

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

KIPP ACADEMY CHARTER SCHOOL

Case No. 02-RD-191760

Employer,
and

NICOLE MANGIERE
and
CHRISTOPHER DIAZ,

Petitioners,

and

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

Union.

**BRIEF OF NATIONAL HERITAGE ACADEMIES, INC.
AS AMICUS CURIAE**

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INTEREST OF AMICUS CURIAE

National Heritage Academies, Inc. (“NHA”) is a charter-school management company for nearly ninety charter schools in the states of Colorado, Georgia, Indiana, Louisiana, Michigan, New York, North Carolina, Ohio, and Wisconsin. Together, these schools educate more than 59,000 students, roughly the same number of students as the San Francisco United School District, the nation’s 70th largest.

NHA was founded on a set of principles—core values that reflect the high personal and educational standards that NHA holds itself to every day. These values are: ownership for the success of students; doing the right thing always; behaving with care; striving to make NHA-managed schools the best choice for parents and students; and acting with discipline to sustain academic and financial viability.

As a charter school management company operating in numerous states, NHA has a strong interest in uniform labor standards for collective action by employees. Uniform standards promote fairness and reduce the administrative burdens that attend divergent labor standards, particularly where such uniform standards are already applied to all other educational institutions in this industry that, like NHA, are not state actors. For those reasons, NHA respectfully urges the National Labor Relations Board to continue to allow the exercise of jurisdiction over charter schools under the National Labor Relations Act.

INTRODUCTION

The National Labor Relations Board has jurisdiction over charter schools that are not political subdivisions of the state. The Board’s continued exercise of that jurisdiction over such charter schools, consistent with its precedent in *Hyde Leadership Charter School-Brooklyn*, 364 NLRB No. 88 (2016) and *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016), is proper because the categorical declination of jurisdiction over such institutions would be contrary to the text and purposes of the National Labor Relations Act (the “Act”).

Specifically, the Board has invited *amicus* briefs to address, “whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act. . . .” *Kipp Academy Charter School*, Case No. 02-RD-191760, *Order Granting Review in Part and Invitation to File Briefs* (Feb. 4, 2019). To address this issue, it is crucial to begin in the appropriate context by identifying the particular class of charter schools under consideration.

A decision regarding the exercise of jurisdiction can only be made after it has been determined that jurisdiction exists in the first place. The Supreme Court has held that the Board cannot exercise jurisdiction over entities that are political subdivisions of the state because they were either “(1) created directly by the state, so as to constitute departments or administrative arms of government, or (2) administered by individuals who are responsible to public officials or to the general electorate.”

NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn., 402 U.S. 600, 604-05 (1971).

Charter schools that meet either of these criteria would not be subject to the Board's jurisdiction at all, and the question of the discretionary exercise of jurisdiction over those schools would not be applicable. Therefore, in this case, where the question presented relates solely to the exercise of jurisdiction, the class of institutions at issue is limited to those charter schools that do not meet either criteria of the test articulated in *Hawkins County*, and thus are *not political subdivisions of the state*.

Consistent with the statutory language of the Act, the Board should continue to broadly exercise its jurisdiction over the class of charter schools that are not political subdivisions under *Hawkins County*. Such exercise of jurisdiction is proper because there is simply no basis to contend that labor disputes involving this class of charter schools do not have a sufficiently substantial effect on commerce to warrant the exercise of jurisdiction. Additionally, although this class of non-political subdivision charters may be regulated at various degrees by the states where they operate, there is nothing about that relationship that is so specialized or unique that the exercise of jurisdiction over those schools in that category would not effectuate the purposes of the Act.

ARGUMENT

I. The Text of the Act Establishes a Presumption in Favor of Jurisdiction.

As noted by the Board in *Hyde*, the Board is to “exercise[] its discretionary jurisdiction when doing so would effectuate the purposes of the Act and fairly protect the interests of employees.” *Hyde*, slip op. at 8. Consistent with such broad jurisdiction given to the Board by Congress, the Act only identifies one specific and narrow circumstance where the Board may decline to exercise jurisdiction. That statutory provision is found in Section 14(c)(1) of the Act, which states:

The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction

29 U.S.C. § 164(c)(1).

Thus, the statutory starting point in evaluating the exercise of jurisdiction is clear: where the Board has jurisdiction, it should generally look to exercise that jurisdiction. The only exception is where the labor dispute involves a class or category of employers where the effect on commerce is too insubstantial to warrant the exercise of the Board’s jurisdiction.

