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NLRB JURISDICTION OVER CHARTER SCHOOLS

David B. Schwartz*

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.1

INTRODUCTION

Charter schools are a fast growing—and controversial—segment of public education in the United States.2 The National Center for Education Statistics (hereinafter “NCES”) defines a “public charter school” as “a publicly funded school that is typically governed by a group or organization under a legislative contract—a charter—with the state, district, or

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other entity. 3 Charter schools often operate as public-private hybrids. 4 On one hand, these entities utilize public funds, are authorized by state statutes, and are regulated by local and state governments. 5 On the other hand, groups outside of the public school system often operate these schools. 6 The central controversy surrounding charter schools is whether they fulfill their promise to use flexibility and innovation to improve education opportunities provided to children underserved by traditional public schools—and whether their outcomes justify diverting governmental funds from public schools to charter schools. 7 Related to this broader controversy, some charter school supporters contend that teachers’ unions and their collective bargaining rights under public sector employment statutes block innovation, efficiency, and improvement in the public schools. 8

The perceived power of teachers’ unions in public-sector bargaining regimes presents the question of legal forum as a critical labor law issue for charter schools. 9 These educational institutions often seek federal jurisdiction under the National Labor Relations Act (hereinafter “NLRA”), and teachers unions aim for state jurisdiction. 10 These paths are taken

4. See NAT’L CTR. FOR EDUC. STAT., supra note 2.
5. See id.
6. See id.
8. See KAHLENBERG, supra note 7, at 315-16; DINGERSON ET AL., supra note 7, at XVI; DIANE RAVITCH, SLAYING GOLIATH: THE PASSIONATE RESISTANCE TO PRIVATIZATION AND THE FIGHT TO SAVE AMERICA’S PUBLIC SCHOOLS 130-33 (2020).
9. See DINGERSON ET AL., supra note 7, at XII; RAVITCH, supra note 8, at 132-33.
10. To be sure, the parties do not always follow this path as the public-sector employment laws of different states vary widely as to the rights of their employees to engage in collective bargaining—if they allow public employees to do so at all. In contrast, the National Labor Relations Act provides a uniform, national scheme encouraging and protecting the right to collective bargaining in private-sector employment.
because employers and unions alike see a particular labor law forum as providing substantial advantages to their position.11

With the acquiescence of local and state agencies and the state courts, the federal National Labor Relations Board (hereinafter “NLRB” or “the Board”) plays the leading role in determining whether charter schools will fall under state or federal bargaining regimes.12 The Board has two primary routes in determining whether to exempt a charter school from its jurisdiction.13 First, it can apply the “Hawkins County” test14 under NLRA Section 2(2),15 which focuses on two discrete characteristics of an employer’s governance: the extent of local/state government’s role in an entity’s creation and the political accountability of its administrators.16 Second, under NLRA Section 14(c)(1),17 the Board can assess a wider array of factual circumstances and broad policy considerations in determining—“in its discretion”—whether to decline jurisdiction over a class or category of employers as not likely to create labor disputes with a substantial effect on interstate commerce.18 The Board has opted to determine jurisdiction over charter schools using the Hawkins County/Section 2(2) approach over the discretionary/Section 14(c)(1) approach.

This Article argues that the Board’s sole reliance on the Hawkins

12. See Hyde Leadership Charter Sch. - Brooklyn, 364 N.L.R.B. No. 88, slip op. at 9 fn.27 (2016) (noting New York Appellate Division holding cases in abeyance involving charter school jurisdiction pending the Board’s determination and that no state agency sought to intervene or participate in the Board proceeding); Pennsylvania Virtual Charter School, 364 N.L.R.B. No. 87, slip op. at 9 fn.26 (2016) (Commonwealth of Pennsylvania did not intervene in proceeding or endorse school’s position in favor of state jurisdiction); Chicago Mathematics & Science Academy, 359 N.L.R.B. 455, 465 (2012) (Neither State of Illinois nor City of Chicago requested Board to cede jurisdiction).
13. See infra text accompanying notes 55-102, 167-211.
15. National Labor Relations Act (NLRA), 29 U.S.C. § 152(2) (“The term ‘employer’... shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.”).
17. NLRA Section 14(c)(1), Pub. L. No. 86-257, § 701(a), 73 Stat. 519, 541-542 (1959) (codified at 29 U.S.C. § 164(c)(1)) (“The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedures Act... decline to assert jurisdiction over any labor disputes 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: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing under August 1, 1959.”).
18. Id.
County test to determine jurisdiction on a school-by-school basis is the better approach over utilizing Section 14(c)(1) to decline jurisdiction over the entire charter school industry. In doing so, the Board takes advantage of the efficiency and relative ease of applying a narrow rule-based approach which is consistent with its own experience in analogous industries concerning hybrid private-public entities. This Article will explain the Board’s choice in terms of its prior use of Sections 2(2) and 14(c)(1) in determining jurisdiction over hybrid entities, survey its application of these provisions to charter schools, and discuss both in terms of rules-versus-standards jurisprudence. This latter basis concerns whether a decision-making body should utilize a test with set triggers or a standard that assesses a broader set of circumstances or factors.\(^{19}\)In this context, this Article argues that the Board’s prior retreats from applying Section 14(c)(1), as well as other important policy decisions, now prevent the Board from developing and applying a standard with which it could decline jurisdiction over the charter school industry and has steered it towards applying the Hawkins County rule rather than Section 14(c)(1).\(^{20}\)

I. Charter Schools as Public-Private Hybrids

State charter school statutes typically permit private individuals and entities to organize a school, obtain a charter from a state or local governmental, and then enter into a charter agreement to operate a school within a local school district (or in some instances, such as cyber charter schools, to operate on a state-wide basis).\(^{21}\) The local school district provides the charter school with the amount it spends on individual students multiplied by the students enrolled in the charter school (known as the per capita payment) and, in some jurisdictions, is required to provide the charter school with rent-free space in existing public-school buildings.\(^{22}\) State and local governments oversee the charter school’s performance in various ways, such as receiving annual reports, but charter school statutes exempt charter schools from many of the requirements imposed on public schools.\(^{23}\) One group of academic experts has characterized charter schools as:

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20. See infra Section II.C.4.
22. See id. at 3.
23. See id. at 1-2.
[trading] greater accountability in exchange for greater autonomy. Accountability comes in the form of the charter, a contract that defines the educational goals that the charter school must attain. Autonomy comes in the form of deregulation, which frequently involves exemption from state laws that govern budgets and financial transparency.  

Charter schools then are a hybrid of private and public education because they are privately operated, but publicly funded and regulated. Charter schools resemble public schools in that they are open to all students within a locality regardless of race, gender, ability or disability and cannot charge tuition. They resemble private schools in that non-governmental individuals or organizations can operate them and, although they are authorized and regulated by public authorities, they are exempt from many of the laws and regulations governing public schools. The hybrid nature of charter schools raises complex issues under labor law, especially as to whether their labor relations should fall under federal or state jurisdiction.

If a charter school is a public entity, it would be exempt from the Board’s jurisdiction as a political sub-division under NLRA Section 2(2) and a union would have to resort to state public-sector labor relations law—if the relevant state permits it—to represent the school’s employees in collective bargaining. If a charter school is a private entity, a union can seek to establish its status as the employees’ collective-bargaining representative under NLRA Section 9(a), by either requesting


27. Green et al., supra note 24, at 1132-33; but see infra note 262 (states also impose a multitude of regulations on private schools).


31. National Labor Relations Act, 29 U.S.C. 159 (a) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes
voluntary recognition from the school or by filing a representation petition with the NLRB for an employee election.\textsuperscript{32} In recent years, the American Federation of Teachers and other labor unions have filed representation petitions to the NLRB to conduct employee elections to qualify as the collective-bargaining representatives of the employees of charter schools.\textsuperscript{33} Conversely, charter schools employees or the schools themselves have filed decertification or “RM” petitions, respectively, with NLRB regional offices to nullify union certifications as public-sector bargaining representatives and to bring their workplaces under NLRB jurisdiction—only to be opposed by unions seeking to retain their public-sector status under state regulation.\textsuperscript{34} As will be discussed below, the NLRA requires the Board to determine not only whether a charter school qualifies as an eligible employer under the NLRA, but also provides the Board with the discretionary authority to determine whether asserting jurisdiction over

of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ”).

\textsuperscript{32} NLRB, CASEHANDLING MANUAL 11002.2 (2020). The Board designates representation petitions as either “RC”, “RM”, or “RD” petitions. See id. In a RC petition, an employee, group of employees, or a labor organization asks the Board to determine the status of the filing party as the bargaining agent in a described bargaining unit. See id. In a RM petition, an employer alleges that it has received one or more claims for recognition as the exclusive bargaining agent or that the continued majority status of the incumbent union is in question. See id. In a RD petition, an employee, group of employees, or a labor organization asserts that the certified or currently recognized bargaining agent is no longer the bargaining representative. See id.


\textsuperscript{34} See, e.g., Kipp Academy Charter Sch., No. 02-RD-191760, 2019 WL 656300 (Feb. 4, 2019); see also Evergreen Charter Sch., No. 29-RD-175250 (Oct. 27, 2016); Riverhead Charter Sch., No. 29-RD-132061, 2016 WL 6069608 (Oct. 7, 2016); Hyde Leadership Charter Sch. - Brooklyn, 364 NLRB No. 88, slip op. at 5. (Aug. 24, 2016). Presumably, parties maneuver to obtain the regulatory forum that it believes to be most advantageous, depending on the particular state’s legal and political attitudes toward public-sector unionism. Commentators have accused charter schools, their supporters, and associated entities of “opportunistic lawyering” in sometimes emphasizing their public nature in seeking governmental funding while, at other times, emphasizing their private characteristics in order to evade statutory requirements applied to public entities. See Preston C. Green III et al., Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools, 63 EMORY L.J. 303, 336 (2013).
II. NLRB METHODS OF DETERMINING PRIVATE/PUBLIC STATUS FOR JURISDICTIONAL PURPOSES

A. Statutory Provisions and Rules vs. Standards

The NLRB provides the Board with two complementary approaches to determine whether or not to assert jurisdiction over employers with both private-sector and public-sector characteristics. First, the Board must determine whether the entity qualifies as an “employer” under Section 2(2) of the Act or is exempt as a political subdivision. To make this determination, the Board applies its long-established “Hawkins County test” to determine the public or private status of an employer under Section 2(2). Second, if the Board determines that an entity is a statutory employer and not a political subdivision, it can invoke its discretionary authority under Section 14(c)(1) of the Act and decline jurisdiction over the entire industry to which the entity belongs (its “class or category”) based on a broader assessment of the place of charter schools in the NLRA’s national scheme regulating labor relations.

