

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIPP ACADEMY CHARTER SCHOOL,

Employer,

and

NICOLE MANGIERE and  
CHRISTOPHER DIAZ,

Case No. 02-RD-191760

Petitioners,

and

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

Union.

**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF  
INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE***

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women. Several unions affiliated with the AFL-CIO represent charter school employees. The AFL-CIO files this brief *amicus curiae* in support of the position of the United Federation of Teachers (UFT) that a narrow declination of jurisdiction over KIPP Academy Charter School (KIPP) by the National Labor Relations Board is warranted in this case.

1. It is well-established that the Board has inherent authority to decline to exercise its jurisdiction in particular instances where “the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.” *NLRB v. Denver Bldg. & Constr.*

*Trades Council*, 341 U.S. 675, 684 (1951). See also *Northwestern University*, 362 NLRB 1350, 1352 (2015) (relying on *Denver Building Trades Council* to decline jurisdiction over college football players); *Contract Services, Inc.*, 202 NLRB 862, 863-64 (1973) (relying on *Denver Building Trades Council* to decline jurisdiction over employer operating in Panama Canal Zone); *Temple University*, 194 NLRB 1160, 1161 (1972) (declining jurisdiction without relying on § 14(c)(1) of the Act).

The Board’s decision in *Temple University* is illustrative. Temple “was chartered by the Commonwealth of Pennsylvania as a private college in 1888.” 194 NLRB at 1160. However, “[i]n 1965, the Commonwealth enacted the Temple University-Commonwealth Act,” which “provided for ‘the establishment and operation of Temple University as an instrumentality of the Commonwealth to serve as a State-related university in the higher education system of the Commonwealth.’” *Ibid.* Among other things, “[t]he Commonwealth retains title to the land and buildings it erects [for university purposes] and does not charge rent.” *Ibid.* In addition, Temple’s “status as an ‘instrumentality’ makes it a ‘public employer’ within the meaning of the Commonwealth’s . . . Public Employees Relations Act.” *Id.* at 1161.

“Although the University is in form a private, nonprofit institution, it is apparent from the above that the 1965 statute established the University as a quasi-public higher educational institution to provide low cost higher education for Commonwealth residents.” *Ibid.* For that reason, the Board concluded that there is such “a substantial nexus between the University and the Commonwealth” that, “[u]nder the special

circumstances of this case, . . . it would not effectuate the policies of the Act to assert jurisdiction over the University.” *Ibid.*

The rationale for declining jurisdiction over KIPP is at least as strong as the rationale relied on by the Board in *Temple University*.

KIPP is a “conversion charter school” for purposes of the New York State Charter School Act of 1998 (CSA), N.Y .Educ. Law Ch. 16, Tit. II, Art. 56, § 2850 *et seq.*, meaning that it is a “pre-existing public school[] that ha[s] been converted to [a] charter school[.]” Decision and Direction of Election (DDE) 3 (quoting *Hyde Leadership Charter School-Brooklyn*, 364 NLRB No. 88, slip op. 8 (2016)). Such conversion charter schools “differ from startup charters in that they, for example, retain the students and teachers of the converted public school.” *Ibid.* And, while “[g]enerally, . . . employees of a charter school are not part of the local school district’s bargaining unit and are not covered by its collective bargaining agreement,” “[e]mployees of conversion charters . . . are an exception to this general rule.” DDE 9 (quoting *Hyde Leadership*, 364 NLRB No. 88, slip op. 2). Indeed, New York law requires that employees of a conversion charter school “shall be deemed to be included within the negotiating unit containing like titles or positions, if any, for the school district in which the charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit.” DDE 9-10 (quoting CSA § 2854(3)(b)).