The Board has consistently asserted jurisdiction over labor disputes involving wide swaths of classes and categories of different types of employers—even those

heavily regulated by or, otherwise deeply intertwined with, various levels of government. These classes include:

- Government Contractors— As noted by the Board in *Hyde*, “[m]any government contractors are subject to exacting oversight by statute, regulation, or agreement. Yet the Board routinely asserts jurisdiction over private entities that provide services, under contract, to governmental bodies.” *Hyde*, slip op. at 8. (citations omitted).
- Entities Involved in National Security— Obviously, entities involved in this crucial commercial sector have a deep relationship to the government connected to the most fundamental governmental function, and yet the Board has noted that, “for over 60 years, in times of both war and peace, the Board has asserted jurisdiction over employers and employees that have been involved in national security.” *Firstline Transp. Security, Inc.*, 347 NLRB 447, 453 (2006).
- Private Schools— “The Board has long exercised jurisdiction over private schools, both for-profit and nonprofit.” *Hyde*, slip op. at 8 (citing *The Windsor School*, 200 NLRB 991 (1972); *Shattuck School*, 189 NLRB 886 (1971)).
- Private Universities— “The Board has exercised jurisdiction over private non-profit universities for more than 45 years.” *Trustees of Columbia University*, 364 NLRB No. 90, slip op. at 2 (2016).

There is no reasonable basis, let alone any record evidence, to suggest that the particular class at issue in this case—charter schools that *are not political subdivisions* under *Hawkins County*, and thus subject to the Board’s jurisdiction—ought to be given special treatment by way of a class-wide, categorical discretionary exemption to Board jurisdiction that has not been applied to these other classes of governmentally connected employers. Instead, the Board should continue permitting the broad assertion of jurisdiction consistent with the Act and its historical practice.

II. The Act’s Statutory Exception to Jurisdiction Over a Class of Employers Where the Effect of a Labor Dispute on Commerce is Not Substantial Does Not Apply to a Category of Institutions that Educates Millions of Students.

Turning to the particular statutory basis for declining jurisdiction mentioned in the Act, whereby the Board can decline jurisdiction where the effect of a labor dispute involving a particular class/category of employer on commerce is not sufficiently substantial, the Board has never found that any class of charter schools would fall under this *de minimis* test. However, the Board has found the exact opposite. In considering one particular cyber charter school and the very narrow class of “Pennsylvania’s cyber charter schools” the Board found:

[The school] alone serves about 3000 students and its operating budget is in the millions of dollars each year. And it is but one of 14 cyber charter schools in Pennsylvania. All of those schools employ teachers and staff and purchase products and services in the private sector economy. Accordingly, we reject PVCS’ claim that Pennsylvania’s cyber charter schools do not substantially affect commerce.

Pennsylvania Virtual, slip op. at 9. The Board also looked at the broader category of charters schools in a footnote stating,

Moreover, we disagree with the dissent’s suggestion that charter schools overall have an insignificant impact on interstate commerce. Charter schools are a significant and growing, category of employers in the education sectors. From the school year 1999-2000 to 2012 to 2013, the percentage of all public schools that were charter schools increased

from 1.7 to 6.2 percent, and charter schools have generally increased in enrollment size over time.

Id. at n. 25 (citing National Center for Education Statistics, *Fast Facts*, <https://nces.ed.gov/fastfacts/display.asp?id=30> (last visited July 18, 2016)). Indeed, the government statistics cited in *Pennsylvania Virtual* have been updated to account for the most recent school years and still show the increasing commercial impact of charter schools:

Between school years 2000–01 and 2015–16, the percentage of all public schools that were charter schools increased from 2 to 7 percent, and the total number of charter schools increased from 2,000 to 6,900. In addition to increasing in number, public charter schools have also generally increased in enrollment size over this period: from 2000–01 to 2015–16, the percentages of public charter schools with 300–499, 500–999, and 1,000 or more students each increased, while the percentage of charter schools with fewer than 300 students decreased.