This Article will discuss these two approaches to determining jurisdiction in terms of the jurisprudential dichotomy between the “rule” versus “standard” approaches in making legal determinations. Establishing

35. Hyde Leadership, slip op. at 1.
36. See discussion infra Section II.B.; discussion infra Section II.C.2. regarding the Board’s overall approaches to determining whether to assert jurisdiction over a particular employer.
37. See Hyde Leadership, slip op. at 4.
38. Id. at 5.
39. See id. at 3.
40. See id.
41. See generally Paul M. Schwartz, Voting Technology and Democracy, 77 N.Y.U. L. REV. 625, 655 (2002) (“we can consider a standard to be an open-ended decision making yardstick and a rule, its counterpart, to be a harder-edged decision making tool.”); Cass Sunstein, Problems with Rules, 83 CAL. L. REV. 953, 1023 (1995) (“the choice between rules and rulelessness might be well be based on a highly pragmatic, contextualized inquiry into the costs of the two approaches in the area at hand.”); Sullivan, supra note 19, at 57 (“These [legal] forms can be classified as either ‘rules’ or ‘standards’ to signify where they fall on the continuum of discretion.”); Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577, 580 (1988) (“the blurring of clear and distinct property rules with the muddy doctrines of ‘maybe or maybe not’”); Pierre J. Schlag, Rules and Standards, 33 UCLA L. REV. 379, 382 (1985) (“The trigger [in a rule or standard, respectively] can be either empirical or evaluative and the response can be either determined or guided.”); H.L.A. Hart, supra note 2.
a "rule"—a concise test—binds the decisionmaker "to respond in a determinate way to the presence of delimited triggering facts."\(^{42}\) In contrast, a "standard" approach—the use of a group of factors or considerations to assess the broader circumstances of a situation—"tends to collapse decision making back into the direct application of the background principle or policy to a fact situation."\(^{43}\) For example, the government can regulate the speed of highway traffic by establishing a rule—"do not go over 60 miles per hour"—or a standard—"do not drive unreasonably fast."\(^{44}\) The former sets sixty miles per hour as the triggering fact for the rule violation, and the latter requires the decisionmaker to decide what set of circumstances (road conditions, traffic flow, or weather/visibility) indicates whether the motorist's speed was unreasonably fast.\(^{45}\) Among the advantages of rules are simplicity of application and consistency in enforcement; the advantages of standards include the ability to weigh multiple factors to capture the totality of a situation.\(^{46}\) While rules and standards operate as poles of legal decision-making, in actual practice, they often "mark a continuum, not a divide . . . and [that] all kinds of hybrid combinations are possible."\(^{47}\) For example, a rule can incorporate evaluative aspects into its trigger or triggers and, conversely, a standard can utilize triggers into its consideration of multiple factors or circumstances.\(^{48}\) Perhaps most importantly in the context of NLRB caselaw, a standard that repeatedly comes to the same result can "crystallize" over time into a rule.\(^{49}\)

The Board's use of the \textit{Hawkins County} test in determining whether an entity is a political subdivision under NLRA Section 2(2) is a "rule" because it focuses on two attributes—"public creation" and "political control"—as possible "triggers" in determining whether an entity should be exempt as a political subdivision from the Board's jurisdiction.\(^{50}\) In contrast, Section 14(c)(1) provides a "standard" permitting the Board to assert or decline jurisdiction based on broader considerations regarding the relationship of a class of employers to national labor relations policy.\(^{51}\) But,

\(^{42}\) Sullivan, supra note 19, at 58.
\(^{43}\) \textit{Id}.
\(^{44}\) Sunstein, supra note 41, at 959.
\(^{45}\) See generally Sullivan, supra note 19, at 58-59 (describing standards as giving the decisionmaker more discretion than rules do).
\(^{46}\) \textit{Id.} at 65-66.
\(^{47}\) \textit{Id.} at 61.
\(^{48}\) \textit{Id.} at 61-62.
\(^{49}\) \textit{Id.} at 62. ("A rule may be understood as simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way.")
\(^{51}\) See 29 U.S.C. § 164(c)(1).
the NLRA’s statutory language ultimately provides only a starting point for the Board’s application, or in J.C. Gray’s paradox that “statutes are sources of law, not part of the law itself.”52 The Board’s actual determination of jurisdiction in prior cases has created its own law of jurisdiction, which in turn, binds it in relation to charter schools.53 This Article will discuss the Board’s use of NLRA Sections 2(2) and 14(c)(1) in determining jurisdiction over the full range of entities operating in relation to governmental regulation and oversight, then survey its application of these provisions to charter schools, and finally discuss both in terms of rules-versus-standards jurisprudence.54

B. NLRA Section 2(2)—the Political Subdivision Exemption

The NLRA does not provide a definition of “political subdivision thereof” in Section 2(2) nor does its legislative history provide any insights as to Congress’ intent regarding the parameters of this term.55 Since 1968, the Board has instead applied its own test—set out in Hawkins County—finding that an entity qualifies as a political subdivision under Section 2(2) if it is either (1) created directly by the state so as to constitute a governmental department or an administrative arm (“state creation”) or (2) administered by individuals who are responsible to public officials or the general electorate (“political accountability”).56 In making this determination, the Board will consider state-law pronouncements regarding an entity’s public status, but does not find them to be controlling.57 In NLRB v. National Gas Utility of Hawkins County,58 the Supreme Court approved the Board’s test, but not its application to the eponymous utility company (“the Utility”) created under a 1937 state law that permitted Tennessee residents to form utility districts to provide services to the public, such as sewers, water, police and fire protection, and natural gas distribution.59

52. HART, supra note 1, at 13 (quoting J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 119 (1902)).
54. See infra, Section II.B.
57. Id. at 691.
59. See id.
The Court’s decision, as briefly synopsized below, illustrates the parameters of the federal-state issues raised in determining NLRB jurisdiction over mixed public-private entities.60

In 1967, Plumbers and Steamfitters Local 102 filed a petition with the NLRB region to represent the Utility’s pipefitters, won the subsequent Board election, and was certified by the Board as the pipefitters’ bargaining representative.61 The Utility refused to bargain with the union, contending that the Board could not assert jurisdiction because it was a political subdivision of the State of Tennessee and thus did not qualify as an employer under Section 2(2) of the NLRA.62 After the Board found that the Utility had violated the NLRA by refusing to bargain,63 it sought review of the Board’s bargaining order in the Sixth Circuit of the United States Court of Appeals.64 The circuit court declined to enforce the Board’s order, finding that the Board should respect Tennessee law, as set out in a decision of the state supreme court, classifying utilities under the 1937 statute as part of the state government.65 After granting certiorari, the United States Supreme Court approved the Board’s test, deferring to the Board’s construction of the term “political subdivision” within the NLRA, and rejecting the Sixth Circuit’s reliance on the decision of the Tennessee Supreme Court that found utility districts to be an operation of state government.66 Instead, the United States Supreme Court held that federal law controls public-subdivision status, based on the Congressional intent that the NLRA should “solve a national problem on a national scale” and rejecting its limitation “by . . . varying local conceptions, either statutory or judicial.”67 The Court nonetheless went on to reject the Board’s application of the second prong of its test.68 The Court found that the Utility was not administered by individuals who are responsible to political officials or the general electorate, based on the authority of an elected county judge to appoint the Utility’s administrators and the fact that they can be removed for malfeasance or nonfeasance under Tennessee’s General Ouster Law.69 The Court also noted other circumstances

60. Id. at 604.
61. Id. at 601.
62. Id.
63. Id. at 602.
65. Id. at 313.
66. Hawkins Cnty., 402 U.S. at 602-03.
67. Id. at 603-04 (quoting NLRB v. Hearst Publ’ns, 322 U.S. 111, 123 (1944)).
68. Id. at 602-03.
69. Id. at 607.
indicating political subdivision status and its "public status" such as emi-
inent domain authority, "necessary and requisite" powers, and its exemp-
tion from federal income tax and social security. Justice Stewart dis-
sented, stating that the Board was entitled to weigh the various factors and
come to its own conclusion in construing Section 2(2).

In the fifty years since the Supreme Court approved the Hawkins
County test, the Board has applied the test to determine the political sub-
division status of a wide variety of employers, including art museums, public television stations, public libraries, state universities (and affil-
iated entities), zoos, state bar associations, community action agen-
cies, and hospitals. The Article will briefly discuss the Board’s prac-
tice in applying the two prongs of the Hawkins County test as foreshadowing later issues arising in its application to charter schools.

1. Hawkins County First Prong: State Creation as an
Administrative Division

Under the first prong of the Hawkins County test, the party claiming
an employer to be an exempt political subdivision must demonstrate that
the state created the entity as a governmental division or administrative arm. The Board has found such status when the state has directly created
the entity, funded it, and exercised close oversight and control over its
operations. The Board’s most extensive discussion of the Hawkins

70. Id. at 608.
71. Id. at 609-10.
72. Detroit Inst. of Arts, 271 N.L.R.B. 285, 286 (1984); Minneapolis Soc’y of Fine Arts, 194
1386, 1388 (1982).
75. Rsch. Found. of City Univ. of N.Y., 337 N.L.R.B. 965, 968 (2002); Univ. of Vt., 297
79. E.g., Truman Med. Ctr., 239 N.L.R.B. 1067, 1067 (1978); Bishop Randal Hosp., 217
80. See infra Sections II.B.1., II.B.2.
82. State Bar of N.M., 346 N.L.R.B. at 679; see Ass’n for the Developmentally Disabled, 231
N.L.R.B. 784, 784 (1977) (disability service provider exempt based on creation under Ohio statute;
services limited to state residents; state funding; state ownership of facilities; state performance of
accounting, payroll, and purchasing functions; and the state board could deny approval of the actions
of the non-profit’s director); Madison Cnty. Mental Health Ctr., 253 N.L.R.B. 258, 258-59 (1980)
County’s first prong occurred in State Bar of New Mexico, where the Board analyzed its requirements vis-à-vis the circumstances of the creation of the New Mexico bar association. The Board found that because the state supreme court created the association (acting pursuant to a 1978 state statute), the bar association “exists pursuant to State action and owes its entire existence to the will of the State of New Mexico” and thus met the state creation requirement of the first prong. The Board further found that the bar met the administrative-subdivision requirement because: it was created “to assist the judicial branch ... in regulating the legal profession”; it “fulfills regulatory functions on behalf” of the court; the court “controls the governing structure of the State Bar”; the court “exercises substantial control over the State Bar’s priorities and operations”; and the court “exercises significant control over [its] budget.”

Despite its close analysis of the state statute, the Board found, as required by the Hawkins County decision, that federal law (and not its designation in the New Mexico state statute) determined the bar association to be a political subdivision. The Board also found that the bar association “exists to fulfill a State purpose”—the regulation of the legal profession to protect the public.

In contrast, the Board has found employers not to be exempt under the first prong where the state clearly did not create them—even if they otherwise resembled arms of local government. In Research Foundation of CUNY, the Board found that twelve private incorporators created the employer as a not-for-profit educational corporation under New York statute to administer contracts and grants awarded to the City University of New York (hereinafter “CUNY”). The Board noted that while the Research Foundation provided services to CUNY, it operated separately through an independent board of directors and its managers who exerted...
"direct and independent control over its employees, management, labor relations, budget, and daily operations."\(^{91}\) No special legislative act or action by a public official was required to create the employer.\(^{92}\) Although the employer’s purpose benefitted a public university, there was no indication that the state intended it to operate under the control of the university.\(^{93}\) The Board further opined that the "plain language" of Section 2(2) did not exempt private entities acting as government contractors.\(^{94}\) The Board concluded that: "[t]he creation of the [e]mployer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption."\(^{95}\) In the absence of a finding that it was created by the state, the Board will not exempt an entity from its jurisdiction as a public subdivision even where the entity is clearly performing public functions.\(^{96}\)

2. **Hawkins County** Second Prong: Political Accountability

Under the second prong of the **Hawkins** test, the party claiming that an entity is an exempt employer from the NLRA has the burden of establishing that the employer’s policy-making officials have "direct personal accountability" to public officials or the general public.\(^{97}\) The Board will find such accountability where public officials can either appoint or remove a majority of the governing board of the entity.\(^{98}\) Though determining whether political appointees constitute a majority of the directors or trustees of an entity would seem to be a simple proposition, the Board often has to assess the circumstances surrounding an entity’s operations to determine this status.\(^{99}\) For example, in Cape Girardeau Care Center, the Board found the county government’s approval of a list of director nominees submitted by a nursing home’s owner to be "purely ministerial" because it was not based on any legal authority (or circumstances indicating that the county government controlled the employer), but was simply

