

Oral Argument Not Yet Scheduled

No. 17-60364

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**VOICES FOR INTERNATIONAL BUSINESS AND EDUCATION, INC.,
d/b/a INTERNATIONAL HIGH SCHOOL OF NEW ORLEANS**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**APPELLEE BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH A. HEANEY
Supervisory Attorney

GREG P. LAURO
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-1743
(202) 273-2965

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

STATEMENT REGARDING ORAL ARGUMENT

The Board agrees with Petitioner that oral argument would assist the Court. The Board observes, however, that the narrow issue in this case—whether a single charter school in Louisiana, created and run by private individuals, is a political subdivision exempt from the Act’s coverage—turns on the straightforward application of the Board’s well-settled political-subdivision test to largely undisputed facts.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Voices for International Business and Education, Inc., d/b/a International High School of New Orleans (“Voices”) to review a Decision and Order of the National Labor Relations Board

issued on May 5, 2017, and reported at 365 NLRB No. 66. (ROA.442-45.)¹ The Board found that Voices unlawfully refused to bargain with United Teachers of New Orleans, Local 527, LFT, AFT (“the Union”), which the Board certified as the bargaining representative of a unit of Voices’ employees. (ROA.442-43.) The Board has cross-applied for enforcement of its Order, which is final under Section 10(e) and (f) of the National Labor Relations Act, as amended. 29 U.S.C. § 160(e) & (f). The Union has intervened on the Board’s behalf. On August 16, 2017, the Court accepted for filing an amicus brief filed by the Louisiana Association for Public Charter Schools and the Texas Charter School Association in support of Voices (“Amici”).

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. 29 U.S.C. § 160(a). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because Voices transacts business within this Circuit. Voices filed its petition for review on May 11, 2017; the Board filed its cross-application on June 5, 2017. Both were timely; the Act places no time limitations on such filings.

¹ “ROA.” refers to the administrative record, which includes the representation hearing transcript (Record Volume I, ROA.1-59), exhibits (Record Volume II, ROA.60-195), and the pleadings before the Board and the Board decisions under review (Record Volume III, ROA.196-445). Where applicable, references before a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Voices’ opening brief; “ABr.” refers to Amici’s brief.

The Board's unfair-labor-practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 15-RC-175505), in which Voices contested the Board's certification of the Union as the employees' collective-bargaining representative. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record in that proceeding is part of the record before this Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair labor practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

ISSUE STATEMENT

The Board found that Voices violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. Voices admits its refusal, but claims that because it is a "political subdivision" it is excluded from the Act's definition of "employer" and exempt from the Board's jurisdiction. In rejecting that argument, the Board found that Voices had met neither prong of its political subdivision test,

which requires the entity seeking the exemption to establish that it was (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. Thus, the question on appeal is whether substantial evidence supports the Board's reasonable finding that Voices was an employer covered by the Act and therefore properly found that Voices violated the Act by refusing to bargain.

STATEMENT OF THE CASE

The Board found that Voices violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to recognize and bargain with the Union. Voices took those actions in order to challenge the Union's certification, following a representation election, as the exclusive collective-bargaining representative of a unit of Voices' employees. Voices attempts to evade its duty to bargain by claiming that it is a "political subdivision" within the meaning of the Act, and thus not a statutory employer subject to the Board's jurisdiction. The Board's findings in the representation and unfair labor practice proceedings are summarized below.

I. The Board's Findings of Fact

A. Background: Voices' and IHS's Operations

Voices is a private non-profit corporation established in 2009 by private individuals. (ROA.236, 238-39; 80, 83.) That year, Voices began operating the

International High School of New Orleans (“IHS” or “the School”),² pursuant to a charter with the Louisiana Board of Elementary and Secondary Education (“BESE” or “School Board”). (ROA.236.) The charter was entered into pursuant to Louisiana’s Charter Law.

As further described below, the Charter Law, Voices’ articles of incorporation and by-laws, the charter, and the parties’ stipulations set forth how Voices was established and detail the selection and removal process of Voices’ board members, including that they are private individuals who are appointed or removed by other board members, not by the State. These documents also establish Voices’ role as the School’s employer with final authority over the School’s operations. (ROA.236-38; 19-20, 32-33, 46-53.)

B. The Charter Law Authorizes Local School Authorities To Enter into Charters with Non-Profit Corporations to Operate Public Schools, But Does Not Permit the State To Appoint or Remove Members of a Charter School’s Governing Board

In 1997, the Louisiana Legislature passed the Louisiana Charter School Demonstration Programs Law (“Charter Law”). La. Stat. Ann. § 17:3971, *et seq.* (2017). The Charter Law “authorize[s] the creation of innovative kinds of independent public schools for pupils.” *Id.* at § 17:3972(A). Its stated purpose is

² As used in this brief, the term “Voices” refers to both Voices and the School unless context requires separate references.

“to provide opportunities for educators and others interested in educating pupils to form, operate, or be employed within a charter.” *Id.* at § 17:3972(B)(1).

The Charter Law allows local school authorities to enter into charters with nonprofit corporations to operate public schools. Thus, the Charter Law specifies that “[a]ny of the following may form a nonprofit corporation for the purposes of proposing a charter as provided in this Subsection,” including a “group of 10 or more citizens” or a “business or corporate entity registered to do business in Louisiana.” *See* La. Stat. Ann. § 17:3983(A)(1). Pursuant to the Charter Law, a local school board and a local charter authorizer “may enter into any charter it finds valid, complete, financially well structured, and educationally sound.” *Id.* at § 17:3983(A)(4)(a). The Charter Law requires that, with one exception not applicable here, the operator of a charter school must “be organized as a nonprofit corporation under applicable state and federal laws.” *Id.* at § 3991(A)(1)(a).

The Charter Law gives charter school officers and employees authority over the school’s operations and provides that:

[A] charter school and its officers and employees may exercise any power and perform any function necessary, requisite, or proper for the management of the charter school not denied by its charter, the provisions of this Chapter, or other law applicable to the charter school.

Id. at § 3991(A)(2). The Charter Law also provides that the charter school’s governing board, not the State, employs the charter school’s faculty and staff, and

that the non-profit charter operator (here, Voices) shall have “exclusive authority over all employment decisions” at the school. *Id.* at § 3997(A)(1)(a)-(b). Notably, the Charter Law contains no provision for appointing or removing a charter school’s or charter operator’s governing board members.

C. Private Individuals File Articles of Incorporation Establishing Voices and Providing that only Voices’ Board Members Can Appoint or Remove Other Board Members

On August 7, 2009, private citizens filed articles of incorporation with the Louisiana Secretary of State to create Voices as a Louisiana nonprofit corporation for educational purposes, including operating a charter school. (ROA.238; 79-80, 83.) The articles provide that Voices’ board members are “responsible for the overall policy and direction” of the school and shall “delegate responsibility for the day-to-day operations” to IHS’s head of the school and Voices’ committees. (ROA.238; 81-82.)

Voices’ by-laws, in turn, provide that its corporate powers are vested in and exercised by its board of directors. (ROA.238; 132.) The articles named Voices’ original board members, who were all private individuals, none of whom were appointed by the State or BESE. (ROA.238; 83-85; *see* ROA.19-20, 32-33, 46-53.) The articles also state that the board members “will approve by a majority vote, new members, officers and committee chairs.” (ROA.81-82.) Further, Voices’ by-laws provide that a board member “may be removed with or without

cause by a three-fourths vote of the remaining” board members.³ (ROA.238; 133, article III, section 3.5.) As with the Charter Law, the articles of incorporation and by-laws make no reference to the State’s power to appoint or remove board members.

D. Voices’ Charter with BESE Provides that Voices is a Private Corporation with Final Authority over School Operations; that Voices is the School’s Employer; and that Voices and the School are not State Agents

The most recent charter between Voices and the School Board, signed in 2015, establishes IHS as a Type 2 charter school, meaning that it is a “pre-existing public school converted and operated as a result of and pursuant to a charter between the non-profit corporation [Voices] created to operate the school and [BESE].” (ROA.238; 91-92; *see* Charter Bulletin 126, Section 107(B), ROA.386, 391 (regulation promulgated by BESE to implement the Charter Law).) The charter refers to Voices’ board members as “charter operator” for the purposes of operating IHS as a charter school. (ROA.238; 92, section 1.1.1.) Consistent with the Charter Law’s requirements, the charter requires Voices to maintain itself as a non-profit corporation. (ROA.238; 92, section 1.1.5.) The charter provides that Voices, as charter operator, shall be the “final authority” in all matters affecting IHS. (ROA.94, Section 2.2.7.) For example, Voices is solely responsible for

³ Likewise, Voices’ officers are elected by a majority vote of the board, and may only be removed by a three-fourths vote of the board. (ROA.134.)

