UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LTTS CHARTER SCHOOL, INC.,
d/b/a UNIVERSAL ACADEMY

and **Case 16-CA-170669**

KIMBERLY FREE, an Individual

RESPONDENT'S ANSWERING BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS

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Table of Contents

Table of Contents……i

Index of Authorities……iii

I. Statement of the Case……1

II. Issues……3

III. Judge Ringler's factual findings which support his conclusion of law are evidenced in the hearing record……4

IV. Judge Ringler properly determined that Universal Academy is a political subdivision under the Act and is not subject to the jurisdiction of the Board……6

A. The Judge correctly found Universal Academy to be administered by individuals who are responsible to public officials……6

1. The Second Prong of the *Hawkins County* test does not require that a public official appoint every member of the entity's board……9

2. The Commissioner's power is not a narrow and limited emergency power as argued by the CGC, but rather, is broad……11

3. The Commissioner's authority to reconstitute boards is "practically unreviewable"……14

B. Judge Ringler's decision is consistent with the actual operations and characteristics of Texas open-enrollment public charter schools……17

1. These public schools are state funded……20

2. These public schools perform the purely governmental function of providing free public education pursuant to a constitutional mandate……21

3. The Texas Supreme Court considers open-enrollment public charter schools to be institutions, agencies, or organs of state government deriving their status and authority from the Texas Constitution or laws passed by the Legislature pursuant to the Constitution……26

C. Judge Ringler's conclusion is consistent with prior Board decisions involving public charter schools……28

1. *Chicago Mathematics*……29

2. *Pennsylvania Virtual*……30

3. *Hyde Leadership*……31

V. Conclusion……35

Signature page……36

Certificate of Service……36

Index of Authorities

Cases

Braun v. Trustees of Victoria I.S.D.,
114 S.W.2d 947 (Tex. Civ. App.—San Antonio 1938, writ ref'd.).....22

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156, 83 S.Ct. 23, 99 L.Ed.2d 207 (1962).....15

Charter School Administrative Services,
353 NLRB 394 (2008).....30

Chicago Mathematics and Science Academy Charter School, Inc., Employer, and Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL-CIO, Petitioner,
359 NLRB no. 41 (2012).....29, 30

Hinds County Human Resource Agency,
331 NLRB 1404 (2000).....17

Hyde Leadership Charter School—Brooklyn,
364 N.L.R.B. no. 88 (2016).....7, 12, 25, 31-35

LTTS Charter School, Inc. v. C2 Construction, Inc.,
342 S.W.3d 73 (Tex. 2011).....2, 21, 26, 27

Mumme v. Marrs,
40 S.W.2d 31 (Tex. 1931).....18

Ntakirutimana v. Reno,
184 F.3d 419 (5th Cir. 1999).....16

Neeley v. West Orange-Cove Consl. I.S.D.,
176 S.W.3d 746 (Tex. 2005).....18, 19

NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.,
402 U.S. 600, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).....6, 7, 10, 17, 25

Pegasus School of Liberal Arts & Sciences v. Ball-Lowder,
2013 WL 6063834 (Tex. App.—Dallas 2013,
pet. denied) (unpublished opinion).....24

Pennsylvania Virtual Charter School,
364 NLRB No 87 (2016).....7, 9, 30, 31, 35

Research Foundation of the City University of New York,
337 NLRB 965 (2002).....28, 29

San Antonio I.S.D. v. McKinney,
936 S.W.2d 279 (Tex. 1996).....19, 24

StarTran, Inc. v. Occupational Safety and Health Review Com'n.,
608 F.3d 312 (5th Cir. 2010).....17

State Bar of New Mexico & Commc'ns Workers
of Am. Local 7011, Afl-Cio, Petitioner,
346 NLRB 674 (2006).....18

Stout v. Grand Prairie Independent School Dist.,
733 S.W.2d 290 (Tex. App.—Dallas, writ ref'd., n.r.e.).....22

West Orange-Cove I.S.D. v. Alanis,
107 S.W.3d 558 (Tex. 2003).....19

Statutes and rules

29 USCA § 152.....16

29 CFR § 1975.5(b).....25

TEX. CONST. art. VII, § 1.....6, 18

TEX. EDUC. CODE § 7.003.....22

TEX. EDUC. CODE § 11.002.....2, 22

TEX. EDUC. CODE § 12.001.....20

TEX. EDUC. CODE § 12.101.....20

TEX. EDUC. CODE § 12.103.....24, 25

TEX. EDUC. CODE § 12.105.....2, 5, 20, 21

TEX. EDUC. CODE § 12.1051.....22

TEX. EDUC. CODE § 12.1052.....22

TEX. EDUC. CODE § 12.1053.....23

TEX. EDUC. CODE § 12.1054.....23

TEX. EDUC. CODE § 12.1056.....23

TEX. EDUC. CODE § 12.1057.....23

TEX. EDUC. CODE § 12.1058.....23

TEX. EDUC. CODE § 12.106.....5

TEX. EDUC. CODE § 12.107.....20, 21

TEX. EDUC. CODE § 12.108.....21

TEX. EDUC. CODE § 12.115.....1, 2, 6-12, 34

TEX. EDUC. CODE § 12.116.....1, 2, 6-12, 14, 15, 34

TEX. EDUC. CODE § 12.1163.....12

TEX. EDUC. CODE § 12.117.....5

TEX. EDUC. CODE § 12.1181.....12, 13

TEX. EDUC. CODE § 12.128.....21

19 TEX. ADMIN. CODE § 100.1047.....12, 13

Other

Act of May 28, 1993, 73rd Leg., R.S., ch. 347, §§ 8.33 and 8.35, 1993 Tex. Gen. Laws 1479, 1556.....19

JOINT SELECT COMM. TO REVIEW THE CENTRAL EDUC. AGENCY, *Final Report to the 74th Legislature*, p. 1, Tex. S.B. 7 (1994).....20

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Respondent LTTS Charter School, Inc. d/b/a Universal Academy ("Universal Academy") submits the following Answering Brief to Counsel for the General Counsel's Exceptions to the Decision of Administrative Law Judge Robert A. Ringler (JD-49-17) dated June 21, 2017.

