the public body that authorized the charter], the Michigan Department of Education, nor [sic] any other local or State official has any involvement in the selection or removal of any members of the Employer’s governing board, or in the hiring of the Employer’s administrative staff. The members of the Employer’s board of governors are appointed by and subject to removal *only* by private individuals and not by public officials. Given the undisputed method of appointment and removal of board members, we find that none of the board members are responsible to public officials ... and that, therefore, the Employer is not “administered” by individuals who are responsible to public officials or the general electorate. [353 NLRB at 398.]

This narrow approach to the question, we submit, is incorrect and inconsistent with *Hawkins County*.

As detailed above, the Court in *Hawkins County* examined the totality of the relevant circumstances—including, but by no means limited to, the method by which the entity’s governing board was selected—and determined that those circumstances, taken together, “betoken a state, rather than private, instrumentality” and “suggest the public character of the District.” *Id.* at 606-08, 609.

Moreover, as shown above, in *Hawkins County*, the Court rejected the Board’s articulation of the appropriate test in that case precisely because it was limited to an inquiry into the means by which the utility district’s commissioners were selected: The Court held that the test “is not whether the entity is administered by ‘State-appointed or elected officials,’” as the Board had stated, but instead “whether the entity is ‘administered by individuals who are responsible to public officials or the general electorate.’” *Id.* at 605 (emphasis supplied by the Court).

This understanding of the proper analysis inheres in the very language of the test. The key word is “responsible,” which means “expected or obliged to account (for something, to someone); answerable; accountable,” Webster's New World College Dictionary (2010), as the Board and courts have recognized in other contexts arising under the Act. See *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 490 (2d Cir. 1997) (“To be responsible is to be answerable for the discharge of a duty or obligation.” (Citations omitted.)); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545, 549 (9th Cir.1960) (same); *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949) (same).⁶ The phrase “responsible to” does *not* mean only “appointed by” or “elected by,” as the *Hawkins County* Court took pains to point out. Hence, the phrase “responsible to public officials or the electorate” denotes a level of *accountability* to public officials and/or the public. The proper inquiry therefore looks to all the circumstances that go to the question whether an entity is publicly accountable.

To be sure, the process for selecting the entity’s governing board can be highly relevant to this inquiry. If members of an entity’s governing board are appointed by public officials or elected by the public, that fact can and should weigh in favor of finding the entity to be a political subdivision—as was the case in *Hawkins County*. But it is an error of the first magnitude to treat the *absence* of publicly appointed or elected governing officials

⁶ To the same effect are cases considering the meaning of the word “responsible” in other statutory settings. See *Cleveland v. City of Los Angeles*, 420 F.3d 981, 990 (9th Cir. 2005) (holding, for purposes of Fair Labor Standards Act, that “[t]he word ‘responsible’ means ‘expected or obliged to account (for something, to someone), answerable, accountable’ and ‘involving accountability, obligation or duties’” (quoting Webster's New World Dictionary, Third College Edition (1986))). See also *Lawrence v. City of Philadelphia*, 527 F.3d 299, 314 (3d Cir. 2008) (same).

as *conclusively establishing* that an entity is *not* administered by persons who are “responsible to” public officials or the electorate.⁷ Indeed, if the composition of the entity’s governing board were conclusive of the question, then the Court’s extensive discussion of the characteristics of the utility district at issue in *Hawkins County*, 402 U.S. at 605-09, would have been superfluous given the Court’s finding that the board was appointed by, and subject to removal by, public officials.

This point is reinforced by the fact that the United States Department of Labor, interpreting an identically worded jurisdictional limitation set forth in the Labor Management Reporting and Disclosure Act of 1959 (“LMRDA”), 29 U.S.C. § 402(e),⁸ has determined that the “political subdivision” exception to that labor statute’s coverage calls for a fact-intensive and case-specific inquiry that turns on a number of circumstances

⁷ To be sure, the *CSAS* decision, by way of a footnote, mentioned in passing that its conclusion was “reinforced by” the fact that the corporation “does not receive public funds directly, does not need public approval for its corporate budget, and is not subject to the same ‘sunshine laws’ as [the charter school itself],” 353 NLRB at 398 n.7, all factors that would weigh against a finding that the entity is a political subdivision under the proper test. But the fact that the analysis in text gave dispositive weight to the lack of a publicly appointed or elected governing board, while subordinating other factors to a “reinforc[ing]” role, makes the decision nonetheless out of step with *Hawkins County*.