KIPP was started in 2000 by a teacher employed by the traditional public school where KIPP first operated as an educational intervention program. DDE 3-4. KIPP opened as a charter school in the same location as that traditional public school – on a

campus it still shares with other traditional public schools – and with the same student body and with teachers who were already members of the UFT-represented bargaining unit. *Id.* at 4, 14. *See also Matter of Corcoran (KIPP Academy Charter School)*, 45 PERB § 3013, 4, 6-7 (2012). KIPP pays no rent for the use of its publicly-owned facility. CSA § 2853(3)(e). As a conversion charter school, KIPP is subject to a Memorandum of Understanding (MOU) negotiated between the then-New York City Board of Education (now known as the New York City Department of Education) and the UFT providing that “employees of a Conversion Charter School shall be subject to the collective bargaining agreements for like titles or positions . . . including but not limited to salary, medical, pension and welfare benefits and applicable due process procedures.” DDE 10 (quoting MOU). “The MOU also addresses the placement rights of conversion charter school employees in the event of layoffs or closure.” *Ibid.* The founder of KIPP “included the MOU in his KIPP Academy charter application.” *Ibid.*

KIPP employees have thus been covered by the district-wide collective bargaining agreement between the UFT and the New York City Department of Education for almost two decades. “It is undisputed, for example, that KIPP Academy’s staff members have had dues regularly deducted and remitted to the Union; that they participate in the Union’s pension plan; and that they receive the same medical and welfare benefits as other DOE employees represented by the Union, including through the Union’s Welfare Fund.” DDE 16.

With regard to payments to the union in particular, KIPP acknowledges that it “deduct[ed] ‘agency shop fees’ in an amount equal to full dues” from its employees in

compliance with New York law, *i.e.*, without authorization from individual employees.<sup>1</sup> KIPP Opposition to Request for Review 17 (citing Taylor Law §§ 201(2)(b), 208(3)(1)). *See also ibid.* (noting that “public sector labor agreements – like the UFT contract – have no ‘dues checkoff’ provisions because the state law requires employers to deduct union membership dues from employees’ pay for remittance to the union”). If KIPP were not covered by the district-wide collective bargaining agreement and New York law, its payment of agency fees to the UFT without individual employee authorization would constitute a criminal violation of federal labor law. *See* 29 U.S.C. § 186(a), (c)(4), and (d).

To be sure, KIPP management has chafed at the statutory requirement that it recognize the UFT and comply with the district-wide collective bargaining agreement. However, KIPP’s repeated efforts to challenge these requirements have been uniformly rebuffed. *See Matter of Corcoran*, 45 PERB § 3013 (rejecting KIPP’s effort to decertify the UFT); *KIPP Acad. Charter Sch. v. United Fed’n of Teachers*, Index No. 656183-16 (N.Y. Sup. Ct.) (unpublished order dated Nov. 29, 2016) (rejecting KIPP’s effort to enjoin UFT from seeking to arbitrate disputes under the district-wide collective bargaining agreement on the ground that KIPP was allegedly not covered by the agreement). *See also Kipp Acad. Charter Sch. v. United Fed’n of Teachers*, 723 Fed. Appx. 26, 30 (2d Cir. 2018) (unpublished) (rejecting KIPP’s federal claim that it was not

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<sup>1</sup> The hearing in this case took place before the Supreme Court issued its decision in *Janus v. AFSCME, Council 31*, 585 U.S. \_\_\_, 138 S. Ct. 2448 (June 27, 2018).

covered by the collective bargaining agreement as “barred by *res judicata*” because “[t]he state court decision was a final judgment on the merits”).

Like *Temple University*, then, this case concerns a “unique relationship” between KIPP, as a school that was previously a traditional public school, and the New York Department of Education, as the entity charged with operating the local public school system, including all charter schools. 194 NLRB at 1161. Although no longer a political subdivision, KIPP still serves the same students, relies on employees from the broader UFT bargaining unit, and operates in a facility for which the Department of Education “retains title” and for which the Department “does not charge rent” to KIPP. *Id.* at 1160. As was the case in *Temple University*, then, “[u]nder the special circumstances of this case, . . . it would not effectuate the policies of the Act to assert jurisdiction over [KIPP].” 194 NLRB at 1161.

2. Because the circumstances presented by KIPP as a conversion charter school operating under New York State law are unique – or, at most, are shared only by other conversion charter schools in New York – there is no basis for the Board to decline jurisdiction over charter schools generally as a “class or category of employers” under § 14(c)(1) of the Act. 29 U.S.C. § 164(c)(1).<sup>2</sup>

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<sup>2</sup> Although the Board has, in requesting briefs from the parties and *amici*, framed the issue as “whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act,” it is notable that no party has requested such a broad declination of jurisdiction. The UFT urges that “the Board should limit its declination of jurisdiction to KIPP, a conversion charter school.” UFT Brief in Response to Invitation to File Briefs 11. KIPP, for its part, argues that the Board should assert jurisdiction over the school. KIPP Brief on Review 7.