“managing” the school and carrying out the charter (sections 2.1.1 and 2.2.1), and for the school’s financial management (section 2.2.6.), including the school’s operation and budget (3.2.1, ROA.94, 102). It is also solely responsible for developing school enrollment policies (2.4.1) and for implementing the student handbook (2.6.1) and rules for written discipline (2.7.1, ROA.95-96). Voices has exclusive authority to design and implement the school’s “educational program” (2.13.1) and plan for assessment of student performance, including all required student testing (2.16.1, ROA.97-98).

The charter provides that Voices, not the State, will be the employer of IHS’s faculty and staff, and will have authority over the “hiring of personnel, terms of employment, and compensation.” The charter also states that “the teachers and other staff employed by the Charter Operator are not employees of BESE or the LDE [Louisiana Department of Education].” (ROA.238; 105, section 4.1.1.)

The charter further provides that Voices is “not acting as the agent of, or under the direction and control of BESE,” except as specifically required by law or the charter. (Section 6.3.1, ROA.108.) The charter likewise confirms that no officer, agent, employee, or subcontractor of Voices or IHS is an officer, employee, or agent of the State. (Section 6.3.4, ROA.109.) It also provides that the State will not assume “liability” for Voices’ actions and that Voices’

obligations to other parties with whom it may contract are not the responsibility of the State. (Sections 6.3.1-2, ROA.108-09.)

The charter indicates that Voices, as charter operator, elected not to follow any collective bargaining agreements entered into by the local school district where IHS is located. (ROA.238; 127.) It also indicates that Voices elected not to participate in the Teacher’s Retirement System of Louisiana or the Louisiana School Employees’ Retirement System. (ROA.238; 128.)

In keeping with the facts just discussed, the parties stipulated that Voices is a private entity and that no state entity has day-to-day control over Voices’ operations. The parties also stipulated that the selection or removal of Voices’ board members does not require state involvement. *See* ROA.19-20, 32-33, 46-53.

II. The Board Proceedings

A. The Representation Case

On May 4, 2016, the Union petitioned the Board for a representation election among a 47-employee unit consisting of teachers and other employees at Voices. (ROA.236; 234.) Voices contended that it is a “political subdivision” of the State of Louisiana, and thus expressly excluded from the definition of “employer” found in Section 2(2) of the Act, 29 U.S.C. § 152(2), and exempt from the Board’s jurisdiction.

Following a hearing, the Regional Director issued a Decision and Direction of Election finding that the Board has jurisdiction over Voices because it is an employer under the Act, and directing an election. (ROA. 236-41.) The Regional Director applied the Board's political subdivision test, endorsed by the Supreme Court, which requires the entity seeking the exemption to establish that it was "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *See NLRB v. Natural Gas Util. Distr. of Hawkins Cty.*, 402 U.S. 600, 604-05 (1971). The Regional Director found that Voices had failed to prove that it was a political subdivision under either prong of that test. (ROA.239-41.)

On February 11, 2017, the Board (Members Pearce and McFerran; Chairman Miscimarra dissenting⁴) denied Voices' request for review of the Regional Director's decision, and affirmed her determination that the Board has jurisdiction over Voices. (ROA.222-23.) The Board agreed with the Regional Director, for the reasons stated in her decision, that Voices was not exempt as a political subdivision under either prong of the *Hawkins County* test. (ROA.222 & n.1.) The Board found that the Regional Director's analysis was consistent with two recent Board decisions applying the *Hawkins County* test to charter schools

⁴ Phillip A. Miscimarra was named Chairman in April 2017 after having served as Acting Chairman since January 2017.

“operating pursuant to a state statute, whose creation by individual applicants and governance by its board [] exhibit only minor, non-substantive differences from the instant case.” (*Id.*) See *The Pennsylvania Virtual Charter School*, 364 NLRB No. 87, 2016 WL 4524109 (Aug. 24, 2016); *Hyde Leadership Charter School*, 364 NLRB No. 88, 2016 WL 4524108 (Aug. 24, 2016). The Board found that, in asserting jurisdiction in those cases, the Board “rejected arguments similar to those raised by [Voices] in this case.” (ROA.222 n.1.)

The Board also found no merit to Voices’ argument that the Board should, pursuant to Section 14(c)(1) of the Act, 29 U.S.C. § 164(c)(1), exercise its discretion to decline jurisdiction over the charter school because of its purportedly limited impact on interstate commerce, the legislative intent to treat charter schools as public schools, and the State’s authority to regulate the labor relations of its employees.⁵ The Board again noted that it had rejected similar arguments in *Pennsylvania Virtual* and *Hyde Leadership*. (ROA.222 & n.1.)

Thereafter, the Board conducted a secret-ballot election and the unit employees voted 26 to 18 for union representation. (ROA.198.) On June 7, 2016,

⁵ Section 14(c)(1) provides that the Board has discretion to “decline to assert jurisdiction over any labor dispute involving any class or category of employers” whose effect on commerce is not, in the Board’s opinion, “sufficiently substantial” to warrant its jurisdiction. 29 U.S.C. § 164(c)(1). Neither Voices nor Amici have raised any argument based on Section 14(c)(1) in their respective briefs to the Court. They have consequently waived any such argument. See cases cited at p. 19 (arguments not raised in parties’ opening briefs are waived).

the Board certified the Union as the exclusive collective-bargaining representative of those employees. (ROA.291-92.)

B. The Unfair Labor Practice Case

Voices contested the validity of the certification by refusing the Union's bargaining demand. The Union filed an unfair-labor-practice charge, and the Board's General Counsel issued a complaint alleging that Voices' refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) & (1). (ROA.442.) The General Counsel subsequently filed a motion for summary judgment. Voices opposed, again claiming that the Board lacked jurisdiction because Voices is assertedly not an employer under the Act. (*Id.*)

III. The Board's Conclusions and Order

On May 5, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) issued a Decision and Order granting the General Counsel's motion for summary judgment and finding that Voices violated the Act by refusing to bargain with the Union.⁶ (ROA.443.) The Board found that all representation issues raised by Voices in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding. (ROA.442.)

⁶ Voices (Br. 1, 6) incorrectly states that Chairman Miscimarra dissented to the granting of summary judgment in the unfair labor practice case, but that decision was unanimous. Chairman Miscimarra simply noted his dissent to the denial of Voices' request for review in the underlying representation proceeding. (ROA 442 n.2.)

The Board's Order requires Voices to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (ROA.443.) Affirmatively, the Order directs Voices, on request, to bargain with the Union as the representative of the unit employees. (*Id.*) The Order further requires Voices to post a remedial notice. (ROA.444.)

STANDARD OF REVIEW

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

This deferential standard of review applies to every interpretation of the Act by the Board; no exception exists for interpretations regarding "jurisdictional or legal questions[s] concerning the coverage of the Act." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 n.7 (1984). The Supreme Court recently reaffirmed that courts must accord such deference to an agency's interpretation of

a statute within its expertise, even on questions of agency jurisdiction. *City of Arlington v. FCC*, 529 U.S. 290, 133 S. Ct. 1863, 1868 (2013) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), and reiterating that courts must defer to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s jurisdiction); *accord Exelon Wind I, LLC v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014) (noting that in *City of Arlington*, the Supreme Court afforded *Chevron* deference to an agency’s interpretation of its own jurisdiction). This Court has also instructed that the “Board’s decision to assert jurisdiction is a matter within its discretion” and “will not be overruled . . . unless the Board’s action departed substantially from that taken in seemingly like cases.” *NLRB v. Highview, Inc.*, 590 F.2d 174, 178-79 (5th Cir. 1979) (internal quotes and citations omitted).