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91. *Id.* at 968.
92. *Id.* at 969.
93. *Id.* at 968.
94. *Id.*
95. *Id.* (citations omitted). The Board also found that the Research Foundation was not exempt under the second prong of the **Hawkins County** test. *Id.* at 969-70.
96. *See id.* at 968.
part of the employer’s efforts to obtain tax-exempt financing.\textsuperscript{100} In contrast, in \textit{Oklahoma Zoological Trust}, the Board found political accountability based on the mayor of Oklahoma City appointing trustees from a list of nominees submitted by the Zoological Society, a private group, as well as other circumstances such as the zoo’s public funding and statutory requirements that the trustees take an official oath of public office and seek public approval for the use of tax revenues.\textsuperscript{101} Chairman Gould dissented, contending that the Zoo’s private trust agreement rather than a public statute established the appointment procedures and that the mayor at most exercised only a limited veto power; he also noted the absence of an “unfettered” removal power.\textsuperscript{102}

3. Application to Charter Schools

Despite the Board’s long experience in applying the \textit{Hawkins County} test to a wide variety of entities, the Board’s efforts in applying the test to charter schools initially misfired on procedural grounds.\textsuperscript{103} Nonetheless, in \textit{Chicago Mathematics},\textsuperscript{104} a non-precedential decision, the Board set out an approach to applying the \textit{Hawkins County} test to charter schools,

\begin{itemize}
  \item \textsuperscript{100} \textit{Cape Girardeau Care Ctr., Inc.}, 278 N.L.R.B. at 1019-20.
  \item \textsuperscript{101} \textit{Okla. Zoological Tr.}, 325 N.L.R.B. 171, 172 (1997).
  \item \textsuperscript{102} \textit{Id.} at 173-74. Subsequently, in the Research Foundation case, discussed above, the Board found no public accountability despite the presence of public officials on the entity’s board of directors. The Board observed that these officials did not constitute a majority on the board, but also that the entity’s by-laws rather than public statute had placed these officials on the board, thus echoing Chairman Gould’s contention in \textit{Oklahoma Zoological Trust}. \textit{Rsch. Found. of City Univ. of N.Y.}, 337 N.L.R.B. at 969-70.
  \item \textsuperscript{103} In \textit{Charter School Administration Services, Inc.}, a Board consisting of only two members applied the \textit{Hawkins County} test and asserted jurisdiction over a non-profit corporation engaged in managing charter schools located in several states. Charter Sch. Admin. Servs., Inc., 353 N.L.R.B. 394, 394 n.1, 397-99 (2008). A subsequent decision by the Supreme Court invalidated the basis of all NLRB two-member decisions and effectively rendered them non-precedential. New Process Steel, LP v. N.L.R.B., 560 U.S. 674, 674 (2010). The Board subsequently referred to the \textit{Charter School} decision as “[a] nonprecedential, but soundly reasoned, decision” which it would draw upon in its decision in \textit{Chicago Mathematics and Science Academy Charter School, Inc.} Chi. Mathematics & Sci. Acad. Charter Sch., Inc., 359 N.L.R.B. 455, 462 (2012). Unfortunately, the Board’s decision in \textit{Chicago Mathematics} foundered on procedural grounds as well when in \textit{Noel Canning v. NLRB}, 573 U.S. 513 (2014), the Supreme Court found that President Obama had unlawfully placed three nominees without Senate confirmation despite the Senate being in pro forma session. \textit{Id.} at 556-57. Because two of the unlawfully appointed members made up part of the \textit{Chicago Mathematics} majority opinion, that decision was also rendered non-precedential. In \textit{Pennsylvania Cyber Charter School}, a properly-constituted Board applied \textit{Hawkins County}—with frequent citation to \textit{Chicago Mathematics}—to find that a Pennsylvania charter school was not an exempt political subdivision. \textit{See Pa. Cyber Charter Sch.}, No. 6-RC-120811, 2014 WL 1390806, at *2 (Apr. 9, 2014). The Board chose not to publish this decision, thus also reducing its value as precedent. See generally id.
  \item \textsuperscript{104} \textit{Chi. Mathematics & Sci. Acad.}, 359 N.L.R.B. at 461-62.
\end{itemize}
ultimately followed four years later in Hyde Leadership and Pennsylvania Virtual. It found that a private non-profit corporation that established and operated a public charter school was not exempt under either prong of the Hawkins County test.

Regarding the first prong, the Board held that the school was created by private individuals and not by a governmental entity, special legislative act, or public officials. The Board characterized the Illinois Charter Schools Act as only providing the “framework” or “roadmap” for the school’s creation and operation and that the “independent initiative of private individuals” brought the charter school into existence. Regarding the second prong, whether an entity is administered by individuals who are responsible to public officials or to the general electorate, the Board found that private individuals (and not public officials) could appoint or remove a majority of the school’s governing board and therefore the charter school was not a political subdivision.

Only in 2016, did the Board establish firm precedent, in two cases issued on the same day, regarding the application of the Hawkins County test to charter schools. In Pennsylvania Virtual, the Board applied the test to a cyber charter school that remotely taught students throughout Pennsylvania using computers. Regarding the first prong of Hawkins County, the Board found that a group of individuals created the school under the Pennsylvania Charter School Law, when they: organized and filed an application for a charter with the Norristown, Pennsylvania school district; filed for non-profit corporate status with the Pennsylvania Department of State; and formulated and instituted governance and operating procedures for its school. The Board rejected the employer’s assertion

108. Id. at 460-61.
109. Id. at 461.
110. See id. at 462-63. Member Hayes concurred with the Board majority’s application of the Hawkins County test but would have exercised the Board’s discretion to decline jurisdiction under Section 14(c)(1). Id. at 466, 468.
111. See, e.g., Pa. Virtual Charter Sch., No. 87, slip op. at 1, 5, 7; Hyde Leadership Charter Sch. - Brooklyn, 364 N.L.R.B. No. 88, slip op. at 1, 5, 6 (2016).
112. Pa. Virtual Charter Sch., slip op. at 1, 2, 13. While the charter school at issue in Pennsylvania Virtual was a cyber charter school that teaches students remotely using computers; the Board has applied the same principles to all charter schools. Id. at 5, 7. For example, in New Foundations Charter School, the Board asserted jurisdiction over a “bricks-and-mortar” charter school located in Pennsylvania and created under the same charter school law. New Foundations Charter School, No. 04-RC-199928, 2018 WL 329944, review denied (Jan. 31, 2018).
that the Pennsylvania state government created the school by granting it a charter or that the government’s role in funding and contracting with the school exempted it from the Board’s jurisdiction. The Board noted that it “routinely asserts jurisdiction” over employers performing governmental services under contract. Regarding the second prong of Hawkins County, the Board found that the “relevant inquiry” was whether public officials possessed the authority to appoint or remove a majority of the individuals administering the entity under state law or whether the employer’s own governing documents authorized these actions. The Board found that Pennsylvania Virtual’s own bylaws and governing documents controlled the appointment and removal of the school’s board members without the involvement of any local or state government officials. The Board found it unnecessary to consider additional factors (such as the Pennsylvania charter school law’s designation of the trustees as public officials or the state’s oversight and regulation of the school) because they could not qualify the school as a political subdivision where there was no public involvement in the appointment or removal of the school’s administrators.

Building on Pennsylvania Virtual, the Board in Hyde Leadership asserted jurisdiction over a New York charter school created under that state’s Charter School Act enacted in 1998. Regarding the first Hawkins County prong, the Board found that private individuals took the initiative in creating the school by preparing and filing an application with the New York Department of Education that included detailed information about the proposed school and then putting into effect documents concerning its governance and operations. The Board found that the action of New York State Board of Regents in granting the school a charter did not constitute a governmental act of creation nor that the conduct

114. Id. at 7.
115. See id. at 5-6. Since the Board found that the state had not created the school, it found it unnecessary to address the other element of the first prong: whether the school qualified as a governmental department or administrative arm. Id. at 6. Nonetheless, the Board found that the school would not meet this qualification either, finding that the school’s relationship with the state government was “akin” to that of a contractor. Id.
116. Id. at 7.
117. Id. at 3.
120. Id. at 5.
of governmental entities in funding or contracting with it otherwise exempted the school from the Board’s jurisdiction.\footnote{121} Regarding the second Hawkins County prong, the Board found that the school was not administered by individuals who are responsible to public officials or the general electorate because the school’s founder selected the members of its initial board (which was only then approved by the Board of Regents) and the sitting board had the power to appoint new trustees to fill vacancies or to remove current trustees using processes set out in its by-laws.\footnote{122} The Board found that the Regents’ authority under New York law to remove charter school trustees for malfeasance law did not constitute “direct personal accountability” because it applies to all New York educational institutions, both public and private.\footnote{123}

Member Miscimarra dissented, stating that he would find that the charter school met both prongs of Hawkins County.\footnote{124} Regarding the first prong, Member Miscimarra pointed to New York state law as empowering the Board of Regents to bring a charter school into existence by both approving the school’s charter application and incorporating it as an education corporation.\footnote{125} In addition, he relied on other circumstances to indicate that state law recognizes charter schools to be “public” schools, such as the Charter School Act characterizing charter schools as political divisions of the state, and the public school system providing almost all of the school’s funding.\footnote{126} Regarding the second prong, political accountability, Member Miscimarra relied on the authority of the Board of Regents to approve a charter school’s initial board of trustees and to remove a trustee for certain misdeeds as well as the school’s charter agreement authorizing the New York City School Chancellor to name replacement members to the school’s board.\footnote{127}


\footnote{122} Hyde Leadership, slip. op. at 6-7.

\footnote{123} Id., slip op. at 7.

\footnote{124} Id., slip op. at 9 (Miscimarra, Member, dissenting).

\footnote{125} Id., slip op. at 11.

\footnote{126} Id., slip op. at 12 n.35.

\footnote{127} Id., slip op. at 13.
In the three years since the Board asserted jurisdiction over the charter schools in *Hyde Leadership* and *Pennsylvania Virtual*, the Board denied review in eleven representation cases involving charter schools. Each time, the Board majority found that the charter school at issue was not an exempt political subdivision under Section 2(2); former Member Miscimarra, in turn, referenced his corresponding dissents in several cases. In doing so, the Board demonstrated its willingness to apply its interpretation of the test to a variety of different forms of charters created and operated under different state charter school laws, finding both the governance of the schools and the state statutes to be sufficiently similar to their counterparts in *Hyde Leadership* and *Pennsylvania Virtual*. The Board also denied review over a trio of cases involving charter schools located in New Orleans, where after Hurricane Katrina devastated the city in 2005, the State of Louisiana utilized existing laws to convert ninety percent of the city’s public schools into charter schools. Despite Louisiana’s public policy in favor of transforming public schools into charters, the Board denied review of the regional directors’ decisions, 


129. *E.g.*, Advocs. for Arts-Based Educ. Corp., 2017 WL 971632. The Board also rejected invoking Section 14(c)(1) in many of these cases and declined to use its discretionary authority to decline jurisdiction. *Id.* In an unfair labor practice case, the Board found a Texas charter school to be exempt. LTTS Charter Sch., Inc., 366 N.L.R.B. No. 38, slip op. at 1 n.1 (Mar. 15, 2018). Shortly thereafter, in another unfair labor practice case, the Board asserted jurisdiction over an Arizona charter school. Excalibur Charter Sch., Inc., 366 N.L.R.B No. 49, slip op. at 1 (Mar. 29, 2018).


based on similarities in the schools’ governance and state statutes with *Hyde Leadership* and *Pennsylvania Virtual*.\footnote{132}{Advocs for Arts-Based Educ. Corp., slip op. at n.1; Better Choice Found., at n.1.}