“Charter school laws vary from state to state and often differ on several important factors, such as who may authorize charter schools, how authorizers and charter schools are held accountable for student outcomes, and whether the teachers in a charter school must be certified.” Education Commission of the States, “50-State Comparison: Charter School Policies” (published Jan. 23, 2018), available at <https://www.ecs.org/charter-school-policies/> (last checked March 20, 2019). *See generally* National Conference of State Legislatures, “Charter Schools in the States – A Series of Briefs” (cataloging differences and similarities between different states’ charter school laws), available at <http://www.ncsl.org/research/education/charter-schools-in-the-states.aspx> (last checked March 20, 2019).

The Board’s own decisions make clear that charter school laws – and, consequently, the schools that operate pursuant to those laws – vary significantly from state to state, making a classwide declination of jurisdiction over charter schools inappropriate. Applying the test set forth in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), the Board has found that charter schools that operate under the laws of Pennsylvania, New York, Arizona, and Louisiana are not political subdivisions and, therefore, are within the Board’s jurisdiction. *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016) (Pennsylvania); *Hyde Leadership*, 364 NLRB No. 88 (New York); *Excalibur Charter School, Inc.*, 366 NLRB No. 49 (2018) (Arizona); *Lusher Charter School*, 15-RC-174745 (Order Denying Request for Review, Feb. 1, 2017) (Louisiana); *International High School of New Orleans*, 15-RC-175505 (Order Denying Request for Review, Feb. 1, 2017) (Louisiana). In contrast, the Board

has found a charter school operating under Texas law *is* a political subdivision and thus outside of the Board’s jurisdiction. *Universal Academy*, 366 NLRB No. 38 (2018).

That the outcome of such cases should vary depending on the details of each applicable state law should come as no surprise. The Board has routinely found that institutions of a generally similar character – *e.g.*, universities, museums, etc. – either are or are not political subdivisions based on the specific laws that regulate their operation. *Compare Cornell University*, 183 NLRB 329 (1970) (university not a political subdivision despite certain schools being run by State of New York), *with University of Vermont*, 297 NLRB 291 (1989) (reversing earlier decision to find university is a political subdivision under state law). *Compare also Minneapolis Society of Fine Arts*, 194 NLRB 371 (1971) (museum not a political subdivision), *with Founders Society Detroit Institute of Arts*, 271 NLRB 285 (1984) (museum is a political subdivision because executive director appointed by and responsible to municipal officials). In each case, the relevant inquiries are whether the entity is “either (1) created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate,” *Hawkins County*, 402 U.S. at 604-05. Importantly, these inquiries turn on the specific requirements of the governing state law, *not* on whether an entity falls within a broad “class or category of employers,” 29 U.S.C. § 164(c)(1), such as “university,” “museum,” or “charter school.”

In sum, there is no basis to treat charter schools operating under divergent state laws as identical for declination of jurisdiction purposes. Indeed, having already

determined that charter schools in some states are political subdivisions under *Hawkins County* while others are not, it would be irrational to treat all charter schools as a singular “class or category of employers” for purposes of § 14(c)(1) of the Act.<sup>3</sup>

3. Finally, analogies to cases involving government contractors as a basis to determine whether to assert or decline jurisdiction – *see, e.g., Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. 10 & n.31; *Hyde Leadership*, 364 NLRB No. 88, slip op. 8 & n.26 – are especially inapt in the context of charter schools.<sup>4</sup>

A principal stated purpose for charter schools is that they are “laboratories for experimentation” within the public education system. *Hyde Leadership*, 364 NLRB No. 88, slip op. 15 & n.61 (Member Miscimarra, dissenting) (citing Christopher A. Lubienski & Peter C. Weitzel (eds.), *THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS* (Harvard Educ. Press 2010)). *Accord* CSA § 2850(2) (stating purpose of New York charter school law as “[e]ncourag[ing] the use of different