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

SUMMARY OF ARGUMENT

The Court should uphold the Board’s finding that Voices violated the Act by refusing to bargain with the Union. Before the Board, Voices defended its conduct by claiming it is a “political subdivision” of the State and therefore exempt from the Board’s jurisdiction. The Board reasonably found that Voices failed to meet either prong of its Supreme Court-endorsed political-subdivision test, which requires Voices to establish that it was either (1) created directly by the state to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. On appeal, Voices challenges only the Board’s finding that it failed the second of these prongs, thereby waiving any argument regarding the first prong.

The Board reasonably concluded that Voices is not administered by individuals who are accountable to any public officer or to the general electorate. The Charter Law, Voices’ articles of incorporation and by-laws, the charter, and the stipulated facts establish that no board members are selected or subject to removal by any public official. Instead, Voices’ board is a self-perpetuating entity that controls its members’ appointment and removal without any state involvement and that has final authority over the School’s operations and labor relations. Thus, Voices fails to prove that it is exempt from the Board’s jurisdiction.

Voices points to other factors (such as the State’s limited authority to remove Board members, Voices’ reliance on public funds, and the State’s statutory and regulatory oversight of Voices) that it claims demonstrates its status as a political subdivision. In doing so, Voices ignores that whether the board members are selected or removed by public officials is the dispositive question in the *Hawkins County* prong two analysis, and it cites no precedent to support its position that any of these other factors require a different answer.

Voices does not further its argument by relying on other state laws or state court decisions that refer to a charter school as a “local education agency” or as a “public school.” This argument rests on the fallacy that any reference, in any state law or state court decision, to a charter school as “public” for any purpose necessarily transforms it into a political subdivision exempt from the Act’s coverage. But federal law, not state law, controls this question.

Voices and Amici, relying on unfounded speculation, likewise fail to show that the Board’s jurisdiction over Voices usurps the State’s control over all charter schools within this Court’s jurisdiction. The Board’s decision affects only one school—Voices. Moreover, the Charter Law makes clear that the State *chose* to provide education to school-aged students partly through its schools and partly through regulated private corporations, such as Voices.

As noted, Voices declined to argue that it is a political subdivision under the first prong of the political subdivision test, waiving the right to make any such argument here. It is settled that amici cannot expand the scope of the appeal to include issues not argued by a party in its opening brief in court; therefore, the Court should decline to consider Amici's argument that Voices is exempt from the Board's jurisdiction under the first prong. In any event, Amici's claims regarding that prong fail on the merits because Voices was not created directly by the state. Rather, it was created by the private individuals who filed for its incorporation as a private, non-profit corporation.

ARGUMENT

THE BOARD REASONABLY FOUND THAT VOICES IS NOT A POLITICAL SUBDIVISION EXEMPT FROM THE BOARD'S JURISDICTION

Voices contends that it is a "political subdivision" of the State of Louisiana, and thus expressly excluded from the definition of "employer" found in Section 2(2) of the Act, 29 U.S.C. § 152(2), and exempt from the Board's jurisdiction. As found by the Board (ROA.222, 236-41), Voices failed to establish that it falls within either prong of the Board's political subdivision test, endorsed by the Supreme Court, which requires the entity seeking the exemption to establish that it was "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are

responsible to public officials or to the general electorate.” *See NLRB v. Natural Gas Util. Distr. of Hawkins Cty.*, 402 U.S. 600, 604 (1971).

In its opening brief to this Court, Voices does not argue that it is exempt as a political subdivision under *Hawkins County*’s first prong, which would require Voices to prove that it was “created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government.” 402 U.S. at 604-05. Accordingly, Voices has waived the right to make any such argument to this Court. *See United States v. Pompa*, 434 F.3d 800, 806 n.4 (5th Cir. 2005) (“Any issue not raised in an appellant’s opening brief is deemed waived.”); Fed. R. App. P. 28(a)(8)(A) (opening brief of appellant must contain “appellant’s contentions and the reasons for them”).

Thus, on appeal, Voices challenges only the Board’s finding that it is not a political subdivision under the second prong of the *Hawkins County* test. As discussed below, Voices’ challenge to the Board’s finding that it is not administered by individuals who are responsible to public officials or the general electorate fails. Voices’ arguments cannot overcome the Board’s finding that the Charter Law, Voices’ articles of incorporation and by-laws, the charter, and the stipulated facts show that Voices’ board is appointed by and subject to removal by its own members and that the board controls the school’s operations and labor decisions.

A. The Board’s Construction of the Narrow “Political Subdivision” Exemption to the Act’s Broad Definition of “Employer” Is Entitled to Deference

Section 2(2) provides that “political subdivisions” are not “employers” subject to the Board’s jurisdiction under the Act. 29 U.S.C. § 152(2). That term is not defined and the legislative history does not contain any explicit consideration of its meaning. *See Hawkins Cty.*, 402 U.S. at 604; *NLRB v. Natchez Trace Elec. Pwr. Ass’n*, 476 F.2d 1042, 1043 (5th Cir. 1973). As the Supreme Court explained in *Hawkins County*, however, “[t]he legislative history does reveal . . . that Congress enacted [this] exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.” 402 U.S. at 604 (internal citations omitted).

As noted, the Supreme Court has endorsed the Board’s political subdivision test. 402 U.S. at 604-05. Moreover, this Court and others have recognized that *Hawkins County* is the “proper test” to determine whether an entity is a political subdivision. *Smith v. Reg. Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016). *See also Concordia Elec. Coop., Inc. v. NLRB*, 95 F.3d 46 (5th Cir. 1996) (per curiam); *Nobles v. Metro. Transit Auth.*, 15 F.3d 179 (5th Cir. 1994) (per curiam); *Natchez Pwr.*, 476 F.2d at 1043-44. *Accord MMC, LLC v. NLRB*, No. 15-1312, slip op. at 9, 2017 WL 3568290, at *3-4 (D.C. Cir. Aug. 18, 2017); *Pikeville United*

Methodist Hosp. of Ky. v. United Steelworkers of Am., 109 F.3d 1146, 1151 (6th Cir. 1997); *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 662-63 (7th Cir. 1990); *Truman Med. Ctr., Inc. v. NLRB*, 641 F.2d 570, 572 (8th Cir. 1981).

The Supreme Court further explained that the Board’s construction of the broad statutory term “political subdivision” is “entitled to great respect.” *Hawkins County*, 402 U.S. at 605; accord *Natchez Pwr.*, 476 F.2d at 1044; *StarTran, Inc. v. Occupational Safety & Health Review Comm’n*, 608 F.3d 312, 324 (5th Cir. 2010). It is settled that the Board’s jurisdiction under Section 2(2) is to be interpreted broadly, while exemptions under Section 2(2), including for political subdivisions, are to be construed narrowly. *NLRB v. Princeton Mem’l Hosp.*, 939 F.2d 174, 177 (4th Cir. 1991); *NLRB v. Parents & Friends of the Specialized Living Ctr.*, 879 F.2d 1442, 1448 (7th Cir. 1989); *Museum Assocs. v. NLRB*, 688 F.2d 1278, 1280 (9th Cir. 1982).

B. Voices Is not Administered by Individuals Who Are Responsible to Public Officials

1. *Hawkins County*’s second prong requires a showing that a majority of administering officers are appointed by and subject to removal by public officials

An entity is a “political subdivision” under the second prong of *Hawkins County* if it is “administered by individuals who are responsible to public officials or to the general electorate.” 402 U.S. at 604-05. To determine whether an entity satisfies this requirement, the Board has consistently examined whether the

majority of administering individuals are appointed by, and subject to removal by, public officials. *See Reg'l Med. Ctr. at Memphis*, 343 NLRB 346, 358-59 (2004) (noting that this requirement is “consistently evidenced” throughout Board decisions); *see also Hawkins Cty.*, 402 U.S. at 607-08 (focusing on facts that members of state-created entity’s governing board of commissioners were appointed by elected county judge and subject to removal procedures applicable to all public officials). In answering this “dispositive question,” the Board “examines whether the composition, selection, and removal of the members of an employer’s governing board are determined by law, or solely by the employer’s governing documents.” *Hyde Leadership*, 364 NLRB No. 88, slip op. at 6, 2016 WL 4524108, at *9. This is the relevant inquiry because the “latter indicate that appointment and removal are controlled by private individuals—as opposed to public officials—and the entity will be subject to the Board’s jurisdiction.” *Id.* *Accord Research Found. of the City Univ. of New York*, 337 NLRB 965, 969 (2002).