One of the Louisiana cases occasioned the single instance (so far) of federal appellate review of the Board’s application of the *Hawkins County* test to charter schools. In *Voices for International Business and Education, Inc. v. NLRB*, the Fifth Circuit upheld both prongs of the *Hawkins County* test as consistent with the common meaning of “political subdivision” insofar as “ultimate authority over policy-making remains with the public.”\footnote{133}{Voices for Int’l. Bus. & Educ., Inc., 905 F.3d at 773-74.} The court emphasized that the public did not select the directors who set policy for the school because the charter school’s board of directors was self-perpetuating.\footnote{134}{Id. at 774.} The court approvingly characterized the Board’s approach as elevating “public creation” and “public control” to be the “predominant consideration[s]” in indicating whether there is public or private control of policymaking.\footnote{135}{See id. at 776.} Although charter schools are part of the public school system (noting that in post-Katrina New Orleans, charters constitute ninety percent of all the public schools), the court found that they are not politically accountable to the state and thus the state lacks political influence over them.\footnote{136}{See id. at 777, 777-78.} This situation reflects a legislative choice in Louisiana’s charter school statute.\footnote{137}{Id. at 778.} “Private control was not a bug of that law; it was a reason for it.”\footnote{138}{See id. The concurring member of the circuit panel agreed with the result, but later criticized the Board for asking the court to defer to the Board’s interpretation of the NLRA under the *Chevron* doctrine rather than relying on congressional direction to find such “unambiguously private entities” to be subject to collective bargaining. See id. at 778-81 (citing *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (Ho, J. concurring)). Contrary to the concurrence, the court majority relied less on deference to the Board’s application of the *Hawkins County* test (and its interpretation of Section 2(2)) and more on its own view of the role of political accountability in defining the private versus public status of an employer under Section 2(2). See id. at 773-74, 778.} In the absence of political accountability over policymaking, the court found the charter school was not a political subdivision under Section 2(2) of the NLRA.\footnote{139}{See TAYLOR, supra note 55, at 733-34.}

The only time the Board found a charter school to be an exempt public subdivision occurred in an unfair-labor practice case rather than in a
representation case. In LTTS Charter School, Inc. d/b/a Universal Academy, the Board affirmed an administrative law judge’s finding that a Texas charter school was exempt from the Board’s jurisdiction. The Board agreed with the judge that the Texas Commission of Education, a public agency, could, under certain conditions, reconstitute the school’s governing body by its authority to appoint new members or retain incumbent members. Further, the Board found that the Texas Education Code specifically granted the Commission of Education this authority as to charter schools under particular conditions—in contrast, the removal authority at issue in Hyde Leadership provided the New York Board of Regents only with the authority to remove board members for malfeasance from any educational corporation created under the Regents’ authority. Accordingly, the Board found that the school to be exempt under the second prong of the Hawkins County test.

4. The Hawkins County test as a rule

In terms of rules versus standards jurisprudence, the Board is clearly interpreting Section 2(2)—and the Hawkins County test—as a rule-based approach to determining jurisdiction. Indeed, the Board in Pennsylvania Virtual and Hyde Leadership has considerably tightened its application of the Hawkins County test, moving away from its use of evaluative criteria in its earlier use of the test. For example, in State Bar of New Mexico, the Board took account of the attorney bar association’s public purpose in regulating the legal profession in determining the relationship between the state and the bar association. In Cape Girardeau Care Center, the Board evaluated the circumstances regarding the county government’s authority to approve the care center’s directors to determine whether it was ministerial in character. In the charter school context, however, the Board has limited itself to examining only the processes of creation and appointment or removal of governing board members and moving away from assessing the purpose—as advocated in Member

141. Id.
142. Id. The New York Board of Regents’ authority to grant the status of “educational corporation” extends to both public and private entities. See id.
143. Id. at 3.
Miscimarra’s dissents—behind the state’s relationship with the charter schools at issue.\textsuperscript{148} As noted earlier, rules and standards can exist on a continuum, with evaluative aspects playing a role in a rule despite its natural role in the operation of a standard.\textsuperscript{149} Further, as noted earlier, standards that produce the same result upon iteration often “crystallize” into rules.\textsuperscript{150}

The Board’s decision to apply a “rule” approach when assessing whether to assert jurisdiction over individual charter schools was not inevitable. By way of contrast, by examining the broader circumstances of the charter school’s relationship with state entities, the federal courts have essentially opted to apply a “standard” approach when trying to determine whether a charter school is a state actor for Section 1983\textsuperscript{151} civil action, or any other constitutional litigation. In \textit{Greater Heights Academy v. Zelman}, the Sixth Circuit upheld the district court’s dismissal of a Section 1983 lawsuit by two Ohio charter schools that alleged three Ohio government officials had denied them due process when they withheld “per pupil” payments from the schools without a hearing.\textsuperscript{152} The court found charter schools to be “part and parcel” of Ohio’s public education system and therefore these schools could not accuse the state officials of depriving them of their rights under the Fourteenth Amendment of the United States Constitution\textsuperscript{153} (including due process of law).\textsuperscript{154} In doing so, the court relied on such circumstances as: the Ohio statute and the Ohio Supreme Court’s designating charter schools as political subdivisions; state control over their creation, student testing requirements, and health and safety standards; state approval of school sponsors to oversee the schools; state funding through taxation; and the legal requirement that charter schools must be open to all residents, non-sectarian, and non-discriminatory.\textsuperscript{155}

In \textit{Caviness v. Horizon Community Learning Center, Inc.}, the Ninth Circuit affirmed the federal district court’s decision dismissing a former

\begin{footnotesize}
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\item\textsuperscript{148} See, e.g., \textit{Hyde Leadership}, slip op. at 12 n.32 (Miscimarra, Member, dissenting) (noting that the school was incorporated for educational purposes); \textit{Pa. Virtual Charter Sch.}, slip op. at 13 n.13 (Miscimarra, P., dissenting) (noting that the purpose here was to provide K-12 education.)
\item\textsuperscript{149} Sullivan, \textit{supra} note 19, at 61.
\item\textsuperscript{150} Id. at 62.
\item\textsuperscript{151} 42 U.S.C. § 1983 (civil action for deprivation of civil rights).
\item\textsuperscript{152} Greater Heights Academy v. Zelman, 522 F.3d 678, 681 (2008).
\item\textsuperscript{153} Id.; U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").
\item\textsuperscript{154} Greater Heights Acad., 522 F.3d 678 at 680 (citing City of Trenton v. New Jersey, 262 U.S. 182, 186-87 (1923), describing a state as supreme "[w]ith respect to its political subdivisions.").
\item\textsuperscript{155} Id. at 680-81; OHIO REV. CODE ANN. §§ 2744.01(F), 4117.01(B) (West 2016); State \textit{ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.}, 857 N.E.2d 1148, 1165 (2006).
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teacher’s Section 1983 complaint. The complaint had alleged that the charter school acted under color of state law when it allegedly violated his constitutional rights (i.e. liberty, due process, and freedom to associate) by declining to renew the teacher’s contract without a hearing. The Ninth Circuit found an insufficiently close nexus between the state and the charter school’s conduct toward its former teacher, but unlike the Sixth Circuit in Greater Heights Academy, it focused on whether the charter school’s role as an employer constituted state action, rather than examining the broader relationship between the state and the charter school. The court found insufficient evidence that the state was involved in the employment actions at issue or that any of its “substantive standards or procedural guidelines . . . ‘compelled or influenced’” the employment actions undertaken by private parties. The court also found that statutory and administrative characterization of charter schools as “public educational services” was not dispositive. The court therefore agreed with the lower court that the discharged teacher had not demonstrated that the charter school was a state actor and therefore the school had no obligation to provide him with due process (i.e., notice or hearing) before acting against him.

The contrast with the federal courts’ approach illustrates that, on a jurisprudential level, the Board has opted for a “rule” approach to determining political subdivision status based on relatively narrow characteristics as opposed to a “standard” approach weighing broader characteristics. Unlike the Greater Heights Academy decision, in which the Sixth Circuit assessed the broader circumstances regarding the charter schools’ relationship with the state, the Board’s application of the Hawkins County test does not consider the manifold circumstances connecting charter schools to the state and local governments, such as education policy, finance, and regulation. In the Caviness decision, while the Ninth Circuit did not take in the wide range of circumstances utilized in Greater Heights Academy, it still examined a broader set of circumstances than the Haw-

157. Id.
158. Caviness, 590 F.3d at 812, 814, 816, 818; Greater Heights Acad., 522 F.3d 678 at 680.
159. Caviness, 590 F.3d at 818. The court also noted that the Arizona charter school statute exempts charter schools from statutes and rules governing public school governing board and school districts, including those regulating the employment rights of teachers. Id. at 817 (citing ARIZ. REV. STAT. § 15–183(E)(5)).
160. Id. at 814.
161. Id. at 818.
162. See id. at 809-10; Greater Heights Acad., 522 F.3d 678 at 679, 681.
kins County test in determining state involvement with the adverse employment action at issue.163 The Board’s application of the Hawkins County "rule" rather than the "standard" utilized by the federal courts can be explained by the narrower connotation of the NLRA Section 2(2)'s use of the term "political subdivision" (indicative of entities placed within a governmental structure) versus the broader ambit of "state actor" for Section 1983 purposes (implying the inclusion of private entities that could be only acting on behalf of the state).164 It could also be presumed that a judicial court of general jurisdiction will naturally feel empowered to decide legal questions on a broader basis than an administrative agency, such as the NLRB, created by statute to determine a narrower body of law.165 As will be seen in this Article’s next Part, Section 14(c)(1) of the NLRA permits the Board—in theory—to consider these broader circumstances in determining whether to decline jurisdiction over an entire class of employers, but the Board—for reasons of past practice and precedent—has declined to do so regarding charter schools.166

C. NLRA Section 14(c)(1)

1. Legislative Background

The NLRA provides the Board with jurisdiction over all enterprises whose impact on interstate commerce is more than de minimis,167 but, as a matter of administrative policy in order to conserve its resources, the Board declines to exercise its jurisdiction over employers which it considers as having an insubstantial effect on interstate commerce.168 The Board most often uses its published jurisdictional standards to determine whether to assert or decline jurisdiction over employers otherwise within its statutory jurisdiction.169 Depending on the category of the relevant enterprise, the jurisdictional standards provide that the Board will assert jurisdiction over an employer based on its purchase or sale of set monetary levels of goods and services coming into or going out of the employer’s home state (known as "inflow" and "outflow") and/or gross volume of

166. See infra Sections II.C.1., II.C.2.
169. Id.
business or revenues. Apart from its published standards, Section 14(c)(1) of the NLRA authorizes the Board to exercise its discretion to decline jurisdiction over entire industries, that is, "over any labor dispute involving any class or category of employers" that it deems as having an insufficiently substantial effect on interstate commerce.

Congress enacted Section 14(c)(1) and (2) in 1959 as part of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). In passing Section 14(c)(1) and (2), Congress sought to resolve the so-called "no-man's land" problem caused by the interaction of the Supreme Court's expansion of federal preemption of state labor regulation and the Board's introduction of monetary standards in which it declined jurisdiction over smaller employers. In *Guss v. Utah Labor Relations Board*, the Supreme Court held that the NLRA "preempt[ed] the field" regarding its provisions and thus prevented state courts or state administrative agencies from dealing with potential violations under state labor relations law or state regulations even where the NLRB had declined jurisdiction under its jurisdictional standards. This situation created a "no-man's land"

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170. *Id.* at 84. In its first years of existence, the Board declined jurisdiction exclusively on a case-by-case basis, but in 1950, it first introduced published jurisdictional standards setting the parameters for an enterprises' impact on interstate commerce, which it has subsequently updated. *Id.* at 83 n.7; OFF. OF GEN. COUNS., NAT'L LAB. REL.'S BD.: AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES § 1-201, at 2 (2017).