⁸ The LMRDA’s jurisdictional provision states, in pertinent part, as follows:

“Employer” means any employer or any group or association of employers engaged in an industry affecting commerce ... and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

29 U.S.C. § 402(e).

including, but not limited to, the method by which individuals on entity's governing body are selected:

Whether a particular entity is a "political subdivision" of a State depends on the facts of each case. Included among the factors that may be considered are the following: (1) whether the State or any other public authority exercises any regulatory control over the entity; (2) whether the State or other political authority participates in the selection of officers of the entity; (3) whether the operations of the entity are conducted independently; (4) whether the operations are financed by the State or other public authority; (5) whether the entity was created by a legislative act; (6) whether the employees of the entity are civil servants subject to regulation by or wage scales of the State or other public authority; and (7) whether the entity is exempt from Federal taxation.

United States Department of Labor Office of Labor-Management Standards, LMRDA Interpretative Manual, § 030.425 (1962). The Department of Labor's analysis, giving force to the LMRDA exclusion that mirrors that of the Act, properly relies on a multivariate examination of the facts and circumstances that bear on the question whether a particular entity is sufficiently accountable to government officials and/or the electorate to be considered a "political subdivision" of a state—rather than a narrow analysis that focuses exclusively on the method by which an entity's governing body is selected.

The sum of the foregoing is this: The analysis employed in a number of Board decisions—exemplified by the quorum-less decision in *CSAS*—is inconsistent with the Supreme Court's teaching in *Hawkins County*, and indeed inconsistent with the approach taken in a substantial number of the Board's own decisions. That approach takes what should be a fact-intensive and case-specific analysis of *all* the circumstances that bear on the question of whether, and if so to what extent, an entity is publicly accountable and collapses it into a narrow inquiry focusing on one single factor—"whether," as the Court

put the matter, “the entity is administered by ‘State-appointed or elected officials,’” 402 U.S. at 605. This approach thus partakes of the very same error that the Court sought to correct in *Hawkins County*. The Board should therefore use this case as an opportunity to correct course and make clear that the proper inquiry under the second prong of *Hawkins County* is not a myopic focus on a single factor, but rather involves a global examination of the “operations and characteristics” of the entity, considered in light of the relevant state law, to determine whether the entity is “administered by individuals who are responsible to public officials or the general public.” 402 U.S. at 604-05.⁹

B. On a Proper Understanding of *Hawkins County*’s Second Prong, CMSA is a Political Subdivision of the State of Illinois

Applying a proper understanding of *Hawkins County*’s second prong—that is, a fact-intensive analysis of all of the circumstances that bear on the extent to which CMSA is publicly accountable—the conclusion is inescapable that CMSA is an exempt political subdivision.

As an initial matter, the “State law declarations and interpretations,” 402 U.S. at 604, as to the public or private nature of charter schools such as CMSA, which are to be “given careful consideration,” *id.*, could hardly be more clear. The Illinois Charter Schools Act declares repeatedly and emphatically that charter schools are “public schools,” 105 Ill. Cop. Stat. §§ 5/27A-2, 5/27A-5, and as detailed above, the law makes plain that charter schools are statutorily designed to be an integral part of the state’s system of public

⁹ We hasten to add that, in pointing out the analytic error in *CSAS* and other Board decisions on the “political subdivision” exception, we do not mean to imply that the results of those cases would necessarily have been different had the Board considered all of the relevant circumstances.

education and to further the state’s educational policy objectives, *see* 105 Ill. Comp. Stat. § 5/27A-2(c) (declaring that charter schools are intended, *inter alia*, “to advance a renewed commitment by the State of Illinois to the mission, goals, and diversity of public education”). This factor weighs significantly in favor of the conclusion that CMSA is a political subdivision of the state. *Cf. State Bar of New Mexico*, 346 NLRB 674, 677 (2006) (state bar is political subdivision where, *inter alia*, court rule declares its purposes including “aiding the courts in improving the administration of justice”); *University of Vermont*, 297 NLRB 291, 295 (1989) (university is a political subdivision where, *inter alia*, legislation declared that university be recognized as an instrumentality of the state).¹⁰