I. Statement of the Case

This case is about a Texas public open-enrollment charter school administered by individuals who are directly responsible to a public official empowered with express statutory authority to reconstitute its board members for virtually any reason. A violation of any law or administrative rule, or a failure to meet any academic or fiscal benchmark set by the state, for example, empowers the Texas Commissioner of Education to remove and replace all or part of the board of directors of this public school and thus maintain public control.[1] Through this control, the administrators of the school have direct personal accountability to the Commissioner.

At the hearing, the Counsel for the General Counsel ("the CGC") alleged Universal Academy operates a "private charter school."[2]

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[1] *See* TEX. EDUC. CODE, §§ 12.115 and 12.116.

[2] GC Ext. 1(c). References to the record in this case will be abbreviated as follows:

Universal Academy responded by showing Judge Ringler Sections 12.115 and 12.116 of the Texas Education Code, which empower the Texas Commissioner of Education with full removal authority over Texas open-enrollment charter schools.[3]

Universal Academy also explained how Texas statutes define charter schools to be public schools and how the Texas Supreme Court has declared them to be public schools operating as organs of state government deriving their status and authority to operate from the state constitution.[4] Moreover, these public schools are charged by statute, alongside the school districts of the state, with "primary responsibility for implementing the state's system of public education."[5]

"**HT**" refers to the Official Report of Proceedings before the NLRB Region 16 in this case, taken on May 3, 2017, with the page number to follow.

"**JS**" refers to the Joint Stipulations of Facts entered by the parties to this proceeding, with the corresponding paragraph number of the referenced stipulation to follow.

"**GC Exh.**" refers to the General Counsel's exhibits, with the exhibit number to follow.

"**JD**" refers to Judge Ringler's decision in this case, JD-49-17, with the page and line number to follow.

[3] *See* TEX. EDUC. CODE §§ 12.115 and 12.116.

[4] *See* TEX. EDUC. CODE § 12.105; *see also LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 269 Ed. Law. Rep. 932 (Tex. 2011).

[5] *See* TEX. EDUC. CODE § 11.002.

Judge Ringler considered these issues and wrote a well-reasoned decision in this case, concluding the Board has no jurisdiction over Universal Academy because it is a political subdivision under the National Labor Relations Act ("NLRA" or "the Act").[6] In his analysis, Judge Ringler found the statutory authority of the Commissioner of Education to reconstitute the members of the board to be "broad, and practically unreviewable."[7] Thus, he determined Universal Academy was a political subdivision under the second prong of the *Hawkins County* test because a public official "retains full authority to reconstitute its Board."[8] Having concluded Universal Academy was a political subdivision and exempt from the Act, Judge Ringler ordered a dismissal of the Complaint in its entirety on jurisdictional grounds.[9]

II. Issues

On August 16, 2017, the CGC filed five exceptions to Judge Ringler's decision on the following points:

1. Whether Judge Ringler correctly found Universal Academy to be administered by individuals responsible to public officials;

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[6] JD 6:10-18.

[7] JD 5:26.

[8] JD 5:20.

[9] JD 6:10-18.

2. Whether Judge Ringler correctly found Universal Academy not to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act;

3. Whether Judge Ringler correctly found Universal Academy not subject to the Board's jurisdiction;

4. Whether Judge Ringler erred in not evaluating the merits of the allegations raised in the Complaint; and

5. Whether Judge Ringler erred in not evaluating the CGC's allegation that Universal Academy violated the Act by maintaining overly broad rules and discharging an employee.

As explained below, the CGC raises no exception or argument warranting the Board overturning Judge Ringler's well-reasoned decision. Universal Academy respectfully requests that the Board affirm the portions of the Judge's decision to which the CGC excepts.

III. Judge Ringler's factual findings which support his conclusion of law are evidenced in the hearing record

Universal Academy is a Texas non-profit corporation operating a Texas open-enrollment public charter school with two campuses in the greater Dallas area.[10] Universal Academy was granted a Contract for Charter on May 18, 1998, by the Texas State Board of Education, and its charter has subsequently been renewed through July 31, 2022.[11] For the past 19 years, and at all times relevant to this case, Universal Academy

[10] JS 1, 4, 5, and 10.

[11] JS 3, 4, 5 and 10.

has held a valid and active Contract for Charter with the Texas State Board of Education.[12]

Universal Academy is not a private school and has never held itself out to be a private school.[13] It is an open-enrollment public charter school, meaning the school accepts any child within its boundaries who applies, granted there is space in the classroom for that child, and there is no entrance exam or any other prerequisite for applying to Universal Academy.[14] Universal Academy provides free public education to its students.[15]

Universal Academy operates using public funds, which it receives as a per-pupil allotment from the State of Texas general fund.[16] Universal Academy uses public funds to pay the salaries of its employees.[17] Universal Academy's employees take part in, and are members of, the

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[12] JS 4, 5, and 10.

[13] HT 202-03; s*ee also* TEX. EDUC. CODE § 12.105. Although the CGC alleged Universal Academy was a "private" charter school in its Complaint, no evidence was introduced to support this claim. To the contrary, the undisputed evidence presented at the hearing showed that Universal Academy is not a private school.