171. 29 U.S.C. § 164(c)(1). The Board can also assert its non-statutory authority to decline jurisdiction over individual employers in a particular case when it decides "that 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); e.g., Nw. Univ., 362 N.L.R.B. 1350, 1352 (2015) (explaining that the Board declined to assert jurisdiction over football players/students at a private university because they participated in a collegiate sports division that included both public and private universities); see also Temple Univ., 194 N.L.R.B. 1160, 1161 (1972) (explaining that the Board declined to assert jurisdiction over a university based on "its unique relationship" with the state of Pennsylvania which transformed the ostensibly private university into a quasi-public institution).

172. § 164(c)(1). The accompanying language in Section 164(c)(2) states: "Nothing in this Act [subchapter] shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." 29 U.S.C. § 164(c)(2).

The primary purpose of the LMRDA, also known as the Landrum-Griffin Act, was to protect the interests of union members by imposing various reporting requirements on unions and to promote union democracy by providing standards for union officer elections and union trusteeships. H.R. Rep. No. 741, at 5 (1959). It also amended the NLRA, most relevantly to this Article by addressing the no-man's land problem discussed above, but also by clarifying the Taft-Hartley provisions concerning secondary coercion. *Id.*

173. *See id.* at 17-8; Bernard Meltzer, *Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6, 55-60 (1959) (discussing preemption issue and "no man's land" problem prior to the enactment of Section 14(c)(1)-(2)).

174. *Guss v. Utah Lab. Rel.'s Bd.*, 353 U.S. 1, 10 (1956). At the time of the *Guss* opinion, Congress had already enacted Sec. 10(a) as part of the Taft-Hartley amendments that permitted the NLRB
where certain employers (and their employees) were denied a federal forum for the resolution of labor disputes because their effect on commerce was too small, but they were also unable to turn to the States for alternative relief because the NLRA nonetheless "occupied the field" and preempted state labor law.Congress feared that the Board’s published jurisdictional standards would also deprive smaller employers of the protections enacted in the Taft-Hartley Act while the preemption doctrine would deprive them of analogous state labor law protections. To untie this knot, Congress enacted Section 14(c)(1) as part of LMRDA to permit the Board to decline jurisdiction on an industry-wide basis (i.e., classes or categories of employers) and Section 14(c)(2) to empower state agencies to assert jurisdiction over the disputes excluded from Board adjudication.

In defining the parameters of the Board’s authority to decline jurisdiction, Congress used the phrases "in its discretion" and "in the opinion of the Board." These phrases extend the Board’s authority to determine the effect of an industry on commerce beyond merely applying a set monetary value to "[enacting] policy decisions about how best to effectuate the purposes of the national labor laws, decisions informed by its special
to enter into cession agreements with state labor agencies to cede jurisdiction over labor disputes except where the section of the state labor statute is "inconsistent" with the "corresponding provision" of the NLRA. See 29 U.S.C. § 160(a) ("Provided, that the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.")

In Guss, the Court identified cessation agreements as the exclusive means that would permit states to act concerning matters entrusted to the Board. Guss, 353 U.S. at 9. In actuality, the NLRB has never entered into a cession agreement with any state agency, but has always found the relevant state labor statute to lack sufficient correspondence to the NLRA. See in re State of Minnesota, 219 N.L.R.B. 1095, 1096 (1975) (state statute prohibited strikes and lockouts and provided for binding arbitration); Kaiser-Frazer Parts Co., 80 N.L.R.B. 1050, 1052 (1948) (state statute did not include anti-communist provisions comparable to those then-contained in Sec. 9(f), (g), and (h) of the Act). See OFF. OF GEN. COUNS., NAT’L LAB. REL.’S BD.: AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, at 2 (2017) ("Board authority to cede jurisdiction") (Board plurality notes that “[prior Board] decisions have effectively rendered the proviso a nullity.” citing Produce Magic, Inc., 318 N.L.R.B. 1171, 1172 (1995).


176. See id. at 4. In reality, the Board has not adjusted its jurisdictional standards to keep pace with inflation. Id. Accordingly, these standards exclude very few employers from the Board’s jurisdiction based on the size of their revenues. Id.


178. 29 U.S.C. § 164(c)(1)-(2).
knowledge and expertise.”179 The Second Circuit described the statutory language as indicating a congressional intent that the Board exercise “very broad discretion” that “would ordinarily be unreviewable.”180 The statutory allocation of broad discretion to the Board to determine jurisdiction on a policy illustrates a “standard” approach to decision making.181 In addition, the text of Section 14(c)(1) specifically provides that the Board can decline to assert jurisdiction either by administrative rulemaking or case decision.182

2. Application Generally

Almost immediately after the passage of Section 14(c)(1) in 1959, the Board began utilizing it to decline jurisdiction over entire industries, but also often reversing itself to assert jurisdiction over the industries at issue. In Flatbush General Hospital, the Board declined to assert jurisdiction over for-profit private hospitals, finding them to be “local in character” because they mostly served area residents and state governments closely regulated them in order to protect the health and safety of state residents.183 Only seven years later, in Butte Medical Properties, the Board reversed its decision to decline jurisdiction and asserted jurisdiction over for-profit hospitals.184 Despite the heavy state regulation of hospital construction and patient care, the Board asserted jurisdiction based on the immense and national scope of this industry; the impact of their aggregate purchases on interstate commerce; the interstate travels of health care dollars to-and-from consumers, national insurance companies, and the recently enacted federal Medicare program; and the existence of only minimal state regulation of hospital labor relations.185 In Ming Quong Children’s Center, the Board also initially declined jurisdiction over non-

180. Id. at 52-53.
181. See HART, supra note 1, at 132 (discussing statutory delegations to administrative agencies as requiring “that the rule-making authority must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were only one uniquely correct answer to be found.”).
182. 29 U.S.C. §164(c)(1).
183. Flatbush Gen. Hosp., 126 N.L.R.B. 144, 145-146 (1960). At that time, the Board only asserted jurisdiction over private hospitals if they were located in the District of Columbia, vitally affected national defense, or were an integral part of a larger establishment that met the Board’s jurisdictional standards. Id. at 145.
185. Id. at 267-68.
profit childcare facilities,\textsuperscript{186} and then reversed itself two years later in \textit{St. Aloysius Home}, stating that it would assert jurisdiction over these facilities based on their impact on commerce without reference either to their non-profit status or charitable purpose.\textsuperscript{187}

Of more direct relevance to charter schools, the Board initially declined to assert jurisdiction over providers of childcare programs or schools associated with public education and then reversed itself. In \textit{Pennsylvania Labor Relations Board}, the Board declined to assert jurisdiction over daycare centers that provided minority children of preschool age with programs to increase their preparedness for entering public elementary schools.\textsuperscript{188} The Board found that these programs were “essentially local in character” because the employer’s activities were centered on the local public school system and that any labor dispute associated with the employer would not have a substantial impact on interstate commerce.\textsuperscript{189} Later that year, the Board followed this line of reasoning in two cases (issued on the same day) in which it declined to assert jurisdiction over two state-funded private schools serving children with disabilities based on their “special relationship to the public school system.”\textsuperscript{190} The schools provided state-mandated educational services to these children which the state could not supply in its public school facilities.\textsuperscript{191} The Pennsylvania Department of Education approved and authorized tuition payments to the private schools and set standards regarding such matters as class size, curriculum, staff certification of the professional staff, and materials/equipment/supplies.\textsuperscript{192} The state also regularly evaluated the

\textsuperscript{186} Ming Quong Children’s Center, 210 N.L.R.B. 125, 901 (1974).
\textsuperscript{187} St. Aloysius Home, 224 N.L.R.B. 1344, 1344-45 (1976). In concurring, Member Fanning reiterated his view that the Board had wrongly decided Ming Quong because the Board had already forswn relying on a class of employers’ non-profit status in several earlier cases when they otherwise had a substantial effect on interstate commerce and that the 1974 amendments only highlighted this basic error. \textit{id.} at 1346, n.9 (citing Drexel Home, Inc., 182 N.L.R.B. 1045, 1047 (1970) and Cornell University, 183 N.L.R.B. 329 (1970)). In dissent, Chairman Murphy and Member Penello argued that the Board could act under its discretionary authority under Section 14(c)(1) to decline jurisdiction in harmony with Congress’ positive “attitude” towards charitable, non-profit, and non-commercial enterprises, as illustrated by the legislative history of both the 1947 Taft-Hartley and the 1974 healthcare amendments. \textit{See id.} at 1346-48.
\textsuperscript{189} \textit{id.}
\textsuperscript{191} \textit{Overbrook Sch.}, 213 N.L.R.B. at 512; \textit{Pa. Sch.}, 213 N.L.R.B. at 514.
\textsuperscript{192} \textit{Overbrook Sch.}, 213 N.L.R.B. at 511; \textit{Pa. Sch.}, 213 N.L.R.B. at 513.
schools' compliance with these standards and neither school accepted private payment of tuition nor participated in any commercial enterprises. The Board found that, though private in form, "the thrust of [each school's] educational activities is to supplement the school facilities and educational program of the public school system." The Board concluded that the Pennsylvania Department of Education exercised "substantial and direct control" over these private schools' operations; that the schools' activities were "essentially local;" and did not substantially impact interstate commerce; therefore, the Board exercised its discretion under 14(c)(1) to decline jurisdiction.

Only a few years later in *D.T. Watson Home for Crippled Children*, the Board reversed its policy regarding private schools providing special education services. While acknowledging that the employer's relationship with the Commonwealth of Pennsylvania resembled that described in *Overbrook* and *Pennsylvania School*, the Board held that, pursuant to its recent decision in *National Transportation Service Inc.*, it would no longer decline jurisdiction based on its assessment of the purposes of the services provided by an employer to the exempt entity (in this case, the state government). Further, the Board in *National Transportation Service Inc.* stated that "nothing in the legislative history of this provision indicates any congressional intent that the Board decline to assert jurisdiction over any employer solely because of the relationship between services it provides to an exempt entity and the purposes of such entity." Instead, the Board would assert jurisdiction where the particular employer met the Section 2(2) definition of "employer" and possessed sufficient

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195. *Overbrook Sch.*, 213 N.L.R.B. at 512; *Pa. Sch.*, 213 N.L.R.B. at 514; see also Laurel Haven Sch. for Exceptional Child., Inc., 230 N.L.R.B. 1197, 1198-99 (1977). The Board cited both *Overbrook School* and *Pennsylvania School* in their decision to decline jurisdiction over a Missouri school for children with developmental issues (albeit without citing Section 14(c)(1)). *Id.* at 1198-99.


197. *D.T. Watson Home*, 242 N.L.R.B. at 1369 n.7-8, 1370 (first citing *Overbrook School*, 213 N.L.R.B. at 511; then citing *Pennsylvania School*, 213 N.L.R.B. at 513) (finding that unlike the employers in *Overbrook School* and *Pennsylvania School*, the D.T. Watson School accepted private tuition payments from non-state approved students.).


control over the employment conditions of its employees to enable it to bargain with the union. \(200\) The Board found that, insofar as they were inconsistent with this rationale, the *Overbrook* and the *Pennsylvania School* cases were no longer controlling. \(201\) The Board found that, despite the state’s oversight and financial role in the home’s operations, the employer retained sufficient control over the employment conditions of its employees and therefore asserted jurisdiction over the employer. \(202\)

The most prominent—and longest lasting—incident where the Board has invoked Section 14(c)(1) to decline jurisdiction occurred via administrative rulemaking in 1973 when the Board declined to assert jurisdiction over the horse-racing and dog-racing industries. \(203\) In its rulemaking, the Board relied on three characteristics of these industries as justifying declining jurisdiction over them. \(204\) First, the states exerted extensive state control over racetrack operations, that included employee licensing and policing the sport’s integrity. \(205\) Second, both horse-racing and dog-racing’s pattern of short-term employment (high percentage of temporary employees, high turnover, short workhours, and brief or sporadic employment) indicated that the two industries exerted only a minimal impact on interstate commerce and that the Board would probably encounter administrative problems in applying the NLRA to these short-term employees. \(206\) Third, the actual occurrence of only a few labor disputes in these industries supported the Board’s earlier finding that the impact of labor disputes on these industries would be insubstantial. \(207\) The Board declined jurisdiction based on both a close relationship to and regulation by local government and because Board jurisdiction would “not substantially contribute to stability in labor relations.” \(208\) Despite subsequent criticism

\(200\) *D. T. Watson Home*, 242 N.L.R.B at 1370 (citing *National Transportation*, 240 N.L.R.B. at 565). Several years later, in *Management Training Corp.*, the Board abandoned the control test altogether and stated that it would assert jurisdiction if the employer qualified under Sec. 2(2) of the Act and would assume that the parties themselves could determine if effective bargaining was feasible. Mgmt. Training Corp., 317 N.L.R.B. 1355, 1358 (1995); see NLRB v. Young Women’s Christian Ass’n of Metro. St. Louis, 192 F.3d 1111, 1116-19 (8th Cir. 1999) (delineating and approving the Board’s change in course).