Illinois charter schools in general, and CMSA in particular, also are created in much the same way as the utility district in *Hawkins County* was—to wit, by means of interested parties’ application to public officials (in the case of Illinois charter schools, a local school board and the State Board of Education), pursuant to specifications provided in the relevant state enabling legislation, for the granting of certain public powers set forth in the legislation. *See* 402 U.S. at 606 (“Under [the Tennessee enabling] statute, Tennessee residents may create districts to provide a wide range of public services”).

Because CMSA is public school, the overwhelming majority of its funds come from public sources—local, state, and federal formula grants. And the Illinois Charter Schools Law extensively regulates charter schools in their capacities as public schools in order to

¹⁰ While the *State Bar of New Mexico* and *University of Vermont* decisions only analyzed the entities in question under the first prong of the *Hawkins County* test, the factors relevant to the two prongs inevitably overlap considerably. Indeed, we submit that the very same factors discussed here demonstrate that the Acting Regional Director in this case was correct in determining that CMSA meets the first prong.

ensure oversight by and accountability to the state and local governments. Indeed, apart from exceptions designed to further the public education purposes of charter schools, they are regulated in the same manner as other public schools. *See generally* 105 Ill. Comp. Stat. § 5/27A-5(a)-(j). Specifically, as detailed above, the charter law imposes substantial audit and financial reporting obligations on charter schools, 105 Ill. Comp. Stat. §§ 5/27A-5(c), 5/27A-9(a) and (b) (in addition to the extensive reporting requirements set forth in the charter); it requires charter schools to comply with the Illinois Freedom of Information and Open Meetings Acts that apply to other public bodies, *id.* § 5/27A-5(c); it makes charter schools bound by the Illinois Local Governmental and Governmental Employees Tort Immunity Act, which includes indemnification requirements, *id.* § 5/27A-5(g)(3); and to police compliance with these and other requirements, it empowers local school boards to revoke, or refuse to renew a charter, if the charter school violates any applicable law or a materially violates its charter, *id.* § 5/27A-9(c). These features—extensive regulation, dependence on public funds, and the requirement that entity serve the public—point to exempt status. *See Rosenberg Library Ass’n*, 269 NLRB at 1175.

Of critical significance here, the charter law includes extensive regulation of matters relating to charter schools’ personnel and labor relations pursuant to state laws that apply to public sector employees. Both the Illinois Charter Schools Law and the Illinois Educational Labor Relations Act make it clear that charter schools must comply with the state’s public-sector collective bargaining laws. *See id.* § 5/27A-5(g); 115 Ill. Comp. Stat. § 5/2(a). In addition, charter school employees participate in public pension funds, and charter schools are required to make contributions to the relevant pension funds. *See* 40

Ill. Comp. Stat. 5/16-106(9). *Compare Rosenberg Library Ass'n*, 269 NLRB at 1175 (public body's promulgation of employee qualifications and standards for staffing, hours, and funding to govern entity supports conclusion that entity is a political subdivision), and *Hinds County Resource Agency*, 331 NLRB 1404, 1405 n.12 (2000) (“[T]he fact that the employees participated in the state retirement system” suggests political subdivision status.), with *St. Paul Ramsey Medical Center*, 291 NLRB 755, 758 (1988) (finding it “[s]ignificant[]” that the entity’s employees are “excluded from coverage under the state public employment labor relations act and the state public employees retirement act” when determining that hospital is not political subdivision).

The totality of these circumstances demonstrate beyond cavil that CMSA is “administered by individuals who are responsible to public officials” within the intendment of *Hawkins County’s* second prong. To be sure, no public official has the authority to appoint or remove the members of CMSA’s governing board, but as we have demonstrated above, this factor should not—and, in the face of the myriad indicia of public accountability here, cannot—have controlling significance. CMSA is, in short, statutorily exempt from the Board’s jurisdiction.