[14] HT 201-03; s*ee also* TEX. EDUC. CODE § 12.117.

[15] JS 13 and HT 200.

[16] JS 12; s*ee also* TEX. EDUC. CODE § 12.106.

[17] HT 203.

Teacher Retirement System of Texas, a public employee retirement system for employees of Texas public schools.[18]

The Texas Commissioner of Education and the Texas Education Agency ("TEA," the agency over whom the Commissioner presides) have broad and practically unreviewable authority to reconstitute the governing boards of Texas open-enrollment public charter schools.[19] This full removal authority renders Universal Academy a political subdivision under the second prong of the *Hawkins County* test.[20] As such, it is not an employer under the Act and is not subject to the Board's jurisdiction.

IV. Judge Ringler properly determined that Universal Academy is a political subdivision under the Act and is not subject to the jurisdiction of the Board

A. The Judge correctly found Universal Academy to be administered by individuals who are responsible to public officials

Judge Ringler properly applied the correct standard to determine whether Universal Academy was a political subdivision under the Act. To form his conclusion that Universal Academy is a political subdivision, and thus outside Board jurisdiction, he analyzed Universal Academy

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[18] JS 14; s*ee also* TEX. CONST. art. 16, § 67; TEX. GOV'T. CODE, § 822.001, *et seq*.

[19] JD 5:26-27; *see also* TEX. EDUC. CODE, §§ 12.115 and 12.116.

[20] JD 5:21-27; *see also NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

through application of the second prong of the test set forth in *Hawkins County*, and recently affirmed by the Board in both *Hyde Leadership Charter School* and *Pennsylvania Virtual*: is Universal Academy "administered by individuals who are responsible to public officials or the general public"?[21]

In his analysis, Judge Ringler found Universal Academy to be a political subdivision under the second prong of the *Hawkins County* test "because its Board can be removed by the TEA."[22] To support this finding, Judge Ringler cited Texas Education Code Sections 12.115 (removal power) and 12.116 (procedures for removal).[23]

Sections 12.115 and 12.116 of the Texas Education Code are contained within Chapter 12 of the Education Code, which pertains specifically and only to public charter schools.[24] In these statutes, the Texas Legislature has expressly given the Commissioner of Education and TEA removal authority over public charter school board members.[25] Section 12.115 provides the Commissioner and TEA with power to

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[21] *See Hawkins Cty.*, 402 U.S., at 602; *Pennsylvania Virtual Charter School*, 364 NLRB No 87, slip op. at 13 (2016); *Hyde Leadership Charter School—Brooklyn,* 364 NLRB 88, p. 8 (2016); *see also* JD 2:1-4.

[22] *See* JD 4:20.

[23] JD 3:3-32; *see also* JD 4:20 and 5:13-16.

[24] TEX. EDUC. CODE, §§ 12.115 and 12.116.

[25] *Id.*

reconstitute the governing body of a Texas open-enrollment public charter school if the Commissioner determines that the public charter school:

> (1) committed a material violation of the charter, including failure to satisfy accountability provisions prescribed by the charter;
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> (2) failed to satisfy generally accepted accounting standards of fiscal management;
>
> (3) failed to protect the health, safety, or welfare of the students enrolled at the school;
>
> (4) failed to comply with [Subchapter D, Chapter 12 of the Texas Education Code] or another applicable law or rule;
>
> (5) failed to satisfy the performance framework standards adopted under [Texas Education Code] Section 12.1181; or
>
> (6) is imminently insolvent as determined by the commissioner in accordance with commissioner rule.[26]

Judge Ringler analyzed these statutory provisions in his decision and concluded it yielded a "clear answer" to the question of whether Universal Academy is administered by individuals responsible to public officials.[27] After reviewing the record and the laws and rules applicable to Texas open-enrollment charter schools, he opined:

> Given the extensive regulation of public and charter schools, this standard is, for practical purposes, quite broad, and

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[26] TEX. EDUC. CODE, §§ 12.115 and 12.116.

[27] JD 5:13-17.

> grants the TEA a wide array of valid justifications to reconstitute its Board.[28]

Accordingly, Judge Ringler determined Universal Academy's administering individuals are responsible to public officials.[29] In making this determination, he contrasted and differentiated this case from a recent Board opinion where it found a charter school to not be a political subdivision under the second prong of the *Hawkins County* test because its board was not subject to removal by public officials.[30]

1. The Second Prong of the *Hawkins County* test does not require that a public official appoint every member of the entity's board

The CGC argues in its brief that the Commissioner of Education's power to reconstitute Universal Academy's board is not enough.[31] The CGC would have the Board hold that Universal Academy is not a political subdivision under the second prong of the *Hawkins County* test because the Commissioner does not have the power to remove *and* appoint its board members, and the CGC complains that "none of the board of directors has ever been appointed by the state."[32] While the

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[28] JD 5, fn. 14.

[29] JD 5:13-17.

[30] JD 6:3-5, citing *Pennsylvania Virtual Charter School*, 364 NLRB No 87, slip op. at 13 (2016).

[31] CGC's Brief in Support of Exceptions, pp. 10-11.

[32] *Id.*

Commissioner of Education actually does have appointment power (Sections 12.115 and 12.116 empower the Commissioner to remove board members *and* appoint new board members in the place of those removed[33]), the CGC is drifting into territory that the United States Supreme Court has already told us is wrong. In *Hawkins County*, the Court held:

> But the 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 to the general electorate.[34]

Universal Academy would urge the Board not to follow the CGC's guidance into creating a new requirement for the second prong of the *Hawkins County* test that the Supreme Court has already disapproved. Instead, Universal Academy urges the Board to affirm Judge Ringler's finding that a broad and "practically unreviewable" power by a public official to reconstitute its board meets the control-test requirement of the second prong of the *Hawkins County* test for a political subdivision.[35]

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[33] TEX. EDUC. CODE § 12.115 and 12.116.