\(201\) *D. T. Watson Home*, 242 N.L.R.B. at 1370.

\(202\) Id.

\(203\) Declination of Assertion of Jurisdiction 38 Fed. Reg. 9537, 9537 (Apr. 17, 1973) (the racing rule). The Board had earlier declined jurisdiction over these industries in a series of cases dating back to 1950. Id. at 9537 n.5, (citing L.A. Turf Club, Inc., 90 N.L.R.B. 20 (1950) and subsequent cases).

\(204\) Id.

\(205\) Id.

\(206\) Id.

\(207\) Id.

\(208\) Id. Chairman Fanning did not join in the Board’s conclusion to decline to assert jurisdiction over the horse-racing and dog-racing industries, relying on his earlier dissent in Centennial Turf Club,
of this rulemaking from several Board members, the Board has never overruled this rule. Nonetheless, the Board has rejected Section 14(c)(1) declination in cases involving similar industries when it found that labor disputes in the industries at issue were likely to substantially impact interstate commerce and that extensive state regulation and close oversight could coexist with the Board’s assertion of jurisdiction.

3. Application to Charter Schools

As with its initial application of the Hawkins County test to charter schools, the Board first declined to apply Section 14(c)(1) to the charter

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Inc., 192 N.L.R.B. 698, 699 (1971), in which he declined the majority’s reliance on state regulation of the industries in light of the Board’s assertion of jurisdiction over employees in the gaming industry despite similar intensive state regulation. Id. (citing El Dorado Club, 151 N.L.R.B. 579 (1965)). He also noted the Board’s assertion of jurisdiction over other industries in which it had previously declined jurisdiction, such as private hospitals and nursing homes, non-profit colleges/universities, and professional baseball. Id. (internal citations omitted).

209. Am. Totalisator Co., Inc., 243 N.L.R.B. 314, 314-15 (1979). In Elliot Burch, the NLRB issued an advisory opinion regarding a petition to represent racetrack employees pending before the New York State Labor Relations Board in which the NLRB stated that it would continue to decline jurisdiction. Elliot Burch, 230 N.L.R.B. 1161, 1161-62 (1977). In concurring on procedural grounds, Chairman Fanning noted his continued disagreement with the Board’s rule, pointing to the enormous monetary and interstate impact of horseracing involving tens of million attendees at racetracks, hundreds of millions in revenues, and billions in pari-mutual betting as well its resulting impact on other industries in commerce, such as the food service companies supplying racetrack concessions. Id. at 1162. He quipped “how many hot dogs do 43,147,257 people eat?” Id. at 1163 n.6. He also pointed out the recent rise in labor disputes in horseracing itself, despite its regulation by the states. Id. at 1162. Subsequently, several Board members expressed interest in reversing the Racing Rule, but the Board has never done so. Am. Totalisator Co., 243 N.L.R.B. at 314-15 (Members Fanning and Truesdale dissenting); Del. Racing Ass’n, 325 N.L.R.B. 156, 156 (1997) (Chairman Gould, concurring). Although the Racing Rule remains in effect, the Board now asserts jurisdiction over racetracks that no longer operate primarily as racetracks because they have added gambling casinos to their facilities. Yonkers Racing Corp., 355 N.L.R.B. 225, 227 (2010).

210. See, e.g., Am. League of Pro. Baseball Clubs, 180 N.L.R.B. 190, 190 (1969) (scope of the operations of a professional baseball league and its member teams are clearly national in scope and ought not be subject to diverse state laws; future labor disputes likely to be national in scope beyond individual state boundaries).

211. Volusia Jai Ala, Inc., 221 N.L.R.B. 1280, 1282 (1975). The State of Florida regulated the jai alia industry through its Division of Pari-Mutual Wagering which ensured the frontons’ compliance with state regulation through on-site oversight by state employees permanently employed at the fronton. Id. Florida also directly regulated many aspects of the frontons’ operations including licensing employees, annually approving the continued employment of some of the managers, and directly intervening in labor disputes (including providing a right of appeal of discharges and suspensions as well as engaging in strike resolution efforts). Id. The state also directly shared in the proceeds from the frontons’ gambling operations. Id. at 1280-82. In asserting jurisdiction, the Board also noted the relevance of its prior assertion of jurisdiction over state-regulated gambling casinos. Id. (citing El Dorado Club, 151 N.L.R.B. 579 (1965)).
school industry in a non-precedential decision, *Chicago Mathematics*. The Board majority relied on the resemblance of the charter school at issue to a government contractor that retained control over most of its employment matters, but still remained subject to “exacting oversight” by governmental bodies through statutes, regulations, and agreements. The majority viewed the Chicago School Board as exerting only limited control over the charter school and noted that the charter agreement itself recognized the school’s retention of a private appointment power over its governing board. As for the Racing Rule, the majority found that the rulemaking did not establish a general standard for the Board to exercise its discretion to decline jurisdiction. Instead, the Board majority relied on the particular circumstances of the racetracks’ operations, especially their use of short-term employment as tending to both minimize their impact on commerce and to hinder the Board’s ability to oversee the tracks’ labor relations. The majority stated that it “should act with great care” when depriving employees of the benefits of the Act, even where private entities perform “important public work subject to extensive government control.” Finally, the majority pointed out that neither the State of Illinois nor any local agency had sought to enter into a cession agreement with the Board for it to cede its jurisdiction to a state agency under Section 10(a) of the Act.

In his dissent, Member Hayes responded that the Board should decline jurisdiction under Section 14(c)(1) because charter schools resembled the horse- and dog-racing industries based on: its integrated and highly-regulated relationship with the state government and the local

212. *Chi. Mathematics & Sci. Acad.*, 359 N.L.R.B. 455, 455 (2012). In an earlier case, Charter School Administration Services, Inc., 353 N.L.R.B. 394 (2008), the two-member Board (Chairman Schaumber and Member Lieberman) similarly found that a company that managed charter schools located in several states was not an exempt public subdivision under the *Hawkins County* test. The Board did not directly discuss declining jurisdiction but rejected the Regional Director’s statement that asserting jurisdiction over the employer “would create policy and legal issues unique to education involving State legislation and outside the Board’s expertise and mission.” *Id.* at 399 n.21 (internal quotations omitted). This case is non-precedential because it was issued by a two-member Board. *Id.* at 455.

213. *Chi. Mathematics & Sci. Acad.*, 359 N.L.R.B. at 464 (“In many, if not most, respects, this charter school case is not much different from other Board cases involving government contractors. Many government contractors are subject to exacting oversight in the form of statutes, regulations, and agreements. Yet the Board routinely asserts jurisdiction over private entities that provide services, under contract, to governmental bodies.”).

214. *Id.* at 457-58.

215. *Id.* at 465.

216. *Id.*


218. *Id.* at 465-66.
school district and the school’s fundamentally local nature. Member Hayes pointed to several characteristics of the charter school-government relationship as indicating an “entwinement” and a “special relationship” with state and local government comparable to that found in Temple University. These characteristics include the state having authorized the creation of charter schools to serve as an integral part of the public school system; its extensive regulation of their operations (including its labor relations and financing); and its classification of charter school as public schools and its employees as public employees (including imposing on them some of the same legal requirements applied to the public sector).

As with the Hawkins County test, the Board first discussed Section 14(c)(1) in the charter school context in a precedential decision in Pennsylvania Virtual. In asserting jurisdiction over the Pennsylvania cyber charter school at issue, the Board majority rejected invoking Section 14(c)(1) in order to decline jurisdiction over the school. They found that cyber charter schools exerted a substantial effect on commerce, noting that the Pennsylvania Virtual Charter School—one of thirteen cyber charter schools in Pennsylvania—taught 3,000 students with an operations budget in the millions of dollars. The majority also found that the state did not mandate the establishment of charter schools, but merely permitted others to create them as an alternative to state schools. They also rejected the proposition that because K-12 education is local in nature, any labor disputes involving charter schools would have only localized effects based on the schools “unique and special relationship” with state governments. The majority demurred from analogizing charter schools with the Board’s declination of jurisdiction over the horse and dog-racing industries, finding the latter to be a response to the unique na-

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219. Id., (first citing Seattle Real Estate Board, 130 N.L.R.B. 608 (1961); then citing United States Book Exchange, 167 N.L.R.B. 1028 (1967); and then citing Evans & Kuntz, Ltd., 194 N.L.R.B. 1216 (1971) (citing to similar cases where the Board declined jurisdiction in regards to real estate, book exchanges, and small law firms respectively).
220. Id. at 467
221. Id.
223. Id. at 1 (3-2 decision) (consisting of Chairman Pearce and Members Hirozawa and McFerran).
224. Id. at 9.
225. Id.
226. Id.
227. Id.
ture of those industries and the states’ interest in maintaining their integrity.\(^{228}\) The majority instead found that state and local regulatory oversight of charter schools to be more “akin” to the “exacting oversight” imposed by governments over their contractors and that this kind of oversight does not prevent the Board from routinely asserting jurisdiction over government contractors.\(^{229}\)

In dissent, Member Miscimarra relied on two clusters of policy rationales as supporting declining jurisdiction under Section 14(c)(1).\(^{230}\) First, charter schools as a “class or category” have an insubstantial effect on commerce because state and local issues predominate in issues relating to their “creation, structure and operation” and, as with the horseracing and dog-racing industries, “they are peculiarly related to, and regulated by, local governments.”\(^{231}\) He also argued that the charter schools are local in nature because they are an “integral component of the K-12 system of public education, in that they are tuition-free, open to all children, are funded on a per-student basis, and state/local authorities regulate and oversee them.”\(^{232}\) Member Miscimarra would find that the state and local nature of charter operations indicated that labor disputes will have a largely localized effect, assisted by state laws that often serve to minimize the disruptive effect of labor disputes by limiting public school teachers’ right to strike.\(^{233}\) Member Miscimarra brushed aside charter schools’ status as government contractors, arguing that the Board’s decision in Management Training to overrule the “right to control” test made regulatory oversight a non-issue.\(^{234}\) Second, Member Miscimarra argued that the fact-specific requirements of the Hawkins County test required the Board to painstakingly examine the facts and state laws relevant to each charter school and thus created considerable uncertainty regarding whether they should be regulated under the NLRA or state law.\(^{235}\) In his view, the Board should avoid the delay and uncertainty of applying the Hawkins

