

Notes

THE JURISDICTIONAL DIFFICULTIES OF DEFINING CHARTER-SCHOOL TEACHERS UNIONS UNDER CURRENT LABOR LAW

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ABSTRACT

As charter schools have flourished in form, they have also evolved in variety: parents can send their children to a trilingual immersion school or a school whose classes meet entirely online. The same flexibility that charters offer as an alternative to traditional public schools also makes them difficult to classify for purposes of labor law. When charter-school teachers form a union, it is not clear why the National Labor Relations Board (NLRB), and not a state labor analogue, should have jurisdiction over a charter-school labor dispute. And yet, the NLRB has asserted jurisdiction in most charter-school cases. This Note examines the NLRB's test for determining whether the broad protections of the National Labor Relations Act apply to a group of workers in the context of charter-school employees. It proposes a more robust test for differentiating between charter schools for purposes of the Act, and it applies the test to two charter schools.

INTRODUCTION

On May 29, 2013, thirty Olney Charter High School teachers¹ and their supporters waited to address ASPIRA, Inc. of Pennsylvania's

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1. The author was one of these teachers. Parts of this account are based on the author's recollections.

nonprofit board.² Some sat as others stood, because the board changed its bimonthly public-meeting location from its headquarters' large meeting space to a cramped conference room at the eleventh hour. The teachers had come to ask the board to negotiate with the 65 percent of staff who had signed a petition in support of a union. Although the teachers had requested time on the agenda, the board relegated them to the public-comments section with a new two-minute-per-person time limit kept by a board member's iPhone.³ As the meeting stretched past 9:00 p.m., the teachers asked the board to recognize their union and work with them. The board chair responded, "At this point we are not entering discussions . . . maybe at the next board meeting."⁴

For three years—through substantial staff turnover and changes in administration—the Olney teachers worked to gain recognition for their union. They worked with organizers from the American Federation of Teachers (AFT), a national teachers union that had recently begun to help charter-school teachers launch union campaigns. They filed Unfair Labor Practice charges with the National Labor Relations Board's (NLRB) Regional Office in Philadelphia. The employer, ASPIRA, filed challenges to the NLRB's jurisdiction over the dispute. Eventually, ASPIRA settled with the NLRB and agreed to post notices throughout the school building that it had interfered with the teachers' right to unionize. In April of 2015, after a three-year organizing campaign, Olney Charter High School won its union under an election administered by the NLRB.⁵ But it is not clear why the NLRB, and not the Pennsylvania Labor Relations Board, has jurisdiction over this labor dispute.⁶ Charter-school teachers unions are new compared to public-school teachers unions, and charter schools

2. Jake Blumgart, *Back to School for Labor*, AM. PROSPECT (June 27, 2013), <http://prospect.org/article/back-school-labor> [<https://perma.cc/TUC5-4HGL>].

3. *Id.*

4. *Id.*

5. Laura Benshoff, *After Three Years, ASPIRA's Olney Charter High School Says "Yes" to Union*, NEWSWORKS (May 1, 2015), <http://www.newsworks.org/index.php/local/education/81381-after-three-years-aspiras-olney-charter-high-school-says-yes-to-union> [<https://perma.cc/WRU8-PB3U>]. As of the publication of this Note, ASPIRA and the union still have not bargained for a contract.

6. After the election, ASPIRA, Inc. of Pennsylvania challenged the NLRB's jurisdiction over certification, but then withdrew the challenge. See *Olney Charter High Sch., an Aspira of PA Sch.*, Case No. 04-RC-148637 (N.L.R.B. July 22, 2015) (exception of employer to the hearing officer's report on objection) (filing exceptions to NLRB Hearing Officer's finding of jurisdiction over the employer after the union election); *Olney Charter High Sch., an Aspira of PA Sch.*, Case No. 04-RC-148637 (N.L.R.B. Sept. 25, 2015) (executive secretary office letter) (acknowledging the employer's withdrawal of exceptions and stating the NLRB will not act on the exceptions).

exist in something of a middle ground between public and private schools. Therefore, the question of whether the NLRB or state labor boards have jurisdiction over charter-school teachers unions remains relatively open. This Note examines the NLRB's test for determining whether the broad protections of the National Labor Relations Act (the Act) apply to a group of workers in the context of charter-school employees.

Teachers unions are some of America's favorite villains in the story of public education.⁷ Why does this narrative have staying power? Simply put, almost everyone has had an ineffective teacher. And unlike an incompetent doctor or a surly DMV employee, an ineffective teacher holds power over his students for hours each week during those students' formative years. Any organization devoting resources to ensuring that (even ineffective) teachers have some kind of process before being fired will likely draw the ire of those who have experienced bad teaching. After first winning their collective-bargaining rights in the 1960s, public-sector teachers unions have grown in power and number over time, increasing teachers' perceived professionalism and securing better working conditions, clearer systems for salary raises, and more generous pension benefits.⁸ Teachers unions have also fought for job-security protections that can make terminating a teacher prohibitively expensive in terms of both money and time.⁹

Enter charter schools. Initially invented by unionized teachers who wanted more flexibility,¹⁰ charter schools have been touted as a

7. See, e.g., Moriah Balingit, *GOP Presidential Hopefuls Tested on Education Issues at N.H. Forum*, WASH. POST (Aug. 19, 2015), <https://www.washingtonpost.com/local/education/gop-presidential-hopefuls-to-be-tested-on-education-issues-at-nh-forum/2015/08/18/ef63d62c-45dc-11e5-846d-02792f854297story.html> [<https://perma.cc/6DXA-76TU>] (“[New Jersey Governor Chris] Christie rehashed his now-famous line, declaring, ‘I have no problem with saying that the teachers’ unions deserve a political punch in the face, which they do.’”).