[34] *Hawkins Cty.*, 402 U.S., at 605.

[35] JD 5:26-28.

2. The Commissioner's power is not a narrow and limited emergency power as argued by the CGC, but rather, is broad

The CGC dedicates a considerable portion of its argument to the idea that the power of the Commissioner of Education to reconstitute board members of Texas open-enrollment public charter schools is a limited, emergency power.[36] It even mischaracterizes this power as allowing the Commissioner to reconstitute a board "only in instances where there is fiscal or academic mismanagement or where the health and welfare of the students is at risk."[37] This position does not align with the facts and law and is untenable.

As a plain reading of Section 12.115 of the Education Code makes clear, the Commissioner's powers are much broader. In addition to those items mentioned by the CGC, the statute also empowers the Commissioner to remove board members if the charter school violates *any* law or rule, violates its charter, or is insolvent.[38] As for academic reasons, the standard is not mismanagement, as offered by the CGC, but rather, a mere failure by the charter school to satisfy any academic

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[36] CGC's Brief in Support of Exceptions, pp. 11-12.

[37] CGC's Brief in Support of Exceptions, p. 12.

[38] TEX. EDUC. CODE, §§ 12.115 and 12.116.

benchmark set by the Commissioner.[39] Likewise, the bar for removal based on fiscal issues is much lower than that suggested by the CGC. A failure by the charter school to use required accounting methods or failure to satisfy any financial framework established by the Commissioner empowers the Commissioner to remove board members.[40]

Texas open-enrollment public charter schools report directly to the Texas Commissioner of Education on their academic and financial accountability and are annually required to submit to the Commissioner an independent audit conducted by an outside auditing firm.[41]

The Texas Commissioner of Education has the right and statutory authority to audit a Texas open-enrollment public charter school at any time for cause, and at least once a year without cause.[42] This is in addition to the requirement that these schools provide the Commissioner

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[39] *Id.*

[40] *Id.* The CGC attempts to frame the removal statute in this case as being similar to the one in *Hyde Leadership*, where a statute provided for removal of any private or public school trustee for malfeasance. The Board found this authority to be too limited to create direct personal accountability to a public official. As is evidenced by the much broader Texas statute, this case is much different. *See* discussion of *Hyde Leadership* and comparison of the statute in that case to the statute in this case, *infra*, Section IV, C, 3.

[41] TEX. EDUC. CODE, § 12.1181; *see also* 19 TEX. ADMIN. CODE § 100.1047.

[42] TEX. EDUC. CODE, § 12.1163

with an annual audit performed by an outside independent auditor.[43] The Commissioner's audit may include matters directly related to the management or operation of the open-enrollment public charter school, including any financial and administrative records.[44] In addition to removing and appointing board members of the school, the Commissioner retains power to withhold funding, suspend authority to operate, or take any other reasonable action deemed necessary.[45]

Judge Ringler rightly concluded that the administrators of Universal Academy are responsible to the Texas Commissioner of Education and TEA for purposes of meeting the second prong of the *Hawkins County* test. Universal Academy must regularly report on its activities and financial and academic performance, and if it fails to meet the Commissioner's standards, the Commissioner may remove its board and appoint new members. The breadth of laws and rules applicable to Universal Academy, Judge Ringler found, is extensive, and this gives the Commissioner of Education and TEA a "wide array of valid justifications

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[43] TEX. EDUC. CODE, § 12.1181; *see also* 19 TEX. ADMIN. CODE § 100.1047 (turning in the audit even one day late empowers the Commissioner to reconstitute the entire board of the public charter school).

[44] *Id.*

[45] TEX. EDUC. CODE, § 12.1162.

to reconstitute its Board."[46] Universal Academy urges the Board to disregard the mischaracterization by the CGC of the Commissioner of Education's statutory removal authority as a "limited" or "emergency" power. Instead, Universal Academy urges the Board to affirm Judge Ringler's finding that this broad power gives the Commissioner of Education full removal authority, and affirm Judge Ringler's conclusion that Universal Academy meets the definition of political subdivision under the second prong of the *Hawkins County* test. [47]

3. The Commissioner's authority to reconstitute boards is "practically unreviewable"

The CGC argues that a Texas public charter school's right of appeal of the Commissioner's decision to reconstitute its board also limits the Commissioner's power.[48] Texas Education Code Section 12.116 does provide for an administrative appeal of the Commissioner's decision, but the scope of this appeal is quite limited.[49] The Texas Administrative Procedures Act, which in most other cases provides for a contested case hearing under a preponderance of the evidence standard, does not

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[46] JD 5 fn. 14.

[47] JD 5:26-28.

[48] CGC's Brief in Support of Exceptions, p. 12.

[49] TEX. EDUC. CODE, § 12.116.

apply.[50] Instead, under rules crafted specifically for the Commissioner's modification of the governance of public charter schools, Section 12.116 requires the administrative law judge reviewing this appeal to uphold the Commissioner's decision unless the judge finds the decision to be arbitrary and capricious or clearly erroneous.[51] This is a narrow and deferential standard of review in which the judges cannot substitute their judgment for that of the agency.[52]

As simply put by Judge Ringler in his decision, the Commissioner and TEA's statutory power to reconstitute public charter school boards is "broad, and practically unreviewable."[53] Universal Academy urges the Board to disregard the CGC's argument that an administrative review of the Commissioner's decision to reconstitute a public charter school's board under an arbitrary and capricious or clearly erroneous standard weakens or limits this statutory power over public charter schools.