The Board’s focus on the private appointment and removal of Voices’ board members is consistent with this Court’s established precedent. As this Court has explained, an entity fails to satisfy the second prong of *Hawkins County* precisely because the members of its governing board are not selected by and removable by public officials. *StarTran, Inc.*, 608 F.3d at 323. Thus, “cases 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 that entity *for that reason* fails the second alternative test for being a political subdivision.” *Id.* (emphasis in original). Likewise, the D.C. Circuit recently stated that the pertinent question under prong two is “whether a majority of the individuals who administer the entity . . . are appointed by and subject to removal by public officials.” *MMC, LLC*, slip op. at 12, 2017 WL 3568290, at *5 (internal quotes and citation omitted). *See also FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002) (“An entity can only satisfy the second prong of *Hawkins County* by ensuring that a majority of its board of directors are directly responsible to the general electorate.”); *Pikeville United Methodist Hosp.*, 109 F.3d at 1151 (hospital not political subdivision absent evidence that “City of Pikeville has authority to control the membership of the hospital’s board”).

2. Voices’ governing board, which has complete control over school operations, is comprised of private individuals that the State neither appoints nor removes

The Board reasonably found that Voices is not a political subdivision under *Hawkins County* prong two. As the Board explained (ROA.240-41), Voices is managed by an independent, self-perpetuating board of directors who control the appointment and removal of board members without state input. Moreover, this self-perpetuating board has “complete control” over the school’s operations,

including hiring and firing. (ROA. 241.) Thus the Board reasonably concluded that “it cannot be said that any of the individuals with any control over the administration of the school may be removed by public officials or the general electorate.” (*Id.*)

The Board properly determined that Voices’ board is a self-perpetuating entity, whose members are not appointed by or subject to removal by public officials. As the Board found, and as Voices conceded during the hearing, the initial members of Voices’ governing board were all private citizens, none of whom were selected by the State, any public official, or the general electorate. Rather, Voices’ articles of incorporation, filed by private citizens, named those private individuals as initial board members. Voices also agrees that its articles of incorporation expressly provide that the members of its governing board are appointed and removed by its existing board members, without any input from the State. (ROA.238, 241; *see* ROA.19-20, 32-33, 46-53.) Indeed, the parties stipulated that Voices is a private entity, that no state entity is involved in the selection or removal of its board members, and no state entity has day-to-day control over its operations. (ROA.238-40; *see* ROA.19-20, 32-33, 46-53.) In short, nothing in the Charter Law, Voices’ charter with the State, or its by-laws authorizes any public official or the general electorate to remove any Voices board member. There is simply no record evidence of any law or authority allowing a

public official or general electorate to appoint or remove a Voices board member, or that a Voices board member has ever been appointed or removed by such an authority. (ROA.241.)

These circumstances—where no board member, let alone a majority of them, is subject to selection or removal by any public official—amply support the Board’s finding that Voices fails prong two under this Court’s settled law. In *Natchez Power*, this Court found that a nonprofit electricity distributor was not a political subdivision under prong two where—as is admittedly the case with Voices—its directors were “initially those named by the [private] citizens filing the articles of incorporation,” their “successors are elected” by the existing board members without state input, and the general public exercises no direct control over them. 476 F.2d at 1045. *Accord NLRB v. Highview, Inc.*, 590 F.2d 174, 176-77 (5th Cir. 1979) (nursing home not exempt from Act as political subdivision under *Hawkins County* second prong where independent, self-perpetuating board of directors managed home); *Concordia Elec. Coop., Inc. v. NLRB*, 95 F.3d 46, 1996 WL 405482, at *1 (5th Cir. 1996) (per curiam) (“We have previously rejected the claim . . . that a public utility whose directors are elected by its members is responsible to the general electorate.”).

The Board's finding is also consistent with its caselaw involving charter schools with characteristics similar to Voices.⁷ See *Highview, Inc.*, 590 F.2d at 178 (court will not overrule the Board's jurisdiction determination "unless the Board's action departed substantially from that taken in seemingly like cases"). Applying this settled law regarding *Hawkins County's* second prong, the Board recently found that two charter schools were not political subdivisions in light of their governance by a privately appointed and self-perpetuating board. See *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 7-9, 2016 WL 4524109, at *10-13 (finding it dispositive that none of charter school's governing board members are appointed by or subject to removal by any public official); *Hyde Leadership*, 364 NLRB No. 88, slip op. at 6-7, 2016 WL 4524108, at *9-10 (same).

In addition to the self-perpetuating nature of Voices' board, the Board also found that Voices failed to meet prong two because its board has "complete control" over the school's operations, and therefore, public officials or the general

⁷ Voices and Amici attempt to show inconsistency by relying on decisions by a regional director (Br. 15 n.11) and an administrative law judge (ABr. 5, Appendix 1) finding that charter schools established under California and Texas law were exempt political subdivisions. Because the Board has not adopted those decisions, they are not binding Board precedent. See *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (unreviewed administrative law judge decision not binding precedent); *Rental Uniform Serv., Inc.*, 330 NLRB 334, 336 n.10 (1999) ("Regional Director's Decisions do not have precedential value.") (citation omitted). Regardless, each case stands on its own facts, including the different state law involved. Here, the Board acted as it had in other similar cases.

electorate cannot remove “the individuals with . . . control over the administration of the school.” (ROA.241.) As shown (pp. 6-10) and as the Board found (ROA.241), the Charter Law, charter, and Voices’ by-laws grant its governing board “final authority” over the School’s operations, policies, and employment matters, including the hiring and firing of teachers and setting their terms and conditions of employment. Moreover, the parties’ stipulated that no state entity has day-to-day control over the School’s operations. (ROA.20-21, 49-51.)

This finding is also consistent with this Court’s and the Board’s precedent. Like the directors in *Natchez Power*, Voices’ self-perpetuating board is “empowered to do all things necessary” in conducting the School’s business. 476 F.2d at 1045. Thus, Voices, like the electricity distributor in *Natchez Power*, “is not administered by individuals who are responsible to public officials or to the general electorate; instead, its directors are elected by its members and apparently are accountable only to them.” 476 F.2d at 1045. As this Court noted, this fact alone distinguished the employer in *Natchez Power* from the district utility that the Supreme Court found satisfied prong two in *Hawkins County*. *Id.* See also *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 9 n.23, 2016 WL 4524109, at *13 n.23 (applying second prong, Board found charter school with control over school’s operations and power to hire and fire employees was not political subdivision).

3. Voices fails to cite any factor that overcomes the undisputed fact that its governing board is self-perpetuating

Voices concedes (Br. 12) that its board is self-perpetuating and is granted final authority over school operations, facts which, as shown, are typically fatal to an entity’s claim that it is a political subdivision under the second prong of *Hawkins County*. Voices tries to overcome these facts by pointing to other factors that it characterizes as the school’s “actual operations” and claims demonstrate its political subdivision status. (Br. 18.) But these factors fail to compel a different result here. Indeed, the Board has made clear that “[w]here 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 to the general electorate,’ [its] analysis properly ends.” *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 9, 2016 WL 4524109, at *13. Voices cites no support for its contention that these other factors are conclusive regarding political subdivision status, absent an additional independent finding regarding either prong of the *Hawkins County* test.

Contrary to Voices’ contention, the Board was not compelled to find that Voices is a political subdivision merely because its board members may be disciplined or removed, in limited circumstances, by public officials pursuant to

the State Code of Governmental Ethics.⁸ (Br. 13.) To begin, this is the proverbial exception that proves the rule of Voices’ general exemption from direct State control. Charter Law Section 3996(B) (La. Stat. Ann. § 17:3996B), upon which Voices relies, begins by providing that, but for enumerated exceptions, a charter school and its board “shall be exempt from all statutory mandates or other statutory requirements that are applicable to public schools and to public school offers and employees.” Further, the state ethics code narrowly targets conflicts of interests and malfeasance such as abuse of office for financial gain, illegal payments, and nepotism. The removal process therein typically requires complaint, investigation, and a hearing subject to the rules of evidence. As such, Voices is comparing apples and oranges, namely, its private board’s unfettered power to add or remove members for any reason, with the State’s limited ability to remove them only if and when they are proven to have engaged in specific instances of malfeasance. Notably, there is no evidence that the State has had an opportunity to exercise this power with respect to any member of Voices’ board.