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228. Id. at 9-10.
229. See id. at 10.
230. See id. at 11 (Miscimarra, Member, dissenting).
231. See id. at 11, 13 (citing Hialeah Race Course, Inc., 125 N.L.R.B. 388, 391 (1959); 38 Fed. Reg. 9537, 9537.)
232. See id. at 13.
233. See id. at 14 (pointing out that 14(c)(1) declinations should be based not just on “dollar volume of business in interstate commerce,” but whether state regulation reduces labor disputes to an “insignificant” effect on commerce (citing the New York Racing Ass’n, Inc. v. NLRB, 708 F.2d 46 (2d Cir. 1983))).
234. See id. at 15 (citing Management Training Corp., 317 N.L.R.B. 1355 (1995)).
235. See id. at 12, 15.
County test over multiple charter schools over years of litigation and instead permit state governments to align the labor relations of charter school employees with those of public sector employees.\textsuperscript{236} Subsequent to its decision in Pennsylvania Virtual, the Board has declined to invoke Section 14(c)(1) and has instead asserted jurisdiction over charter schools under the Hawkins County test.\textsuperscript{237} In Kipp Academy Charter School, several employees of a charter school located in New York City filed a decertification petition against a union certified as the employees’ bargaining representative under New York State’s labor relations statute governing public sector employees.\textsuperscript{238} After the NLRB’s Regional Director asserted jurisdiction over the school under Section 2(2) of the Act, the Board initially granted the union’s request for review in order to consider whether to change its position and invoke Section 14(c)(1) in order to decline jurisdiction over charter schools as an industry.\textsuperscript{239} After the parties and amici curiae (including several charter schools and the AFL-CIO) filed briefs on review, the Board “determined not to exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) at this time” and affirmed the Regional Director’s assertion of jurisdiction without any substantive discussion.\textsuperscript{240}

4. 14(c)(1) as a Standard – Foreclosed by the Board’s Prior Policy Path

Dissenting Board members and the Kipp Academy litigants (both parties and amici curiae) have provided the raw materials for constructing a standard for declining jurisdiction under Section 14(c)(1) over charter schools as “a class or category” consisting of four rationales.\textsuperscript{241} First, that charter schools are “entwined” with state and local governments.\textsuperscript{242} Sec-

\textsuperscript{236} See id. at 18 (reiterating his Pennsylvania Virtual dissent regarding Section 14(c)(1), arguing that the Board should decline jurisdiction in order to provide the largely local charter school industry with stability and certainty under state public sector jurisdiction). But see Hyde Leadership Charter Sch. - Brooklyn, 623 N.L.R.B. No. 88, slip op. at 8 (Aug. 24, 2016) (issuing on the same day, the same Board majority declined to apply Section 14(c)(1) to a New York charter school and relied on the same reasoning as in Pennsylvania Virtual).


\textsuperscript{238} See Kipp Acad. Charter Sch., No. 02-RD-191760, 2019 WL 656300 (Feb. 4, 2019).

\textsuperscript{239} See id.

\textsuperscript{240} See Kipp Acad. Charter Sch., 2020 WL 1550556, at 1.


ond, that charter schools possess a "special relationship" with these entities.\(^{243}\) Third, that the K-12 education provided in charter schools is a "essentially local in nature" and unlikely to create labor disputes affecting interstate commerce.\(^{244}\) Fourth, and finally, that the Board's inconsistent application of the Hawkins County test to charter schools undercuts the NLRA's goal of imposing "labor stability" through "a single, uniform, national rule."\(^{245}\) By relying on these factors, the Board could, in theory, follow the federal courts' approach in the Zelman case of consulting a broad range of circumstances in determining the nexus between state and local government and charter schools and develop a standard to assess whether the "whole situation" justifies declining jurisdiction over charter schools.\(^{246}\)

For better or worse, the Board is forestalled from using a standard to determine jurisdiction over charter schools by policy decisions set out in its prior precedents. First, Board decisions that require asserting jurisdiction over all government contractors who qualify as employers under Section 2(2) indicate that charter schools' contractual relationship with state and local governments does not sufficiently entwine the schools with them.\(^{247}\) Second, contradicting the supposed special relationships between local/state governments and charter schools, Board precedent has long asserted jurisdiction over private educational entities operating as adjuncts to public school systems.\(^{248}\) Third, the considerable interstate character of some charter operations as well as their funding by the federal government indicates that charter schools' status as K-12 educational entities does not make them local in nature or localize their impact on interstate commerce.\(^{249}\) Fourth, the NLRA's central purpose of establishing a uniform national labor policy contradicts the proposition that the Board will promote labor stability in the charter school industry by declining jurisdiction over them.\(^{250}\)

The Racing Rule and the Temple University decision are most often cited as supporting the entwinement of charter schools with state and local

\(^{243}\) See id at 464.

\(^{244}\) Pa. Virtual Charter Sch., 364 N.L.R.B. No. 87, slip op. at 13-14 (Miscimarra, Member, dissenting).


\(^{246}\) Sunstein, supra note 41, 999-1000.

\(^{247}\) See infra text accompanying notes 268-273.


\(^{249}\) See infra text accompanying notes 280-285.

\(^{250}\) See Loc. 926, Int'l. Union of Operating Eng'rs, AFL-CIO v. Jones, 460 U.S. 669, 681 (1983) ("Matters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide. This implements the congressional desire to achieve uniform as well as effective enforcement of the national labor policy.") (emphasis in original).
government as justifying the Board declining jurisdiction. But the Board has found that neither precedent are apposite to the charter school industry because of the more attenuated relationship between charter schools and state and local governments in comparison to that between the state governments and the horse and dog racing industries and the university at issue in those precedents. In Pennsylvania Virtual and Hyde Leadership, the Board majority stated the Racing Rule has not served as a template for declining to assert jurisdiction in any other industries involving heavy state regulation. Indeed, the Board has consistently declined to extend the underlying reasoning of the Racing Rule to employers even within the entertainment industry where the state exercised a significant role in preserving their "integrity" (i.e., making sure matches are not fixed, gambling is conducted honestly, and the state is not cheated of its shares of gaming revenues). Thus, states directly control aspects of gaming industries to ensure their integrity while state and local governments act more circumspectly vis-à-vis charter schools by specifying desired educational services and operations through contractual agreements. In the Kipp Academy case, the employer Kipp School itself pointed out that, unlike the racetracks discussed in the Racing Rule, the School does not generate any revenue for the New York Department of


255. See Volusia Jai Ala, Inc., 221 N.L.R.B. 1280, 1280-81 (1975) (fronton with pari-mutual gambling); see also Major League Rodeo, Inc., 246 N.L.R.B. 743, 744 (1979) (professional rodeo circuit). Further, even before issuing the Racing Rule, the Board declined to extend its caselaw declining jurisdiction over the horseracing to gambling casinos or major league baseball. See El Dorado Club, 151 N.L.R.B. 579, 579 (1965); Am. League of Pro. Baseball Clubs, 180 N.L.R.B. 190, 194 (1969).

256. As noted above, the Racing Rule also relies on racetracks relying on a "pattern of short-term employment" which both minimizes the potential effect on interstate commerce and hinders the Board's ability to administer the Act in regard to the horseracing and dog-racing industries. Declination of Assertion of Jurisdiction, 38 Fed. Reg. at 9537. This observation seems dubious as the Board routinely conducts elections and adjudicates unfair labor practices in workplaces that are highly seasonal and utilizes employees on a short-term basis. See Seneca Foods Corp., 248 N.L.R.B. 1119, 1119 n.2-3 (1980) (pattern of regular seasonal employment indicates sufficient community of interest for inclusion in election unit with permanent employees); Baumer Foods, Inc., 190 N.L.R.B. 690, 690 (1971) (employees with reasonable expectation of seasonal employment should be included in election unit).
Education and its employees all have stable long-term employment with the school.257

The Board’s decision in Temple University does not support declining jurisdiction Section 14(c)(1) because the Board only declined jurisdiction over the university as an individual employer rather than exempting it as part of an entire class or category.258 But, insofar as the Board’s reasoning in that case could be “scaled up” to apply to charter schools as a class, it is inapposite because the State of Pennsylvania engaged in a closer and more direct role in Temple University’s financial affairs and its physical operations. In Pennsylvania Virtual, the Board distinguished the facts of Temple University, noting that the state had designated the university as its “instrumentality” and as a “[s]tate-related university,” with substantial involvement in its financial affairs (including holding title to the university’s facilities) and wielding appointment power over one-third of the seats on its board of trustees.259 The state also retained the title to the university’s facilities after directly spending funds to upgrade them.260 Generally state and local governments do not directly influence charter school operations in the manner that the State of Pennsylvania did over Temple’s operations.261 Insofar as the state and local governments directly regulate charter schools (as opposed to merely monitoring their contracts with them), their actions resemble the routine regulation and oversight imposed on private schools by state and local governments, which does not prevent the Board from asserting jurisdiction over them.262

The “special relationship” rationale is generally based on charter schools’ role in fulfilling the governmental responsibility to provide K-12 education.263 Further, charter schools resemble public schools: they are tuition-free and open to all children; are obligated to comply with state statutes and regulations involving academics, teacher standards, student attendance, and health and safety requirements; and provide some of the same rights and benefits to their employees that are provided to public

258. Temple Univ., 19 N.L.R.B. 1160, 1161 (1972) (asserting jurisdiction over Temple would not effectuate the policies of the NLRA).
261. See id.
262. See generally U.S. DEP’T EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009), (compendium of state regulations and oversight of private schools); The Windsor Sch., Inc., 200 N.L.R.B. 991, 991 (1972); Shattuck Sch., 189 N.L.R.B. 886, 887 (1971).
school employees.264 In the Kipp Academy case, several amici put forward additional bases supporting the "special relationship" rationale, such as the local government's role in funding and directing charter schools' provision of educational services;265 the need to defer to the state's encouragement of experiments in public education;266 and the evidence of a "substantial nexus" between charter schools and local government.267 Undercutting the special relationship rationale is that the Board has long asserted jurisdiction over government contractors and private entities that produce goods or supplies services under contract for a public subdivision.268 As noted earlier, the Board in National Transportation Service abandoned the "intimate connection" test where it would determine whether to assert jurisdiction based on whether the government contractor's services served a crucial or core governmental function.269 Further, the Board routinely asserts jurisdiction over employers that are both heavily regulated by and deeply entwined with government entities, including not only government contractors, but private entities involved in national security matters and private schools and universities.270 Although the Board temporized in declining to explicitly label charter schools as government contractors,271 they do operate as government contractors in their form and function. First, charter schools structure themselves as private entities when private individuals and organizations create and operate them.272 As for their function, charter schools enter into agreements with state or local governmental entities to educate local children in exchange for a per-student payment, with the governmental

264. See id. at 467.
271. See Pa. Virtual Charter Sch., 364 N.L.R.B. No. 87, slip op. at 10 (2016) ("Furthermore, even though charter schools may be subject to state and local regulatory oversight, we find that in many, if not most respects, charter school cases are not much different from other Board cases involving government contractors.").
272. See id. at 6.
bodies both regulating and overseeing the school’s operations.\textsuperscript{273} But, even apart from charter schools’ status as government contractors, assessing the nature of a charter school’s services would be difficult. As evidenced by charter school statutes, state governments proffer various reasons for relying on charter schools to provide educational services, ranging from cost efficiency to encouraging educational experiments.\textsuperscript{274} These justifications could just as easily support the school’s exempt status as the Fifth Circuit recognized in \textit{Voices for International Business and Education, Inc. v. NLRB}, stating that: “One of the perceived virtues, if not the virtue, of charter schools is that a lack of political oversight gives them freedom to experiment.”\textsuperscript{275} The court found this purpose—and its relationship to political accountability—supported (rather than undermined) the Board’s finding that the charter was \textit{not} an exempt political subdivision under the \textit{Hawkins County} test.\textsuperscript{276}

Regarding charter school’s putative status as “local activity,” Member Miscimarra argued that “[they] are an integral component of the K-12 system of public education, in that they are tuition-free, open to all children, are funded on a per-student basis, and state/local authorities regulate and oversee them.”\textsuperscript{277} Indeed, in cases arising in New Orleans where ninety percent of the public schools are charter schools, Member Miscimarra asserted that charter schools must be local in nature because they constitute almost all of public education.\textsuperscript{278} This Article contends that even extensive state regulation of charter schools does not establish them as public in character. After all, states also heavily regulate private

\textsuperscript{273} See id.