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[50] *Id.*

[51] *Id.* Indeed, it can be argued that there is no right of appeal at all for the Commissioner's decision to reconstitute a Texas charter school's board. This statute provides that the Commissioner's decision is a "final decision" and the limited right of appeal listed further in the statute only applies to a decision by the Commissioner to revoke a charter.

[52] *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169, 83 S.Ct. 23, 99 L.Ed.2d 207 (1962).

[53] JD 5:26.

Similarly, the CGC argues the Commissioner of Education's removal authority should be viewed as a "rarely exercised emergency power." However, as Judge Ringler noted in his decision, this is mere conjecture.[54] The Commissioner's authority goes far beyond emergencies and endows him with "practically unreviewable power to discharge the Board for a host of non-emergencies."[55] Moreover, even if a power is not exercised often, that fact does not dilute the power itself.[56] Judge Ringler noted that many state powers are rarely exercised, including capital punishment, impeachment, and eminent domain, but they nonetheless "remain vital."[57] The CGC offers the Board no citation to authority to back its claim that a rarely used power is rendered any less powerful of a tool. Universal Academy would urge the Board to disregard the CGC's arguments that the removal authority of the Commissioner of Education is limited, an emergency power, or is somehow less powerful because it is not used frequently. It is the existence of the power, and not the frequency of its use, which gives the Commissioner of Education removal authority over the boards of Texas open-enrollment public charter

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[54] JD 6 fn. 16

[55] *Id.*

[56] *See Ntakirutimana v. Reno*, 184 F.3d 419, 426 (5th Cir. 1999).

[57] JD 6 fn. 16.

schools and makes them subject to removal by a public offical. As discussed by the Fifth Circuit:

> The cases in this area have generally held that if a majority of the board of directors of the claimed political subdivision is *not* subject to selection or removal by public officials or the general electorate, then the entity *for that reason* fails the second alternative test for being a political subdivision under section 152(2).[58]

B. Judge Ringer's decision is consistent with the actual operations and characteristics of Texas open-enrollment public charter schools

The Board deems a state's characterization of an entity as "worthy of careful consideration," but it is not ultimately controlling on the question of whether the entity is a political subdivision under the Act.[59] It is federal law, not state law, which ultimately decides this issue.[60] However, when a state has created a legislative scheme governing the nature and status of the entity in question, the Supreme Court instructs the Board to look to the "actual operations and characteristics" of the

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[58] *StarTran, Inc. v. Occupational Safety and Health Review Com'n.*, 608 F.3d 312, 323 (5th Cir. 2010) (emphasis in original).

[59] *See Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000), citing *Hawkins County*, 402 U.S. at 602.

[60] *See Hawkins Cty.*, 402 U.S., at 602-03.

entity to determine whether it is exempt from the Act under the *Hawkins County* test.[61]

The Texas Constitution mandates that the Texas Legislature create a public school system:

> A general diffusion of knowledge being essential to the preservation of liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[62]

The Texas Legislature, in obedience to this constitutional mandate, created a public school system.[63] The public school system created by the Texas Legislature has long been considered a division or department of the state government.[64] In stressing the importance of the role of the public school system in Texas, the Texas Supreme Court has pointed out the Texas Constitution's link between free public education and the preservation of the liberties and rights of the citizens of this state.[65]

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[61] *State Bar of New Mexico & Commc'ns Workers of Am. Local 7011, Afl-Cio, Petitioner*, 346 NLRB 674, 688 (2006); *Hawkins County*, 402 U.S., at 603-604.

[62] TEX. CONST. art. VII, § 1.

[63] *Mumme v. Marrs*, 40 S.W.2d 31, 34 (Tex. 1931).

[64] *Id.*, at 35.

[65] *Neeley v. West Orange-Cove Consol. I.S.D.*, 176 S.W.3d 746, 785 (Tex. 2005).

The Texas Constitution gives the Texas Legislature sole authority to set the policies and fashion the means for providing a public school system.[66] The discretion given to the Texas Legislature to implement the public school system in this state is broad and of considerable latitude.[67] The Texas Constitution does not dictate a particular structure for the system of free public schools.[68] It is the Texas Legislature's province to "decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means."[69]

From the days of the Texas Republic up until the mid-1990s, the Texas Legislature implemented its constitutional mandate of providing free public education through school districts.[70] In 1993, the 73rd Texas Legislature enacted Senate Bill 7, abolishing the Texas Central Education Agency over the next two years and repealing Titles 1 (General Provisions) and 2 (Public Education) of the Texas Education Code, excepting out only certain school finance chapters.[71] To effect this

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[66] *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003).

[67] *Id.*

[68] *Neeley*, 176 S.W.3d, at 783.

[69] *Alanis*, 107 S.W.3d, at 571.

[70] *See San Antonio I.S.D. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996).

[71] *See* Act of May 28, 1993, 73rd Leg., R.S., ch. 347, §§ 8.33 and 8.35, 1993 Tex. Gen. Laws 1479, 1556.

broad overhaul of the Texas public school system, Senate Bill 7 appointed a Joint Select Committee to focus on the *delivery* of educational programs and services in the public school system.[72] The Joint Select Committee issued a Final Report in December of 1994 recommending, among other things, that the 74th Texas Legislature incorporate charter schools into the public education system.[73]

In 1995, the 74th Texas Legislature created Texas open-enrollment public charter schools.[74] The Texas Education Code describes open-enrollment public charter schools as a "part of the public school system of this state."[75] State-approved open-enrollment public charter schools may be granted to non-profit organizations, institutions of higher education, or other governmental entities.[76]

1. These public schools are state funded

Texas open-enrollment public charter schools are funded with public monies and are generally required to follow most of the same administrative, fiscal and legal requirements as traditional public school

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[72] *See* JOINT SELECT COMM. TO REVIEW THE CENTRAL EDUC. AGENCY, FINAL REPORT TO THE 74TH LEGISLATURE, p. 1, Tex. S.B. 7 (1994).