II. ALTERNATIVELY, THE BOARD SHOULD EXERCISE ITS DISCRETION TO DECLINE TO EXERCISE ITS JURISDICTION IN THE CIRCUMSTANCES PRESENT IN THIS CASE

The foregoing, we submit, conclusively demonstrates that CMSA is exempt from the Board’s jurisdiction under a proper analysis that weighs all of the relevant factors that go to the question whether the entity is accountable to public officials or the electorate. If, however, the Board were to disagree and conclude that CMSA is an employer over which it

has statutory jurisdiction, the Board should exercise its discretion to decline to take jurisdiction on the circumstances present here—specifically, where the state has authorized the creation of charter schools as an integral part of its overall public education system, imposed robust public accountability requirements on the charter schools so created, extensively regulated the finances and operations of charter schools, established that charter school employees are public employees, and established a collective bargaining system regulating labor relations at charter schools. We elaborate on this point in the following.

A. The Board Has Wide Discretion to Decline Jurisdiction

Although the Board’s statutory jurisdiction extends to the furthest reaches of Congress’s power under the Commerce Clause, the Board has never actually exercised the full extent of its statutory jurisdiction. During the initial fifteen years of the Act’s history, the Board decided, on a case-by-case basis, whether it would exercise its jurisdiction over particular controversies. *See Guss v. Utah Labor Relations Board*, 353 U.S. 1, 3 (1957). During this period, the Board declined jurisdiction where, in its view, the employer’s business had an insubstantial impact upon commerce and/or was local in character, and where, in its view, the exercise of jurisdiction will not effectuate the policies of the Act. *See, e.g., Clayton-Dorris Co.*, 78 NLRB 859 (1948); *Duke Power Co.*, 77 NLRB 652 (1948); *F. G. Congdon*, 74 NLRB 1081 (1947); *Johns-Manville Corp.*, 61 NLRB 1 (1945); *Brown & Root, Inc.*, 51 NLRB 820 (1943).

In 1950, the Board issued a series of decisions establishing a set of fixed jurisdictional standards, by industry, largely based on a given type of employer’s annual

volume of business. *See Guss*, 353 U.S. at 3-4; Note, *Discretionary Administrative Jurisdiction of the NLRB Under The Taft-Hartley Act*, 62 Yale L.J. 116, 118 (1952). Those jurisdictional business-volume limitations, as revised from time to time over the years, continue to govern the Board's exercise jurisdiction. *See National Labor Relations Board, An Outline of Law and Procedure in Representation Cases 2-20* (Rev. 2008).

In 1960, Congress codified the Board's discretion in the Landrum-Griffin amendments to the Act, adding what is now Section 14(c) of the Act, 29 U.S.C. § 164(c). In its first subsection, the amendment declares that:

The Board, in its discretion, may, by rule of decision or by published rules ... decline to assert Jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction[. 29 U.S.C. § 164(c)(1).]

That subsection also contains a proviso that the Board may not decline to assert jurisdiction over enterprises meeting Board jurisdictional standards that were in effect on August 1, 1959. *Id.* In the second subsection, Congress made clear that in situations where the Board has declined to exercise its statutory jurisdiction, the states are free to regulate labor relations without triggering federal pre-emption. "Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State ... from assuming and asserting jurisdiction over labor disputes over which the Board declines ... to assert jurisdiction." *Id.* § 164(c)(2).

In addition to adhering to its published business-volume standards, the Board, through its decisional law, continued to discretionarily decline jurisdiction in a number of contexts. *See Rural Fire Protection Co.*, 216 NLRB 584, 586-87 (1975); *NLRB v. Southeast*