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<sup>3</sup> Moreover, declining jurisdiction over charter schools on a classwide basis would risk disrupting existing collective bargaining relationships formed under the NLRA. Even where a state would assert jurisdiction over a charter school if the Board were to decline jurisdiction, some state collective bargaining laws specifically mandate teacher-only bargaining units. *See, e.g.,* Minn. Stat. § 179A.03, subd. 2 (2018). As a result, a state agency would not necessarily extend comity to a Board-approved charter school unit where, for example, that unit combines teachers with other professionals, as NLRA § 9(b), 29 U.S.C. § 159(b), permits. This is yet another reason the Board should decide whether to decline jurisdiction over charter schools on a case-by-case basis.

<sup>4</sup> While drawing the analogy, the Board majorities in both *Pennsylvania Virtual Charter School* and *Hyde Leadership* made clear that “[w]e are *not* saying . . . that government contractor cases are exactly like charter school cases and therefore that the same analytical framework applies in both.” *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. 10 n. 31 (emphasis added). *See also Hyde Leadership*, 364 NLRB No. 88, slip op. 8 n.26 (stating same).

and innovative teaching methods”). This purpose relates directly to the peculiar degree of intertwinement between charter schools and public school administrations, as both entities pursue a shared goal of “provid[ing] parents and students with expanded choices in the types of educational opportunities that are available within the public school system.” CSA § 2850(2). And, given the important role played by teachers and other school employees in the educational “experimentation” that takes place at charter schools, *see, e.g., ibid.* (“[e]ncourag[ing] the use of different and innovative teaching methods” and “[c]reat[ing] new professional opportunities for teachers . . . and other school personnel”), there is no shortage of subjects over which charter schools and their employees may wish to bargain.

The principal reason government entities, like other large employers, typically contract-out non-core functions of their operations is for cost-savings or other efficiency purposes, not “experimentation.” Indeed, given the significant degree of operational control often retained by government agencies over their contractors, “[h]istorically,” what was at issue in government contractor cases was “whether the contractor had sufficient control over its employees’ terms and conditions of employment to enable it to engage in meaningful collective bargaining,” *Hyde Leadership*, 364 NLRB No. 88, slip op. 14 n.52 (Member Miscimarra, dissenting) (citing *Res-Care, Inc.*, 280 NLRB 670 (1986)), *not*, as in the charter school cases, whether the contractor was so intertwined with the government agency in pursuit of a shared public purpose as to constitute a political subdivision itself. Of course, “[t]he need to make that challenging determination [regarding whether the contractor could engage in meaningful collective bargaining]

vanished in 1995, when the Board rejected the *Res-Care* ‘extent of control’ test.” *Ibid.* (citing *Management Training Corp.*, 317 NLRB 1355, 1358 (1995)).

Tellingly, in the government contractor cases, “the Board either conducted no *Hawkins County* analysis whatsoever[,] . . . or required only the most perfunctory analysis to reject an obviously meritless claim by the contractor that it was a political subdivision of the state.” *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. 15 n.31 (Member Miscimarra, dissenting) (citations omitted). No one doubts, in other words, that the typical government contractor is a private entity over which the Board can assert jurisdiction.

In contrast, “charter schools are essentially local in nature and their operations are peculiarly related to . . . local governments” and local governments’ specific “purpose of satisfying public K-12 education requirements.” *Hyde Leadership*, 364 NLRB No. 88, slip op. 14 (Member Miscimarra, dissenting) (quotation marks and footnotes omitted). This “substantial nexus” between charter schools and local school systems, *Temple University*, 194 NLRB at 1161, is illustrated by the fact that some charter schools are political subdivisions themselves, *see, e.g., Universal Academy*, 366 NLRB No. 38, slip op. 1 n.1, and, in any event, the question is so close that, as a general matter, “every charter school case requires an exacting *Hawkins County* analysis,” *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. 15 n.31 (Member Miscimarra, dissenting) (emphasis in original). Thus, both in terms of the underlying social policies involved and the relevant NLRA doctrines, the issue of whether the Board should assert jurisdiction

over a particular charter school bears little resemblance to the issues that arise in government contractor cases.

### **CONCLUSION**

The Board should exercise its inherent authority to decline jurisdiction over KIPP.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the following in the manner specified below:

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