[73] *See Id.*, at p. 25.

[74] *See* TEX. EDUC. CODE, § 12.001.

[75] *See* TEX. EDUC. CODE, § 12.105.

[76] *See* TEX. EDUC. CODE, § 12.101(a).

districts.[77] These public charter schools do not charge tuition.[78] Their state funding is comprised of per pupil allotments, similar to that paid to public independent school districts.[79] The funds received by a public charter school from the State of Texas "are considered to be public funds for all purposes under state law."[80] They are held in trust by the public charter school for the benefit of its students.[81] Any property purchased or leased with these public funds is deemed to be property of the state and public property for all purposes.[82]

2. These public schools perform the purely governmental function of providing free public education pursuant to a constitutional mandate

Texas open-enrollment public charter schools perform the purely governmental function of implementing the state's constitutionally mandated system of providing free public education.[83] The Legislature put public charter schools on equal footing with school districts in their

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[77] *See gen.,* TEX. EDUC. CODE, §§ 12.101 - 12.133.

[78] *See* TEX. EDUC. CODE, § 12.108.

[79] *See Id.*

[80] TEX. EDUC. CODE, § 12.107.

[81] TEX. EDUC. CODE § 12.107(a)(2).

[82] *See* TEX. EDUC. CODE § 12.128(a)(1).

[83] *See* TEX. EDUC. CODE § 12.105; *see also LTTS Charter School, Inc.,* 342 S.W.3d, at 77-78.

responsibility for executing the constitutional mandate for provision of free public schools:

> The school districts and charter schools created in accordance with the laws of this state have the primary responsibility for implementing the state's system of public education and ensuring student performance in accordance with this code.[84]
>
> and
>
> An education function not specifically delegated to the [Texas Education Agency] or the [State Board of Education] under this [Education] code is reserved to and shall be performed by school districts or open-enrollment charter schools.[85]

In Texas, the provision of public education is deemed to be a purely governmental function.[86] Even the planting of a tree on public school grounds has been deemed to be a governmental act.[87]

Texas open-enrollment public charter schools are treated as public bodies under Texas law. They are subject to the open records and open government requirements of the Texas Government Code to the same extent as any other state administrative branch.[88] They participate in

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[84] TEX. EDUC. CODE §11.002.

[85] TEX. EDUC. CODE § 7.003.

[86] *Stout v. Grand Prairie Independent School Dist.*, 733 S.W.2d, at 296; *Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 949-50 (Tex.Civ.App.—San Antonio 1938, writ ref'd.).

[87] *Braun*, 114 S.W.2d, at 949-50.

[88] TEX. EDUC. CODE, §§ 12.1051 and 12.1052.

the Texas Teacher Retirement System to the same extent as school districts.[89] They have immunity from lawsuits to the same extent as school districts and other political subdivisions, and their employees have immunity to the same extent as their school district counterparts.[90] They are governed by statutes which apply, by their terms, to political subdivisions of Texas for purchasing and contracting,[91] group health, dental and disability benefits for political subdivisions,[92] and workers' compensation benefits for political subdivisions.[93] The members of the governing body of a Texas open-enrollment public charter school are considered public officials who must comply with the conflict of interest and nepotism requirements under Texas law for public officials.[94] Texas

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[89] TEX. EDUC. CODE, § 12.1057.

[90] TEX. EDUC. CODE § 12.1056.

[91] TEX. EDUC. CODE § 12.1053.

[92] TEX. EDUC. CODE § 12.1058.

[93] TEX. EDUC. CODE § 12.1058. The CGC points out a provision in Section 12.1058 which instructs that open-enrollment public charter schools are not intended to be "political subdivisions" for all purposes under Texas law, but rather, only when a law references its specific application to open-enrollment public charter schools. There is a good explanation for this. In Texas, a political subdivision is defined as holding "the power to assess and collect taxes." *See Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980). This is not, and has never been, an attribute of a Texas open-enrollment public charter school. Nor has it ever been a requirement of the Board in determining whether an entity is a "political subdivision" under the Act. This is a term of art in Texas law, referencing a particular type of entity, and it is very different than the definition under the Act.

[94] TEX. EDUC. CODE § 12.1054.

open-enrollment public charter schools have been deemed political subdivisions who are subject to the Texas Whistleblower Protection Act.[95]

Moreover, in a global sense, the Texas Legislature instructs:

> "[A]n open-enrollment charter school is subject to federal and state laws and rules governing public schools and to municipal zoning ordinances governing public schools.[96]

This provision is set forth with the heading: "General Applicability of Laws, Rules, and Ordinances to Open-Enrollment Charter School."[97] The expressed intent is clear. Texas considers open-enrollment public charter schools to be public bodies which are treated the same as any other public school.[98]

In the Secretary of Labor's explanation of the definition of "political subdivision" contained in 29 CFR 1975.5, the Secretary lists examples of

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[95] *See Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834, *5 (Tex. App.—Dallas 2013, pet. denied) (unpublished opinion).

[96] TEX. EDUC. CODE, § 12.103(a). Subsection (b) provides an exception for references contained inside the Education Code, where specific reference to their application to open-enrollment charter schools must be expressly stated. Subsection (c) exempts open-enrollment charter schools in small municipalities from compliance with certain zoning ordinances. Read together, all federal and state laws and rules outside of the Texas Education Code which apply to public schools apply equally to open-enrollment charter schools (except for certain municipal zoning ordinances).