The Board reasonably rejected a similar argument based on the state ethics law in *Hyde Leadership*, 364 NLRB No. 88, slip op. at 7, 2016 WL 4524108, at *9-10. There, the Board addressed a state body’s authority, under New York State

⁸ The Charter Law, La. Stat. Ann. § 17:3996B(20), provides that the Code of Governmental Ethics, La. Stat. Ann. § 42:1101, *et seq.* applies to the governing body of a charter school.

education law, to remove a charter school trustee for “misconduct, incapacity, neglect of duty, or fail[ing] or refus[ing] to carry into effect its educational purposes.” *Id.* The Board explained that this limited removal authority is insufficient to transform the trustees of a private, non-profit corporation—who, like Voices’ board members are privately appointed and removed—into individuals who have “direct personal accountability” to public officials or the general electorate within the meaning of *Hawkins County*. *Id.* *Accord Ky. River Cmty. Care, Inc. v. NLRB*, 193 F.3d 444, 451-52 (6th Cir. 1999) (even “[a]ssuming *arguendo* that the state can remove a director for misconduct, we are not persuaded that [the non-profit entity] is run by individuals responsible to public officials”).

Voices’ attempts to distinguish *Hyde Leadership* fail. It wrongly claims (Br. 14) that the Board in *Hyde Leadership* did not address a situation where, as here, “state law governing charter schools” provided the basis for removing a charter school’s board members. As shown, *Hyde Leadership* addressed exactly that, namely, the removal provision in the New York Education Law, which applies to all education institutions in the State of New York. *Hyde Leadership*, 364 NLRB No. 88, slip op. at 7, 2016 WL 4524108, at *10. In another mistaken attempt to distinguish *Hyde Leadership*, Voices observes that both its governing documents (which incorporate state law) and state law provide for removal of its officials by public officials. (Br. 14.) In fact, the same was true in *Hyde Leadership*. *See id.*

(addressing removal authority in both charter and state law). In any event, Voices utterly fails to explain how its purported distinction requires a different result.

Voices likewise overreaches in claiming that the cited removal power is just like the Tennessee “ouster” law in *Hawkins County*, 402 U.S. at 607. (Br. 13.) *Hawkins County* is distinguishable because there the “ouster” law was just one additional factor supporting the other overwhelming evidence showing that a state natural gas utility district was a political subdivision under the second prong. Such evidence included that the district was organized under state law as a “municipality,” created by direct order of a county judge, had eminent domain powers, the power to subpoena witnesses and administer oaths, and all the officers that conducted its business were appointed by a county judge and were removable pursuant to state statutory procedures applicable to public officials. None of those circumstances are present here. *See Natchez Pwr.*, 476 F.2d at 1044 (observing that *Hawkins County* Court “attached great significance” to facts that entity, unlike Voices, “was administered by a Board of Commissioners initially appointed by an elected county judge,” and had power of eminent domain.)

Voices’ dependence on state funds also does not render it a political subdivision. (Br. 17). As the Board found in addressing two other charter schools who also received most of their operating funds from public sources, public funding is not determinative. *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at

5 & n.14, 2016 WL 4524109, at *8 & n.14 (observing that “an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a government entity”) (collecting cases); *Hyde Leadership*, 364 NLRB No. 88, slip op. at 5, 2016 WL 4524108, at *8 (same). And, as the Seventh Circuit has aptly observed, it cannot be enough that an entity is heavily subsidized by the state, for, if it were, “then every tobacco farmer in the nation is a political subdivision.”

Kemmerer Village, Inc., 907 F.2d at 663.

Voices cites no case supporting its claim (Br. 18) that, contrary to the settled law discussed above, an entity run by a privately controlled, self-perpetuating board, is nonetheless exempt simply because it receives public funding or operates pursuant to a contract with a government entity.⁹ Instead, it cites only an

⁹ To support this claim, Voices relies on (Br. 18-19) and attaches to its brief an *amicus curiae* brief that the American Federation of Teachers submitted to the Board in *Hyde Leadership*. The Court should disregard this brief and Voices’ arguments based on it. This brief was not in the Board record in this case, and is not part of the appellate record. *See* Fed. R. App. P. 16(a) (record on appeal includes the Board’s order, its findings, and “the pleadings, evidence, and other parts of the proceedings before the [Board]”); 29 C.F.R. § 102.68 (Board record in representation proceeding includes enumerated documents, but not briefs filed in other cases). *See also NLRB v. New Orleans Bus Travel, Inc.*, 883 F.2d 382, 384 (5th Cir. 1989) (denying motion to supplement Board record on appeal because “[o]ur review is based on the record before the Board”). This Court should decline any request for judicial notice because Voices provides no explanation for failing to enter the brief, filed in July 2014 and therefore available during the May 2016 hearing here, into evidence. *See Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989) (declining to consider census data not presented during trial because there was no reason to wait until appellate proceedings to request judicial notice).

unpublished Section 1983 decision from another circuit finding that a public charter school was a political subdivision of Idaho because it was state funded. *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 778-79 (9th Cir. 2011). However, that case did not address the Board's jurisdiction over a charter school. Instead, it addressed the very different issue of whether a charter school, as a political subdivision, could sue the state regarding the constitutionality of the state's prohibition on the use of denominational texts in public schools. *See id.* That decision offers no analysis as to when a charter school is a political subdivision for the very different purposes at issue here. In any event, the same court has held that an Arizona non-profit corporation that ran a charter school was not a state actor for Section 1983 purposes, even though state law characterized it as a "public" school and the school contracted with the state to provide a public education. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814-17 (9th Cir. 2010).

Voices further claims that it is a political subdivision because state law "constrains the board's choices" as to the board's composition. It notes, for example (Br.12), that the Charter Law specifies that the board may not include any school employees, that no more than 20% of its members may be in the same family, and that at least seven board members must have "diverse" professional skills and work experience. Voices, however, cites no case holding that these facts

compel a finding that it is a political subdivision, or override the fundamental fact that Voices' governing board controls its own composition. If anything, this general standard actually confirms that the selection and removal power rests with Voices' board, not the State. Put differently, that an entity's choice is regulated by the State does not mean it is no longer the entity's choice.

BESE's power to revoke Voices' charter is also not dispositive. (Br. 17.) As the Board explained in *Pennsylvania Virtual*, this argument is unavailing because "[t]he power to revoke a charter is analogous to a state's decision to cease subcontracting work to a private employer that fails to satisfy the state's standards." 364 NLRB No. 87, slip op. at 7, 2016 WL 4524109, at *10. Such revocation power "does not convert the private contractor into a state entity." *Id.*; see *Research Fdn.*, 337 NLRB at 968 (explaining that Section 2(2) does not exempt private entities acting for the government from coverage under the Act); accord *Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999).

Finally, Voices gains no ground in referring to a laundry list of other provisions in the charter, BESE rules, and state law that supposedly demonstrate the "degree of control" that public officials exercise over Voices. (Br. 15-16.) That Voices "is subject oversight and regulation by the [State's Department of Education]" is "insufficient to find that the school is accountable to a public official." *Pennsylvania Charter*, 364 NLRB No. 87, slip op. at 8, 2016 WL

4524109, at *13. Rather, such oversight “resembles that of contractors providing services to the government, over which the Board has routinely exercised jurisdiction.” *Hyde Leadership*, 364 NLRB No. 88, slip op. at 8, 2016 WL 4524108, at *12. Thus, while these various statutory and regulatory proscriptions may show that Voices’ board bears a “heavy” responsibility to the BESE, such responsibility “derive[s] from the contractual relations between [Voices and BESE] and is not the sort of direct personal accountability to public officials or to the general public required to support a claim of exemption under § 2(2).” *Truman Med. Ctr.* 641 F.2d at 573.