Ass'n for Retarded Citizens, Inc., 666 F.2d 428, 431 (9th Cir. 1982). While the Board has from time to time has altered its declination standards in particular contexts—see *Res-Care, Inc.*, 280 NLRB 670 (1986); *Management Training Corp.*, 317 NLRB 1355 (1995)—the Board’s historical justifications for declination are instructive, even where the agency subsequently changed the standard. For example, over a number of years, the Board declined jurisdiction over private non-profit schools with which state and local governments contracted in order to meet their obligation to provide education to disabled children, where the state and local school systems were no equipped to do so. See, e.g., *Overbrook Sch. For the Blind*, 213 NLRB 511 (1974); *Laurel Haven Sch. for Exceptional Children, Inc.*, 230NLRB 1197 (1977). In so doing, the Board relied on the public purpose served by such schools, on the fact that state education agencies exercised control over such schools’ operation through regulation and approval of the schools’ education programs, and that such schools operate as “adjunct[s] of the [states’] public school systems.” *Laurel Haven*, 230NLRB at 1199.¹¹

Notably, the Board has long adhered to its refusal to exercise its jurisdiction over the horse-racing and dog-racing industries. See *Jefferson Downs, Inc.*, 125 NLRB 386 (1959); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959); *Los Angeles Turf Club*, 90 NLRB 20 (1950). The Board offered three reasons for declining jurisdiction in this area that are highly relevant to the instant case—to wit, “that racetrack operations are essentially local in nature,” that such operations are subject to extensive state regulation, and that “declination of jurisdiction will not leave the labor relations of such operations

¹¹ The Board subsequently changed course. See *D. T. Watson Home for Crippled Children*, 242 NLRB 1368, 1370 (1979).

unregulated,” and that, as a general matter, “it would not effectuate the policies of the Act to assert jurisdiction.” *Hialeah Race Course, Inc.*, 125 NLRB at 390. *See also Retail, Wholesale and Dep’t Store Union AFL-CIO, Local 310 v. NLRB*, 745 F.2d 358, 360 (6th Cir. 1984) (stating that Board’s declination of jurisdiction is justified by the fact “that the states exercised extensive control over the horse racing and dog racing industries, including some aspects of labor relations”); *Pari Mutuel Clerks Union of Louisiana v. Fair Grounds Corp.*, 703 F.3d 913, 917 n.2 (2d Cir. 1983) (“The NLRB views regulation of racing industry labor matters as an area best left to the states”).

The Board later codified its approach to these industries in one of its rare exercises of its rulemaking authority. *See* 29 C.F.R. § 103.3. In its explanation of the rule, the Board reiterated and elaborated on the reasons stated in its prior cases, emphasizing, of relevance here, “the extensive State control over these industries,” which includes licensing employees, supervising the industries through administrative agencies. 38 Fed. Reg. 9537 (April 17, 1973). The Board went to observe that “a unique and special relationship has developed between the States and these industries which is reflected by the states’ continuing interest in and supervision over the industries.” *Id.*

The long and the short of the matter is that the Board possesses wide discretion to decline jurisdiction to effectuate the purposes of the Act. As we show in the following, the circumstances here present a compelling case for the Board’s exercise of its discretion to decline jurisdiction.

B. The Board Should Exercise its Discretion to Decline Jurisdiction Over CMSA and Establish Criteria for Such Declination in Future Cases Involving Charter Schools

As we have shown, the Board has exercised its discretion in circumstances in which: (1) the operation of certain entities are largely a matter of state and local, rather than federal, concern; (2) public agencies oversee and extensively regulate certain entities to such an extent that there is a “special relationship” between the states and the entities; and (3) declination of jurisdiction will not leave the labor relations of such operations unregulated.

We submit that these criteria provide an eminently appropriate framework for declination in the charter school context and that, for the reasons detailed in Part I.B. above, the operations of charter schools such as CMSA, considered in light of the Illinois Charter School Law, amply satisfy these criteria. For these reasons, if the Board should determine that it does have statutory jurisdiction over CMSA, it should decline to exercise that jurisdiction in this and all materially similar cases involving charter schools.

We have already canvassed the relevant operational and state-law background above—demonstrating in detail that the State of Illinois has authorized the creation of public charter schools an integral part of its public school system, has extensively regulated charter schools created under the law, has provided that charter school employees are public employees for all relevant purposes, and has included charter school employees within the state’s public sector collective bargaining scheme. We will not repeat that showing here, but instead pause to emphasize a few supplemental points.