[97] TEX. EDUC. CODE, § 12.103.

[98] *See San Antonio I.S.D. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996).

entities that are normally regarded as political subdivisions.[99] The example includes: "State, county, and municipal public school boards and commissions."[100] Moreover, the Board recently proclaimed that it "does not assert jurisdiction over public schools."[101] The Board finds state law declarations and interpretations of the public nature of an entity to be worthy of careful consideration.[102] In Texas, the state legislature has explicitly declared that open-enrollment public charter schools are to be governed by the same federal rules that apply to other public schools.[103] To the extent the Board considers the position of the State of Texas on this issue, the Texas Legislature has spoken quite clearly that it intends open-enrollment public charter schools to be treated as public schools under federal and state law.[104]

In viewing these actual operations and characteristics of Texas open-enrollment public charter schools, the picture is clear. They operate public schools. They carry the same characteristics as other public

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[99] 29 CFR 1975.5.

[100] *Id.*

[101] *Hyde Leadership Charter School—Brooklyn,* 364 NLRB 88, p. 8 (2016).

[102] *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

[103] TEX. EDUC. CODE, § 12.103.

[104] *Id.*

schools. Judge Ringler's decision finding Universal Academy to be a political subdivision under the Act is entirely consistent with the actual operations and characteristics of Texas open-enrollment public charter schools.

3. The Texas Supreme Court considers open-enrollment public charter schools to be institutions, agencies, or organs of state government deriving their status and authority from the Texas Constitution or laws passed by the Legislature pursuant to the Constitution

In 2011, the Texas Supreme Court considered whether an open-enrollment public charter school was a "governmental unit," as that term is defined in the Texas Tort Claims Act, in the case of *LTTS Charter School, Inc. v. C2 Construction, Inc.*[105] At issue in that case was whether a Texas open-enrollment public charter school is an "institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution."[106] The Court examined Texas open-enrollment public charter schools and determined that these schools are "governmental units" under that definition.[107]

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[105] *See LTTS Charter School, Inc.*, 342 S.W.3d, at 73.

[106] *Id.*

[107] *Id.*, at 77-78.

In arriving at this conclusion, the Texas Supreme Court determined that their status as an "institution, agency, or organ of government" arose from the Texas Education Code, wherein they are described as "created in accordance with the laws of this state and, together with traditional public schools, hav[ing] the primary responsibility for implementing the state's system of public education."[108] As for their authority to be considered an "institution, agency, or organ of government," the Court found "that too derives from 'laws passed by the legislature under the constitution,'" citing an Education Code provision which provides that open-enrollment public charter schools have "the powers granted to traditional public schools."[109] In that case, the public charter school before the Texas Supreme Court was Universal Academy. In concluding that Universal Academy was a unit of state government as a public school, the Court wrote:

> "[W]e are confident that the Legislature considers Universal Academy to be an institution, agency, or organ of government."[110]

To a great degree, the Texas Supreme Court undertook the same analysis of the actual operations and characteristics of Texas open-

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[108] *Id.*

[109] *Id.*

[110] *Id.*, at 78.

enrollment public charter schools as did Judge Ringler. Both the Texas Supreme Court and Judge Ringler observed the myriad of public school laws and rules which applied to public charter schools. And both concluded that Texas open-enrollment public charter schools are public bodies. The Texas Supreme Court concluded they are governmental units. Judge Ringler concluded they are political subdivisions under the second prong of the *Hawkins County* test because they are responsible to a public official with removal authority. Universal Academy would urge the Court to affirm Judge Ringler's conclusion, which is consistent with Texas law and the actual operations and characteristics of Texas public charter schools.

C. Judge Ringler's conclusion is consistent with prior Board decisions involving public charter schools

In 2002, in *Research Foundation of the City University of New York*, the Board set forth a precedent it would follow in the charter school cases of *Chicago Mathematics*, *Pennsylvania Virtual*, and *Hyde Leadership*.[111] In *Research Foundation*, the Board determined a university foundation failed to meet the political subdivision test under the Act because there was no state law which mandated the authority of a political official to

[111] *See Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002).

appoint and remove board members of the entity.[112] The bylaws of the foundation provided a political official with authority to appoint and remove its board members.[113] But, the Board determined, this was not enough. There needed to be a statute or some other sort of state law which provided this authority.[114] Thus, the foundation failed the political subdivision control test.[115]

1. *Chicago Mathematics*

The Board followed the reasoning of *Research Foundation* ten years later in *Chicago Mathematics* and discussed its holding in some detail.[116] Noting the conclusion in *Research Foundation* was based upon the absence of a state law providing a political official with removal and appointment power, the Board declared it would examine the charter school under this same standard and determine whether the

> selection and removal of the members of an employer's governing board are determined by law, or solely the employer's governing documents.[117]

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *See Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 41, slip op. at 6-8 (2012).

[117] *Id.*, slip op. at 8.

In *Chicago Mathematics*, the Board found not only was there no state law granting a public official appointment and removal power, but the bylaws of the charter school indicated only sitting board members could appoint and remove board members.[118] There was no public official involved at all. The members were subject to appointment and removal *solely* by private individuals.[119] Accordingly, the Board found the charter school was not a political subdivision.