In any event, Voices fails to show how its required adherence to the listed regulations renders it a political subdivision. For example, Voices does not explain how being subject to the “state non-profit corporations law” makes it a political subdivision of the State. (Br. 15.) That law, of course, applies to all non-profit corporations and certainly not all of them are political subdivisions. Likewise, Voices does not explain why it is a political subdivision simply because it may not pay its board members.¹⁰ (Br. 15.) Further, that Voices cannot unilaterally make material amendments to the charter is doubtless true of many agreements between states and their private contractors. (Br. 16.) While it is true that Voices is subject

¹⁰ Voices errs to the extent it suggests that the State controls how it pays its employees. (Br. 16.) As shown, (pp. 9-10), Voices controls such employment issues pursuant to the charter.

to the state public records and open meetings laws, Voices cites no case holding that these factors, without more, outweigh the critical factors supporting the Board. *See Truman Med. Ctr.*, 641 F.2d at 572 (medical center not political subdivision, even though its books and records were subject to state inspection). In short, none of the regulatory constraints to which Voices remains subject counteract the Board’s critical finding that Voices’ directors, who have final operational authority, are not appointed or removed by public officials.

C. Voices Other Arguments for an Exemption Fail

1. The characterization of charter schools in other statutory contexts does not mandate finding that Voices is a political subdivision

Voices (Br. 19-22) and Amici (ABr. 11) contend that the characterization of charter schools by the State or by other federal statutes applicable in other contexts demonstrate that Voices is a political subdivision. To support its argument, Voices (Br. 20) and Amici (ABr. 11) point to statutes referring to charter schools as a “local education agency” or as a “public” school. Voices also relies on state court decisions and Voices’ tax-exempt status. But these arguments lack merit.

Voices' and Amici's reliance on state law fails to recognize that federal, not state, law controls the application of the political subdivision exemption. Thus, in *Hawkins County*, the Supreme Court agreed with the Board that state law characterizing an entity as organized under state law for a public purpose was not controlling, explaining that federal, rather than state, law governs the Board's political-subdivision determination. 402 U.S. at 602-04. While state law may be relevant, neither Voices nor Amici show that it compels a different outcome.

Voices therefore misses the mark with its claim (Br. 20) that Voices is a political subdivision that is part of the state education system simply because certain Louisiana statutes characterize charter schools as a "local education agency" for the purpose of receiving state and federal funds. As discussed, the State's Charter Law and Voices' governing documents defined the relevant characteristics showing that Voices is not accountable to public officials within the meaning of *Hawkins County* prong two, namely, that its privately appointed board enjoys final authority over the schools' operations, including the power to hire and fire teachers and set their terms and conditions of employment. Given this context, it is of little moment that state law refers to charter schools as "local educational agencies" for the specific purpose of applying for state and federal funds. (Br. 20.) The use of that term alone does nothing to prove that Voices is accountable within the meaning of *Hawkins County*'s second prong and does not offset the board's

characteristics established by the Charter Law and Voices’ governing documents. The Board rejected a similar argument in *Hyde Leadership*, where the relevant state charter law defined charter schools as “public schools.” 364 NLRB No. 88, slip op. at 1, 2016 WL 4524108, at *2. As the Board explained, this characterization did not overcome the fact that the charter school at issue, like Voices, “was not established by state or local government” but by private individuals. *Id.*, slip op. at 8, 2016 WL 4524108, at *12.

Likewise, the Court need not be detained by Amici’s claim (ABr. 11-13) that finding Voices to be a political subdivision “harmonizes” with federal and state treatment of public charter schools. This argument fails because, like Voices’ claims, it is founded on the erroneous premise that a charter school must be a political subdivision so long as it is defined as “public” under any state or federal law for any purpose. The miscellaneous litany of provisions cited by Amici (Br. 11, nn.31-32), however, provide no guidance as to how Voices’ operations are “public” in a manner that would compel a finding that it is a political subdivision within the meaning of the Act.¹¹

¹¹ See, e.g., La. Admin. Code, Tit. 28, Pt. CXXXIX, § 2303 (BESE Charter Bulletin 126, ROA.386, 418) (referring to charter school as “local educational agency” for funding purposes without providing any further definition); 20 U.S.C. § 1401(19) (defining “local educational agency,” for purposes of federal statute governing education of individuals with disabilities, as “a public board of education or other public authority legally constituted within a State” to perform various educational functions); 20 U.S.C. § 7221i(2) (defining charter schools as

Thus, as the Board has explained, the designation of a school or its officials as “public,” without more, fails to establish they are in fact public officials for the purposes of the Act, where, as here, the evidence demonstrates that the school’s board was created and governed by its own by-laws and is a self-perpetuating entity. *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 8, 2016 WL 4524109, at *12. Accordingly, in *Hawkins County*, it was only in conjunction with facts not present here—including that the entity’s board was appointed by a state judge—that the state’s characterization of the utility as a “municipality” showed that it was a political subdivision. 402 U.S. 604-05.

It follows that Voices gains little by relying on state courts’ isolated references to charter schools as political subdivisions or public entities, when those decisions provide no analysis relevant to whether Voices’ is exempt from the Act’s coverage. (Br. 20-22.) In *Moreau v. Avoyelles Parish School Board*, for example, a Louisiana appeals court did not address the issue before this court, whether a charter school is a political subdivision exempt from the Board’s jurisdiction under the Act. 897 So. 2d 875 (La. App. 3d Cir. 2005). Rather, it addressed a suit aimed at compelling a public school board to provide free transportation to charter school

“public schools,” for purposes of Every Student Succeeds Act, without defining any characteristics typical of state administrative arms or departments); 34 C.F.R. §303.23 (defining “local education agency” (LEA), for purpose of federal Early Intervention Program for Infants and Toddlers with Disabilities, as including public charter school that is established as LEA under state law).

students. Within the confines of that different issue, the intermediate state court explained that the charter school was entitled to seek transportation because it was empowered by the Charter Law to ensure that students can get to school. *Id.* at 884-86. It was in this context that the court noted that the charter school’s budget requirements were “the same as any other political subdivision of the state.” *Id.* at 886. The court, however, did not define “political subdivision.” (And this was its only use of that term.) Nor did it address whether the school was a political subdivision under the Act, apply a test similar to prong two of *Hawkins County*, or consider the critical factor of how the school’s governing board members were appointed and removed.

Likewise, *Voices* rips out of context the Louisiana Supreme Court’s finding that a private, non-profit entity was an “instrumentality” of the state. (Br. 21, citing *New Orleans Bulldog Soc’y v. La. Soc’y for the Prevention of Cruelty to Animals*, 2017 WL 1719075 (La. May 3, 2017).) That court found that a non-profit entity—an animal rights organization which contracted to provide animal control services for the City of New Orleans—was subject to the state public records law. 2017 WL 1719075, *4. The court based that finding on different standards, purposes, and facts than those before the Court here. Thus, it emphasized that the state public records law—and the issue of who qualifies as a “public body” or “state instrumentality” subject to it—should be “construed

liberally” in favor of access to public documents. *Id.* at *3-4. The opposite is true here, where the exemption for political subdivisions under the Act should be construed narrowly. *See* cases cited at p. 21. Further, the court based its state-instrumentality finding on facts not present here, including that the animal rights group had police-like powers of investigating infractions of the animal control code, issuing citations, and appearing in court on behalf of the state. *Id.* at *4. There is no evidence that the State has granted equivalent powers to Voices. Equally important is what the court did not do—it did not address the characteristics critical to whether Voices qualifies as a political subdivision, including the method of appointing and removing a majority of the group’s board.

Finally, it matters little that Voices is exempt from paying state and federal taxes, which is true of most non-profit entities. (Br. 19.) The Board has explained why such tax-exempt status tends to negate an entity’s claim to an exemption. *Enrichment Serv. Program, Inc.*, 325 NLRB 818, 820 & n.11 (1998). A federal tax exemption pursuant to 26 U.S.C. § 501(c)(3), which Voices has here, “requires no proof of political subdivision status, but turns instead on [Voices’] non-profit status.” *Id.* *See Concordia Elec. Coop., Inc.*, 315 NLRB 752, 755-56 (1994) (noting same is true of tax-exempt status under Louisiana law.) Of course, as shown, the Board routinely exercises jurisdiction over non-profit entities, including hospitals and colleges, which are, like Voices, exempt from paying taxes. *See id.*,

and cases cited at p. 46. Nor is Voices like the tax-exempt district found to be a political subdivision in *Hawkins County*. (Br. 19.) There, in contrast, the tax exemption had additional meaning in light of other important facts not present here, including that the state chose the utility’s directors, which supported finding that the entity was a political subdivision exempt from the Act. 402 U.S. at 604-06.