First, the manner in which a state government discharges its duty to provide a system free and unrestricted public education is obviously a matter of largely state and local concern. *See Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“Providing public schools ranks at the very apex of the function of a State.”); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”). The Illinois Constitution declares that “the educational development of all persons to the limits of their capacities” is “[a] fundamental goal of the People of the State,” and to that end provides that “[t]he State shall provide for an efficient system of high quality public educational institutions and services” and that “[e]ducation in public schools through the secondary level shall be free.” Ill. Const. Art. X § 1.¹² Given the importance of the provision of a system of free public education to the states, and given further that, charter schools are an integral part of those systems, the Board should grant a state’s interest in advancing its educational goals through the creation of charter schools as matters of state and local concern that are at least on a par with a state’s interest in regulating the operation of racetracks.

Second, it can hardly be gainsaid that the extensive regulation of charter schools set forth in the Illinois charter school law, which includes regulation of labor relations at such charter schools, creates a “special relationship” between charter schools and the state and local officials and agencies that oversee them and hold them accountable. If a state is

¹² Indeed, each and every state constitution imposes an obligation on the state to provide free public education at the elementary and secondary levels. *See* Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure Of Making A Federal Case Out Of Education*, 59 S.C. L. Rev. 755, 784 (Summer 2008) (listing education clauses in each state constitution).

considered to have a “special relationship” with the horseracing industry, it follows *a fortiori* that it has one with public charter schools.

Third, this is manifestly not a case in which the Board’s declination of jurisdiction will not leave the labor relations of charter schools unregulated. Illinois has a sophisticated collective bargaining system that is particular to the public education context; the relevant Illinois collective bargaining statute applies only to employers and employees in the public education system, and Illinois has provided a separate labor relations board for this sector. And, as detailed above, the Illinois legislature has clearly brought employees of public charter schools and their employers within that statute’s coverage.

It should be emphasized that, given the state’s vital interest in the operation of its public school system, Illinois—like other states that have enacted collective bargaining laws governing public education employees—has made its own policy judgments regarding such questions as what constitutes an appropriate bargaining unit, how a union can demonstrate majority support, what the mandatory subjects of bargaining should be, and whether or under what conditions public education employees are permitted to strike. Those policy judgments are often specific to the public education setting and are for that reason often different from the policy judgments reflected in the Act, based as it is on the private sector industry model. Thus, for instance, Illinois teachers, as noted above, can demonstrate majority support through “card-check,”¹³ a method that is not available under

¹³ See 115 Ill. Comp. Stat. § 5/5(c-5); *County of Du Page v. Illinois Labor Relations Board*, 900 N.E. 2d 1095, 1104-05 (Ill. 2008).

the Act. On the other hand, such employees are prohibited from striking except under narrow circumstances that have no analog in the Act,¹⁴ which protects the right to strike.

In light of such state policy judgments concerning how collective bargaining should be conducted in the public school setting, it would trench upon the goals that the Illinois legislature sought to achieve in its Education Labor Relations Act if the Board were to exercise jurisdiction over public charter schools in Illinois. The assertion of Board jurisdiction would establish a dual system of collective bargaining in Illinois public schools, one for charter schools and another for traditional public schools, each with a different set of rights and obligations. Under such a system, some public schools could go out on strike while others could not, thus playing havoc with the unified labor relations system that the Illinois legislature clearly intended to govern throughout the public school system. That judgment is entitled to great weight and militates against the assertion of jurisdiction here.

In sum, where, as here, a state has created a system of charter schools that operate within the confines of the public school system, subject to extensive regulation and oversight, the state has treated charter school employees as public employees for the purposes of state benefit programs and the state public-sector bargaining law—that is, where declination of jurisdiction will not leave the labor relations of such operations unregulated—the Board should decline jurisdiction.

¹⁴ See 115 Ill. Comp. St. § 5/13(b) (prohibiting strikes unless employees are represented by exclusive representative, the parties have invoked mediation without success, a strike notice was given at least ten days in advance, the collective bargaining agreement has expired, and the parties have not submitted the dispute to arbitration).

CONCLUSION

For the foregoing reasons, the Board should conclude that it has no statutory jurisdiction over CMSA or, in the alternative, decline to exercise jurisdiction in the circumstances presented here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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