The percentage of all public school students who attended public charter schools increased from 1 to 6 percent between fall 2000 and fall 2015. During this period, public charter school enrollment increased steadily, from 0.4 million students in fall 2000 to 2.8 million students in fall 2015, an overall increase of 2.4 million students. In contrast, the number of students attending traditional public schools increased by 1.3 million between fall 2000 and fall 2005, and then decreased by 0.6 million between fall 2005 and fall 2015.

National Center for Education Statistics, *Fast Facts*, <https://nces.ed.gov/fastfacts/display.asp?id=30> (last visited March 16, 2019).

Given this context, there is no viable argument that the relevant class of charter schools has an insubstantial effect on commerce. Indeed, following Board’s request for briefing on whether it should decline jurisdiction over this class under

this particular statutory provision, there has not been any attempt to argue that this class has a *de minimis* effect of commerce. The lack of such an argument makes sense, as it would be impossible to sustain.¹

Therefore, on the only statutorily identified basis for declining jurisdiction, no arguments have been advanced that would justify the Board declining jurisdiction over charter schools as a class because of an insubstantial effect on commerce. Instead, it is clear this class of charter schools has a significant—and growing—impact on commerce, meaning that the Board should continue to allow the exercise of jurisdiction over this category.

III. It Would Be Improper to Decline Jurisdiction Over this Class on the Grounds that the Exercise of Jurisdiction Would Not Effectuate the Purposes of the Act.

As there is no basis in the statutory text to support declining jurisdiction over the class of non-political subdivision charter schools, the argument turns to cases where the Board has declined to exercise jurisdiction in particular circumstances where exercise of jurisdiction would not effectuate the purposes of the Act. For example, the Union cites a footnote in the dissent of *Pennsylvania Virtual*, which states that the Board has “the separate authority to decline to exercise jurisdiction *in particular cases* when exercising jurisdiction would not effectuate the purposes of

¹ Even with regard to the more limited class advocated by the Union—New York conversion charter schools—the Union does not attempt to argue that more narrow class would meet the *de minimis* test of the Act.

the Act.” Brief of Union at 10 (quoting *Pennsylvania Virtual*, slip op. at 13, n. 13 (emphasis in original)). By its very terms, this “separate authority” is undisputedly limited to case-by-case determinations, and the Board has never successfully used that authority in conjunction with the decision of a particular case to justify a declination of jurisdiction over a class of employers as broad as the class at issue in this case.² Therefore, this issue of whether exercising jurisdiction would effectuate the purposes of the Act cannot serve as a basis for the Board to decline to exercise jurisdiction over the entire category of charter schools.

Further, even if the “effectuates the purposes” standard could be used to justify a categorical declination of jurisdiction, there is no basis to conclude that exercising jurisdiction over this class would not effectuate the purposes of the Act. To begin, the argument to decline jurisdiction is premised on the public school nature of charter schools and the various points of connection and regulation between the charter schools and the state to argue that exercising jurisdiction in the face of that tight relationship between the schools and the state would not effectuate the purposes of the Act. This argument, however, overlooks the reality that there is already a legal test that weighs the relationship between the institution and the state in the

² As detailed by the Employer in this case, the Board could not make proper categorical rejections of jurisdiction in decisions of particular matters without a proper record. Employer’s Brief on Review at 12. Indeed, that is why the Board ultimately had to engage in formal rulemaking and record findings in effectively declining jurisdiction over dog and horse racing industries. *Id.* at 14.

context of the Board's jurisdiction—the political subdivision test of *Hawkins County*. The question of exercising jurisdiction is only relevant to entities where jurisdiction has already been properly established under *Hawkins County*, meaning it has already been determined that such charters *are not* political subdivisions, and that the relationship between the state and school is not so close as foreclose the Board's broad jurisdiction. There is no authority that suggests that in making the subsequent decision to exercise jurisdiction the Board should essentially re-weigh the same factors as the *Hawkins County* test and come to a different jurisdictional conclusion.