2. The Board’s jurisdiction over Voices does not usurp the State’s control over public education

Voices and Amici, noting that 90% of students in Louisiana attend charter schools, next sound a series of alarms to the effect that failing to exempt Voices from the Act’s coverage will undermine the state-federal balance and state control over local issues like education, and cause dire harm to the State’s public school system. (Br. 22-27; ABr. 1.) In making these speculative arguments, Voices and Amici misunderstand the scope of the Board’s holding. Such claims also ignore that the State *chose* to provide education to school-aged students “partly through its schools and partly through regulated private corporations operating as government contractors.” *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 7, 2016 WL 4524109, at *10.

Voices and Amici mischaracterize or misunderstand the scope of the issue before the Court. Specifically, Voices suggests that the issue is whether the Board may properly take jurisdiction over all “public charter schools” in Louisiana (Br.

23), and Amici claim (ABr. 4-5) that the Court will issue a ruling to apply to “all public charter schools in the Fifth Circuit.” However, what is before the Court is the Board’s case-specific determination that one such school, Voices, is not exempt from the Act’s coverage. This case does not require resolution of the status of every charter school in Louisiana, or any charter schools in Texas or Mississippi.

Voices incorrectly speculates that the State’s ability to provide a free education would be undermined if BESE or local school boards (who can also charter a school) are constrained by the Act’s requirements that an employer recognize and collectively bargain with a union. (Br. 23.) The Board has not in this case asserted jurisdiction over BESE or a local school Board. Rather, it only made the case-specific finding that it had jurisdiction over Voices, a charter school founded and run by private individuals.

Voices’ other arguments boil down to its overbroad mantra that charters schools like Voices “stand in the shoes of the public school-system. They are the system.” (Br. 27; *see* Br. 25-26 (asserting that “the charter school system is the public school system”).) This claim improperly characterizes Voices as a state agent, which it is not. In fact, the charter indicates that Voices does not stand in the State’s shoes. Thus, as shown (p. 9), the charter provides that Voices, not the State, will be the employer of the School’s faculty and staff. It confirms (*see* p. 9) that no officer, agent, employee, or subcontractor of Voices is an officer,

employee, or agent of the State, and that the State will not assume “liability” for Voices’ actions and that Voices’ obligations to other parties with whom it may contract are not the State’s responsibility.

Voices therefore overstates its case in claiming that exempting it from the Act is necessary to “respect federalism” and proper state-federal relations because, Voices posits, public education has traditionally been under the State’s police power. (Br. 26-27). This is another way of saying that Board jurisdiction over Voices would intrude into the State’s choices as to how to structure its educational system.¹² In reality, however, the State controlled the factors that the Board considered in finding that Voices was not a political subdivision exempt from the Act’s coverage. Thus, the State chose to enact a charter law that allowed private individuals, rather than just the State, to create charter schools like Voices, which are governed by privately appointed boards. The State entered into a charter providing that Voices, not the State, would be the employer of the teachers and therefore responsible for their labor relations, and which confirmed that, generally speaking, Voices is not the State’s agent for the purposes of operating the charter school. Thus, as the Board has explained, “by providing that private individuals may establish and operate charter schools, the [State] has shown its intention to

¹² Voices is not authorized to represent the State in this matter and its speculation about the State’s concerns should be taken as just that—speculation.

permit *others* to establish and operate schools.” *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 8, 2016 WL 4524109, at *10.

The Court also need not be detained by Voices’ unsupported speculation (Br. 22-27) that Board jurisdiction over Voices will disrupt the provision of free public education across the State of Louisiana, and undermine New Orleans’ experiment with public charter schools. Voices vaguely suggests that because state labor law differs from the Act, the Board “could trample the choices of elected officials and voters.” (Br. 26) Yet, Voices never explains how any purported differences between the Act and state labor law would inevitably cause such a disaster. Indeed, Voices concedes that public school teachers, including those at charter schools, have a right to collectively bargain and to strike under state law, as they would under the Act. (Br. 22 n.16, citing *Davis v. Henry*, 555 So. 2d 457, 461-62, 464-66 (La. 1990) (state employees have right to strike and “system of organizational rights which parallels that afforded to employees in the private sector”).¹³ Accordingly, as discussed, the charter acknowledges that Voices, not the State, will be the direct employer of its teachers with direct control over their terms and conditions of employment and any collective bargaining over those terms.

¹³ While Voices acknowledges that Louisiana law allows teaches to strike, it states that it does not require “school boards” to negotiate with teacher unions. (Br. 23.) This is a sleight of hand. The Board is not taking jurisdiction over school boards but over a single charter school.

Finally, Voices acknowledges that the Board has frequently taken jurisdiction over private entities, like Voices, that contract with the State to provide services that had traditionally been provided by the State. It claims, however, that the services it provides, a free public education, differ from the “mundane” functions of government contractors that build courthouses, control weeds, or dispose of garbage. (Br. 24.) This argument conveniently ignores that the Board, with court approval, has taken jurisdiction over many private contractors—including medical facilities and military contractors—that provide critical services to state or federal entities. *See Ky. River Cmty. Care*, 193 F.3d at 451-52 (operator of mental healthcare facility); *Kemmerer Village, Inc.*, 907 F.2d at 662-63 (operator of foster home); *Truman Med. Ctr.*, 641 F.2d at 572-73 (operator of medical center); *NLRB v. Pope Maint. Corp.*, 573 F.2d 898, 902-04 (5th Cir. 1978) (contractor engaged in maintenance and repair of aerospace equipment at United States Air Force base). And, as noted, the importance of the service is not the issue. The issue is that the State defined Voices’ operations in a manner that supports the Board’s finding that it is not a political subdivision exempt from the Act.

At bottom, Voices protests that is not merely a vendor hired to provide some ancillary function to public education, rather it provides a public education, and repeats the mantra that “the charter-school system is the public system” in

Louisiana. (Br. 25-27). However, the repeated incantation of the word “public,” as if it were magic, is no substitute for showing that the realities of Voices’ operations compel the Board to find that it is a political subdivision of the State and therefore exempt from the Act’s coverage. This Voices has failed to do.

D. The Court Should Not Consider Amici’s Meritless Arguments Regarding *Hawkins County* Prong One Because Voices Did Not Address That Issue In Its Opening Brief to this Court

1. Amici cannot raise arguments not briefed by a party

Amici admit that their brief focuses on the exact issue that Voices’ declined to address in its opening brief—the application of prong one of the *Hawkins County* test. (ABr. 5.) Yet, it is well-settled that, absent “exceptional circumstances,” which Amici do not claim to be present here, amici cannot expand the scope of the appeal to raise issues not argued by a party in its brief to the Court. *See Squyres v. Heico Co., LLC*, 782 F.3d 224, 233 n.5 (5th Cir. 2015) (explaining that Court “will not” consider arguments raised by amicus where party “failed to raise them in its opening brief”); *Resident Counsel v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993) (“*amicus* [is] constrained by the rule that [it] generally cannot expand the scope of an appeal to implicate issues not presented by the parties to the appeal”). *Accord Eldred v. Ashcroft*, 255 F.3d 849, 851 (D.C. Cir. 2001) (court does not “ordinarily” reach issues raised by amicus but not by parties) (citations omitted); *Cellnet Comm., Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998) (“To the

extent that the amicus raises issues or make[s] arguments that exceed those properly raised by the parties, we may not consider such issues.”¹⁴

2. Amici’s claims lack merit

Even if the Court decides to consider Amici’s claims, they offer nothing that compels the Board to find that Voices is a political subdivision under prong one of the *Hawkins County* test. To satisfy that prong, amici must show that Voices was “created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government.” 402 U.S. at 604-05. Amici fall far short of making such a showing.