\textsuperscript{274} Compare W. VA. CODE § 18-5-G1 (2019) (lists stated purposes for authorizing charter schools including: “(1) Improve student learning by creating more diverse public schools with high standards for student performance; (2) Allow innovative educational methods, practices and programs that engage students in the learning process, thus resulting in higher student achievement; (3) Enable schools to establish a distinctive school curriculum, a specialized academic or technical theme, or method of instruction; (4) Provide expanded opportunities within the public schools for parents to choose among the school curricula, specialized academic or technical themes, and methods of instruction that best serve the interests or needs of their child; (5) Provide students, parents, community members, and local entities with expanded opportunities for involvement in the public school system; (6) Allow authorized public schools and programs within public schools exceptional levels of self-direction and flexibility in exchange for exceptional levels of results-driven accountability for student learning; and (7) Encourage the replication of successful strategies for improving student learning.”), with N.Y. EDUC. LAW § 2850, and 24 PA. STAT. § 17-1702-A (showing a similar list of objectives).

\textsuperscript{275} Voices for Int’l Bus. & Educ. v. NLRB, 905 F.3d 770, 774 (5th Cir. 2018).

\textsuperscript{276} See id.

\textsuperscript{277} Pa. Virtual Charter Sch., slip op. at 13; see Brief for Lusher Charter School as Amicus Curiae at 13-14, Kipp Acad. Charter Sch., No. 02-RD-191760, 2019 WL 656300 (Feb. 4, 2019).

schools over such issues as teacher accreditation, subjects taught, length of school day and school year, and health and safety issues, but, nonetheless, the Board has long asserted jurisdiction over private schools.279 Further, while the actual education of pupils occurs on a local level, the business operations of charter schools often occur on an interstate basis.280 A 2017 report by a Stanford University research center identified the existence of at least eight “super networks”—including the KIPP network that includes the Kipp Academy Charter School—that can consist of multiple charter networks (operating dozens of schools) spanning large physical areas and multiple states.281 The existence of so many super networks controlling multiple charter schools belies the assertion that charter schools as a class are local in nature and that their labor disputes would have primarily localized effects. In addition, the Board routinely asserts jurisdiction over non-retail employers operating solely within an individual state based on either the direct inflow standard or the indirect inflow/outflow standard.282 Finally, while charter schools primarily rely on state and local funding, the United States Department of Education’s Charter Schools Program (CSP) provides money to charter schools, both directly and indirectly.283 In 1967, the Board in Butte Medical reversed

279. STATE REGULATION OF PRIVATE SCHOOLS, supra note 262; The Windsor Sch., Inc., 200 N.L.R.B. 991, 991 (1972).
281. Id. (stating that one of the amici in the Kipp Charter Academy case, National Heritage Association, operates 90 charter schools in 9 states).
282. The direct inflow standard requires that an employer receives a set level of goods and services from out-of-state entities. The indirect inflow/outflow standard requires that the employer providing goods or services to entities within the same state that would in themselves meet the Board’s jurisdictional standards (other than on an indirect inflow/outflow basis). See NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, § 1-201 (2017), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/OutlineofLawandProcedureinRepresentationCases_2017Update.pdf.
283. The United States Department of Education’s website provides the following description of the Charter Schools Program:
The Charter Schools Program provides money to create new high-quality public charter schools, as well as to disseminate information about ones with a proven track record. Federal funds are also available to replicate and expand successful schools; help charter schools find suitable facilities; reward high-quality charter schools that form exemplary collaborations with the non-chartered public-school sector; and invest in national activities and initiatives that support charter schools. Collectively we expect these efforts to increase public understanding of what charter schools can contribute to American education. Charter School Program (CSP) Grant Competitions, OFF. OF INNOVATION AND IMPROVEMENT, https://www2.ed.gov/about/offices/list/oii/csp/about-es-competitions.html (last visited Oct. 4, 2021). The 2018-2019 budget allocated $440 million to CSP and President Trump had requested $500 million for this program in his 2020-2021 budget. U.S. DEP’T OF EDUC., U.S. DEPARTMENT OF EDUCATION, OFFICE OF INNOVATION AND IMPROVEMENT.
its prior posture of declining jurisdiction over private hospitals, in part, because of the interstate flow of monies to and from national medical insurance companies as well as from the Federal government through the Medicare program (passed only two years earlier). A similar interstate flow involving multi-state "super networks" as well as the infusion of federal monies supports asserting jurisdiction over charter schools.

The final rationale in the putative "standard" for declining jurisdiction under Section 14(c)(1) is that the Board's inconsistent application of the Hawkins County test over individual charter schools undermines the NLRA's goal of creating "labor stability" through the application of a "single, uniform national rule." Specifically, that the Hawkins County test requires too many fact-specific variables (state and local laws, the circumstances of a school's creation, and its governing charter and by-laws) that cause "substantial uncertainty and long-lasting instability" in the Board's case law regarding charter schools. Another argument is that the Board's partisan political make-up creates policy oscillations and that permitting the states to apply their own labor relations law would be more likely to impart stability in this area.

Further undermining the labor stability rationale is that the actual course of the Board's application of the Hawkins County test to charter schools has not created a jurisdictional patchwork. While the Board has only decided cases in sixteen percent of the extant charter school

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284. See U.S. DEP'T OF EDUC., supra note 283, at 9; see also CTR FOR RES. ON EDUC. OUTCOMES, supra note 281, at 3 (defining what exactly a "super network" is and how they tend to operate as national management organizations for charter schools).

285. Brief of Ready Colorado as Amicus Curiae at 19, Kipp Acad. Charter Sch., No. 02-RD-191760, 2019 WL 656300 (Feb. 4, 2019); see Kipp Acad. Charter Sch., No. 02-RD-191760, 2019 WL 656300 (Feb. 4, 2019); see Pa. Virtual Charter Sch., slip op. at 18. (Miscimarra dissent contends that the NLRB should defer to state and local governmental regulation of charter school labor relations would afford "much greater certainty and predictability.").

states, it has almost always asserted jurisdiction over charter schools and, in doing so, it is difficult to discern inconsistency in the Board’s application of the test. The Board has asserted jurisdiction over charter schools in six states (Arizona, California, Louisiana, Maine, New York, and Pennsylvania) and found a charter school to be an exempt political subdivision in another state (Texas). So far, then, the Board’s application of the test has not resulted in great variation even in results, much less in its reasoning.

Contrary to these arguments in favor of abjuring NLRB jurisdiction, the legislative intent behind the NLRA has been that the Board’s application of a uniform national policy would enhance stability in labor relations. If the Board were to decline jurisdiction over all charter schools and allow their regulation by state labor law, it would leave charter schools subject to a true “jurisdictional patchwork” of differing state regulation of labor relations. Indeed, individual states asserting jurisdiction would have to determine whether to treat charter school employees either as private-sector or public-sector employees which would leave any jurisdictional patchwork even more variegated.

In sum, Section 14(c)(1) offers a possible approach to developing a standard for declining jurisdiction, based on weighing factors and circumstances—the presence of entwinement, a special relationship, local status, and connection to the national scheme of labor relations—that concern the relationship between state/local governments and charter schools. But, in prior precedent relating to other industries, the Board has rejected applying Section 14(c)(1) in this manner and foreclosed creating a standard in determining jurisdiction over hybrid public-private entities. Thus, the current NLRB approach of sole reliance on the Hawkins County test

290. See, e.g., Pa. Virtual Charter Sch., slip op. at 11 (emphasizing that the Board often can assert jurisdiction over charter schools).
291. See supra, text accompanying notes 128-143.
292. Interestingly, one law review article argues that the Board has not been sufficiently flexible in applying the Hawkins County test and has therefore established a de facto bright-line rule in asserting jurisdiction over all charter schools. Amelia A. DeGory, The Jurisdictional Difficulties of Defining Charter-School Teachers Unions under Current Labor Law, 66 DUKE L. J. 379, 413, 415 (2016).
296. See, e.g., Am. League of Pro. Baseball Clubs, 180 N.L.R.B. 190, 192 (basing much of its decision to assert jurisdiction on the “national scope” of the baseball industry).
to determine jurisdiction over charter schools is not only the best approach, but the only viable options given the NLRB’s past policy decisions.

In rejecting utilizing Section 14(c)(1) to exempt charter schools from Board jurisdiction, this Article does not advocate treating it as a dead letter or nullity. As discussed in this Article, the Board has no need of using Section 14(c)(1) to decline jurisdiction over classes of private entities linked to public entities because Board precedent has comprehensively delineated private employers from public subdivisions under Section 2(2) of the NLRA. That is, the Board in its caselaw has filled in the gaps in defining public subdivision, thus obviating the need for the Board to exercise discretion (and create a standard) to determine jurisdiction in applying Section 2(2). Nonetheless, the Board should not abandon Section 14(c)(1) altogether because it may wish to exercise discretionary declination of jurisdiction over new industries based on their local character despite ostensibly qualifying for Board jurisdiction under its inflow/outflow standard.

For example, the Board has not determined whether to assert jurisdiction over the medical marijuana industry. The individual entities in this industry, such as dispensaries and greenhouses, may meet the Board’s jurisdictional characteristics based on their purchases of equipment and supplies on an interstate basis, but also possess other characteristics (i.e., heavy state regulation, the absence of interstate sales of cannabis products due to state law and federal policy) indicating a local character. The Board could conceivably wish to utilize the discretion provided in Section 14(c)(1) to utilize a standard in assessing a broader array of characteristics in this industry in order to determine whether to assert or decline jurisdiction on an industry-wide basis based on its local character.

298. See, e.g., NLRB Advice Memorandum on Agri-Kind (Oct. 21, 2020) (refusing to consider the question of whether to assert jurisdiction over a marijuana enterprise).
300. In an advice memorandum, the NLRB General Counsel’s Division of Advice concluded that the Board should assert jurisdiction over business enterprises within the medical marijuana industry if they otherwise meet the Board’s monetary jurisdictional standards. Barry J. Kearney, Assoc. Gen. Couns., supra note 299 at 1, 5-9. In discussing Sec. 14(c)(1), the Division of Advice noted that the Board had either reversed or substantially narrowed its “historical declinations.” Id. at 7. In advocating asserting jurisdiction, the Division of Advice found that: the dispensary at issue purchases out-of-state supplies; there are thousands employed in the medical marijuana (some of whom are represented by labor unions); and that labor disputes could affect out-of-state suppliers and other
CONCLUSION

By its course of action in Kipp Academy, the Board opted to continue to apply the Hawkins County test to individual charter schools and—at least for the present—determined not to utilize Section 14(c)(1) to decline jurisdiction over charter schools as a class.\(^{301}\) This Article finds this approach to be correct as the Hawkins County test provides an efficient rule that permits the Board to determine the public or private status of a charter by examining the relatively narrow circumstances of its creation and the extent of its accountability to political actors. This efficiency has made it unnecessary for the Board to invoke Section 14(c)(1) in order to apply a standard-like approach permitting it to consider a wider array of circumstances and factors in determining whether to assert or decline jurisdiction over charter schools as an industry.\(^{302}\) Perhaps most importantly, over the course of time, the Board has chosen policy paths making it impossible to create a standard under Section 14(c)(1) permitting it to decline jurisdiction over charter schools as an industry.\(^{303}\) Nonetheless, Section 14(c)(1) still provides a useful option to the NLRB if it should require a broader analysis as to whether to assert or decline jurisdiction over a particular industry.

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302. See supra Section II.C.4.
303. See supra Section II.C.4.