As support, the Board cited the decision of the National Labor Review Board in *Charter School Administration Services*.[120] That case did not involve a charter school, but rather a charter management company.[121] The Board in *CSAS* found that not only was the board of directors not subject to appointment or removal by a public official, no person involved in running the entity had accountability to any public official.[122]

2. *Pennsylvania Virtual*

Last year, in *Pennsylvania Virtual*, the Board again analyzed a charter school to determine whether it qualified as a political subdivision under the *Hawkins County* test and the Board's decision in *Research*

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[118] *Id.*, slip op. at 9.

[119] *Id.*

[120] *Id.*; *see also Charter School Administrative Services*, 353 NLRB 394 (2008).

[121] *Chicago Mathematics*, 359 NLRB 41, slip op. at 8.

[122] *Id.*

Foundation.[123] In this case, neither the charter school's governing documents nor any applicable law authorized a public official or the electorate with appointment or removal authority for the governing body of the charter school.[124] Finding this dispositive of the case, the Board decided the charter school was not a political subdivision under the second prong of the *Hawkins County* test and was, accordingly, subject to the jurisdiction of the Board.[125]

3. *Hyde Leadership*

On the same day it issued its decision in *Pennsylvania Virtual*, the Board also issued a decision in *Hyde Leadership Charter School—Brooklyn* wherein the Board again applied the rule it annunciated in *Research Foundation.*[126] In *Hyde Leadership*, the charter agreement provided for removal of a board member by a political official in the narrow circumstance where the member made a material misstatement in a background statement or financial interest disclosure report.[127] Important to the Board's decision, however, was the fact that this

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[123] *See Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016).

[124] *Id.*, slip op. at 10-11.

[125] *Id.*, slip op. at 16.

[126] *See Hyde Leadership Charter School—Brooklyn,* 364 NLRB 88, slip op. at 6-7 (2016).

[127] *Id.*, slip op. at 7.

provision for removal by the political official was only contained in the contract for charter and was not contained in any state law.[128] There was, however, a provision in the general education laws of New York that allowed any school trustee in the state, whether public or private, to be removed for malfeasance.[129]

The Board assessed these two removal provisions.[130] Regarding the provision contained in the charter agreement, but not anywhere in law, the Board found this to be non-binding on a public official because it was contained only within the nonprofit charter school corporation's operating documents.[131] The situation was quite similar to *Research Foundation*, where the entity's bylaws provided for removal power, but state law did not. As with *Research Foundation*, the Board decided this provision did not amount to responsibility to a public official, and thus the charter school did not meet the definition of a political subdivision under the second prong of the *Hawkins County* test.[132]

As for the general education law providing for removal of public or private school trustees in the state for malfeasance, the Board found this

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[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

to be too limited of a removal power to create a direct personal accountability between the charter school's board and public officials or the general electorate.[133] Moreover, because the law applied to entities which were unquestionably private, many over whom the Board had previously asserted jurisdiction, the Board found this an unpersuasive argument for the charter school.[134] Based on a lack of a law empowering a public official with direct removal authority over the charter school board members in *Hyde Leadership*, the Board concluded the charter school was not a political subdivision and was subject to the Act.[135]

Hyde Leadership represents the closest the Board has come to considering a public charter school jurisdiction case where there was some level of public official removal authority. The problem, in *Hyde Leadership*, was that the removal authority was illusory. First, the statute only provided for removal in cases of malfeasance, which drastically limited the situations in which a public official would be able to exercise control over the entity.[136] In the words of the CGC, this would be a "limited emergency power." Second, the statute was not directed to

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[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

public charter schools, but rather to all schools in the state, both public and private.[137] The Board was not persuaded in *Hyde Leadership*, but we believe Universal Academy's case presents the Board with the link that was missing from the prior charter school cases, which prevented them from being political subdivisions, and which will lead the Board to affirm Judge Ringler's decision that Universal Academy is a political subdivision.

The chief and primary difference between *Hyde Leadership* and the instant case is that Texas has a specific statute directed solely at open-enrollment public charter schools expressly authorizing the Commissioner of Education to reconstitute their Boards for virtually any reason.[138] The slightest deviation from academic or financial frameworks or compliance with every last applicable law and rule down to the letter gives the Commissioner of Education the ability to remove any and all persons from the board and replace them as the Commissioner sees fit.[139] This is the "direct personal accountability" that the Board looks for when it analyzes entities to determine if they are political subdivisions under

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[137] *Id.*

[138] *See* TEX. EDUC. CODE, §§ 12.115 and 12.116

[139] *Id.*

the second prong of the *Hawkins County* test.[140] Judge Ringler was right to conclude that Universal Academy is a political subdivision.

V. Conclusion

Judge Ringler correctly found that the Commissioner of Education's "broad, and practically unreviewable" full authority to reconstitute the entire board of Universal Academy renders a clear answer to the question of whether it is administered by individuals responsible to public officials.[141] Based on this finding, Judge Ringler rightly concluded that Universal Academy is not an employer under the Act and, therefore, not subject to the Board's jurisdiction.[142] Having made this conclusion, there was no need for Judge Ringler to evaluate the merits of the allegations in the complaint.[143]

Universal Academy respectfully requests that the Board affirm the portions of Judge Ringler's decision to which the CGC excepts. The CGC raised no exception or argument that warrants the Board overturning Judge Ringler's well-reasoned decision.

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[140] *See Hyde Leadership*, slip. op. 7.

[141] JD 5:13-29.

[142] JD 6:10-14.

[143] *See Pennsylvania Virtual*, slip op. at 13 ("Where an examination of the appointment-and-removal method yields a clear answer to whether an entity is 'administered by individuals who are responsible to public officials or the general electorate' the Board's analysis properly ends").

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 30, 2017, a true and correct copy of the foregoing document was electronically filed with the Office of the Executive Secretary of the Board in this matter and served via electronic mail on all counsel of record as listed below:

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