The Board properly found (ROA.239-40) that Voices was not created directly by the State. Rather, as the Board explained, it was created by the private individuals who filed for its incorporation as a private, non-profit corporation in 2009, pursuant to the Charter Law. (ROA.239-40.) Thus, Amici err in relying on its facile syllogism that because the State legislature is charged with establishing

¹⁴ Moreover, that Voices argued prong one of the *Hawkins County* test to the Board does not render Amici’s arguments to the Court regarding this prong permissible. The bar on amici expanding the issues on appeal applies to an issue that a party raised before the agency but abandoned on appeal. *See Davidson v. Veneman*, 317 F.3d 503, 508 n.3 (5th Cir. 2003) (distinguishing bar on review of issue not presented to agency from bar on amici raising issue that party waived on appeal). *See also Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000) (observing that appellant and amicus “may not split up the issues and expect the court to consider that they have all been raised on appeal”; rather, it is “appellant’s case, not a joint appeal by the appellant and amicus,” and “[a]ppellant must raise in its opening brief all the issues it wishes the court to address”).

public schools, and because it fulfilled that mandate by creating the Charter Law, the legislature necessarily created Voices. (ABr. 6-8.) As the Board explained, “[n]owhere in the Charter Law is any agency, department, commission, public benefit corporation, or any other entity created.” (ROA.240.) Indeed, “[i]t was not until . . . the filing of [Voices’] Articles of Incorporation, that [Voices] was created.” (*Id.*)

Settled law supports this finding, and holds that such entities created by private parties are not “created directly” by the State within the meaning of the second prong of *Hawkins County*. Thus, this Court has held that a non-profit electric power association was not a political subdivision under Section 2(2) of the Act, where, like Voices, it was organized by private individuals acting pursuant to appropriate enabling statutes. *Natchez Pwr.*, 476 F.2d at 1045. *See Highview, Inc.*, 590 F.2d at 176 (“It is self-evident that Highview is not a political subdivision under the first [prong] since the record is undisputed that Highview was incorporated as a non-profit corporation by private individuals.”). *Accord Shannon v. Shannon*, 965 F.2d 542, 551 (7th Cir. 1992) (entity not political subdivision where created by private individuals following state law procedures); *Ky. River*, 193 F.3d at 450 (healthcare facility not directly created by state despite claim it “would not exist but for the initiative of various public officials involved”); *Truman Med. Ctr.* 641 F.2d at 572 (medical center organized under Missouri non-

for-profit statute). This precedent also forecloses any claim (ABr. 6-8) that Voices was “created directly” by the State acting on the articles of incorporation. *See Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 6, 2016 WL 4524109, at *9 (explaining that while state issues charter, private individuals who incorporated school as non-profit entity “created” school).

Moreover, as Amici acknowledge (ABr.7-8), the Board has recently applied this settled law to find that charter schools, like Voices, incorporated by private individuals as non-profit corporations under state law, are not “created directly” by the state within the meaning of the first prong of the *Hawkins County* test. *See Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 5-7, 2016 WL 4524109, at *8-9; *Hyde Leadership*, 364 NLRB No. 88, slip op. at 5-6, 2016 WL 4524108, at *7-8. As the Board explained, this is consistent with settled law holding that “entities created by private individuals as nonprofit corporations are not exempt under the first prong of *Hawkins County*.” *Pennsylvania Virtual*, 364 NLRB No. 88, slip op. at 5 & n.13, 2016 WL 4524109, at *8 & n.13 (collecting cases). Indeed, the D.C. Circuit recently noted the absence of any “Board or judicial decision holding that any entity established and maintained by a private company pursuant to state law qualifies as a political subdivision of the state.” *MMC, LLC*, supra, slip op. at 11, 2017 WL 3568290, at *5.

Amici ignore this settled law and instead criticize this position as “myopic.” Notably, however, Amici cite no case to the contrary. Simply put, Amici’s contention that the Legislature “created” all charter schools wrongly equates (ABr. 7) the state act of *allowing* the creation of such schools by others with the State directly *creating* them. The same flaw inheres in Amici’s observation (ABr. 8) that “[t]here are no private persons who can create a public charter school in Louisiana.” Rather, the Charter Law expressly authorizes private persons to do just that, namely, it “authorizes the creation” of schools by private individuals.

This must be distinguished from the entities at issue in the cases cited by Amici (ABr. 8-9 & n.22), which were directly brought into existence by state statute or judicial order. For example, the Board’s decision in *State Bar of New Mexico*, 346 NLRB 674 (2006), on which Amici relies (Br. 8-9), does not compel a different result. There, the Board determined that the “created directly by the state” requirement was satisfied because a judicial rule promulgated by the New Mexico Supreme Court created the State Bar Association, and it found no reason to distinguish between entities created by legislative or judicial action. *Id.* at 676-77. *Voices*, in contrast, was not created directly by any branch of the Louisiana State Government. Thus, Amici err in claiming (ABr. 9) that the New Mexico Supreme Court’s act of directly creating the state bar by judicial rule is “directly analogous”

to the Louisiana State Legislature’s distinct act of “authorizing the creation” of charter schools by private individuals.¹⁵

Based on this false equivalency, Amici mischaracterize this case as being about “the legitimacy of the Louisiana Legislature’s creation of public charter schools.” (ABr. 9-10.) To the contrary, what the state legislature created was the right and ability of private citizens to establish such schools, as they did with Voices. For this reason, contrary to Amici’s claim, there is no conflict between the Board’s finding that Voices is not a political subdivision and its statement in *Hyde Leadership* that “it does not assert jurisdiction over public schools *established by state or local governments.*” (ABr. 12 & n.37, quoting *Hyde Leadership*, 364 NLRB No. 88, slip op. at 8, 2016 WL 4524108, at *11, emphasis added.)

Because amici fail to establish that Voices was created directly by the state, it is unnecessary to also evaluate whether the state intended it to operate as its administrative arm. *See Ky. River Cmty. Care*, 193 F.3d at 450 (if entity cannot

¹⁵ Amici’s other cited cases (ABr. 8 n.22) are likewise distinguishable because they addressed entities that were created directly by the specific act of a state body. *See, e.g., In Re Hinds Cty. Human Res. Agency*, 331 NLRB 1404 (2000) (entity created directly by county); *N.Y. Inst. for Educ. of the Blind*, 254 NLRB 664, 665, 667 (1981) (corporation formed by an act of state legislature); *Northhampton Ctr. for Children & Families*, 257 NLRB 870, 872 (1981) (employer created directly by state’s mental health department); *Madison Cty. Mental Health Ctr., Inc.*, 253 NLRB 258, 258-59 (1980) (mental health board created directly by county); *Ass’n for the Developmentally Disabled*, 231 NLRB 784, 784, 786 (1977) (employer created directly by state mental health board); *Camden-Clark Mem’ Hosp.*, 221 NLRB 945, 947 (1975) (hospital created directly by city ordinance).

show it was created directly by state, unnecessary to determine whether it is an administrative arm); *Natchez Pwr.*, 476 F.2d at 1044-45 (concluding that entity not created directly by state failed the first prong, without addressing administrative arm question); *Hyde Leadership*, 364 NLRB No. 88, slip op. at 6 n.15, 2016 WL 4524108, at *8 n.15 (because charter school “was not created directly by the state, [Board] find[s] it unnecessary to decide whether [the school] is an administrative arm”). *Accord Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 6, 2016 WL 4524109, at *9; *Reg. Med. Ctr. of Memphis*, 343 NLRB at 358. In any event, the Board has rejected the same arguments that Amici make here (Br. 10) and has explained that a state’s characterization of a charter school as “public” does not render that school an administrative arm of the State. *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 6, 2016 WL 4524109, at *9.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Voices' petition for review and enforcing the Board's Order in full.

/s/ Elizabeth A. Heaney
ELIZABETH A. HEANEY
Supervisory Attorney

/s/ Greg P. Lauro
GREG P. LAURO
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570
(202) 273-1743
(202) 273-2965

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
September 2017

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

VOICES FOR INTERNATIONAL BUSINESS)	
AND EDUCATION, INC., d/b/a)	
INTERNATIONAL HIGH SCHOOL OF NEW)	
ORLEANS)	
)	
Petitioner/Cross-Respondent)	
)	No. 17-60364
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	15-CA-182627
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Martin A. Stern
Adams & Reese, L.L.P.
701 Poydras Street, Suite 4500
1 Shell Square
New Orleans, LA 70139

Aaron Gavin McLeod, Attorney
Adams & Reese, L.L.P.
1901 6th Avenue, N., Suite 3000
Birmingham, AL 35203

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel

Dated at Washington, DC
this 22nd day of September, 2017

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,915 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

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