Indeed, it is telling that the Board's decision in *Temple University*, 194 NLRB 1160 (1972), is cited as the exemplar of where the Board declined to exercise jurisdiction over a school (in that case a University) as not effectuating the purposes of the Act because of a the relationship between the institution and the state. In considering the weight of this authority, context is paramount. The Board issued its decision in *Temple University* mere months after the United States Supreme Court's decision in *Hawkins County*, and that decision does not mention the political subdivision test of *Hawkins County*. In the intervening forty years, however, it has become clear that the test of the relationship between the state and the institution is measured under the *Hawkins County* standard as a threshold matter. Had the threshold *Hawkins County* test been applied to the facts in *Temple University*, the

Board's jurisdiction clearly would not apply given the Board's conclusion in that case that, "the University was denominated an 'instrumentality' of the Commonwealth." *Temple University*, 194 NLRB at 1161. This is distinct from the issue in this case, which is limited to whether the Board should exercise jurisdiction over those charter schools that, by virtue of passing muster under *Hawkins County*, have already been determined *not* to be instrumentalities of the state.

There is also the argument pointing to Board action declining jurisdiction over employers in the horse and dog racing industries. Of course, the class of charter schools at issue in this case are materially different from those industries. Specifically, in the horse and dog racing decisions, the focus was the fact that those entire (but relatively narrow) *industries* were under tight state control. To the contrary, the class of charter schools at issue in this case are participants in a much larger and broader industry of K-12 education, and the Board regularly exercises jurisdiction within that industry by asserting jurisdiction over private schools. While charter schools may be regulated and subject to various state and local rules and restrictions, that relationship is not materially different than other private entities (such as government contractors) who are subject to extensive state oversight, but also remain subject to the exercise of the Board's broad jurisdiction.

Finally, there is the argument that the Act's purposes would not be effectuated by the exercise of jurisdiction because institutions would not be able to predict

whether they would ultimately be subject to the Board's jurisdiction, thus creating inconsistency and lack of stability. It is true that the political subdivision test of *Hawkins County* does require a case-by-case, fact-based determination as to whether an institution is a political subdivision of the government. It is also true that charter schools have, and will continue to, fall on either side of that test. However, decisions such as *Hyde* and *Pennsylvania Virtual*, have drawn clear lines for the application of the political subdivision test of *Hawkins County* in the charter school context. Only those schools that are truly political subdivisions of the state will trigger *Hawkins County* and will not be subject to the Board's jurisdiction, and nor should they be as political entities. Such schools are truly and materially different from the charter schools that are not arms of the state. Treating such fundamentally different schools differently for purposes of NLRB jurisdiction does not create any inconsistency or instability and effectuates the purposes of the Act.

Additionally, to the extent the Board retains the authority to decline jurisdiction on a case-by-case basis based on particularized circumstances, it is possible that, in the future there might be some unique set of facts that would cause the Board to decline jurisdiction in a particular matter involving a charter school that is otherwise subject to jurisdiction under *Hawkins County*. That potential, however, exists in every industry and class of employer where the Board has jurisdiction. The exis-

tence of this case-by-case discretionary authority does not create intolerable instability or uncertainty. For example, as noted above, the Board has regularly asserted jurisdiction in the context of private universities, but recently declined jurisdiction in a particular case involving college football players at a private university reasoning that such discretionary declination was appropriate because the Board does not have jurisdiction over public institutions that make up the majority of the applicable league that maintains control over the teams. *Northwestern University*, 362 NLRB 1350 (2015). The existence of this particular case, however, does not suggest that the Board should now categorically decline jurisdiction over the entire class private universities because there may be particular cases involving private universities where the Board might decide to decline jurisdiction for case-specific reasons.

Similarly, here, the fact that some charter schools may not ultimately fall within the Board's exercise of jurisdiction does not create instability or uncertainty at a level that would justify a class-wide decision to decline jurisdiction.

CONCLUSION

There is simply no basis or record support for the Board making a sweeping determination, departing from precedent, to decline jurisdiction over the class of those charter schools that are not political subdivisions of the state. NHA respectfully requests that the Board continue its historical practice of allowing the assertion of its jurisdiction over charter schools that are not political subdivisions of the state.

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, the foregoing Brief of National Heritage Academies, Inc. 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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