8. Richard D. Kahlenberg, *The History of Collective Bargaining Among Teachers*, in COLLECTIVE BARGAINING IN EDUCATION 7, 7–11 (Jane Hannaway & Andrew J. Rotherham eds., 2006).

9. For a detailed discussion of this phenomenon in New York City, see generally Peter Kauffman, Note, *Unionized Charter School Contracts as a Model for Reform of Public School Job Security*, 88 N.Y.U. L. REV. 1379 (2013).

10. See Richard D. Kahlenberg & Halley Potter, *The Original Charter School Vision*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/opinion/sunday/albert-shanker-the-original-charter-school-visionary.html> [<https://perma.cc/2TVG-NNXA>] (“In a 1988 address, [Albert Shanker, the president of the American Federation of Teachers] outlined an idea for a new kind of public school where teachers could experiment with fresh and innovative ways of reaching students.”).

near panacea by education reformers seeking to dismantle traditional public schools' monopoly.¹¹ Charters were designed to be small laboratories for effective education techniques, relaxing some of the red tape surrounding education to give teachers and administrators more flexibility over school designs.¹² They evoke the hope that making public education more competitive will improve all schools.¹³ Charters have given parents—at least those who have the patience and resources to investigate schools, register for lotteries, and submit required paperwork—some choice over their children's education.¹⁴ One problem for teachers unions is that many accomplishments by charter schools have been correlated, or at least associated with, the school's ability to choose whether to employ unionized teachers.¹⁵

Charter schools are also quickly becoming a cornerstone of many large urban school districts' "portfolio plans,"¹⁶ which hand off low-performing schools to charter providers for "turnaround" and create smaller, experimental schools, while maintaining their highest-

11. DANNY WEIL, CHARTER SCHOOL MOVEMENT 213 (2d ed. 2009) (discussing the potential for parents acting "as rational education consumers with the ability to take their business elsewhere . . . and force all schools to increase their efficiency").

12. Richard D. Kahlenberg, *The Charter School Idea Turns 20*, EDUC. WEEK (Mar. 25, 2008), http://www.edweek.org/ew/articles/2008/03/26/29kahlenberg_ep.h27.html [https://perma.cc/5QBS-WD62] (describing the early history of and vision for charter schools).

13. See WEIL, *supra* note 11, at 213.

14. See Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation*, 19 EDUC. POL'Y ANALYSIS ARCHIVES 1, 4 (2011). Frankenberg, Siegel-Hawley, and Wang write:

A parent or student must first hear about the charter program The family must then navigate the application process, which often involves a lottery but also can mean a combination of other requirements like testing, teacher recommendations, parental involvement commitment, or essays. If the student is accepted, then transportation to and from the school may have to be provided by the parent.

Id. (footnote omitted); see also Editorial, *The Bias Inherent in Some Charter Schools' Admissions Process*, L.A. TIMES (Aug. 10, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-charter-application-20160808-snap-story.html> [https://perma.cc/5F6E-SQXH] (detailing the "couple dozen pages" of application materials, including student and parent essays, and requests for medical history, that one LA charter school requires for admission).

15. Rachel M. Cohen, *When Charters Go Union*, AM. PROSPECT (June 18, 2015), <http://prospect.org/article/when-charters-go-union> [https://perma.cc/S27D-4GDH] ("By making it easier for principals to hire and fire staff, the proponents argued, schools could better ensure that only high-quality teachers would be working in the classrooms."). Some of the highest-performing charters, including the Knowledge Is Power Program (KIPP), display exceptional results without unions. DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM 136 (2010).

16. For an explanation of portfolio plans, see ROBIN J. LAKE & PAUL T. HILL, PERFORMANCE MANAGEMENT IN PORTFOLIO SCHOOL DISTRICTS 4–8 (Aug. 2009), <http://files.eric.ed.gov/fulltext/ED532895.pdf> [https://perma.cc/35MD-M7GN].

performing schools as traditional public ones.¹⁷ “Turnaround” or “restart” usually works something like this: the charter provider fires all the existing teachers and staff (who were previously under union collective-bargaining agreements), rehires some staff under at-will contracts, spruces up the school and curriculum, and reopens to serve the neighborhood with a heavy benefit of federal funding¹⁸ and less oversight by school-district officials.¹⁹ Turnaround schools are not the lottery-based charters featured in the popular documentary “Waiting for Superman.”²⁰ Rather, turnaround charters continue to serve eligible students in a given neighborhood, just as the previous school did,²¹ and they may be required to enroll the same students as the

17. See Jeffrey R. Henig, Katrina E. Bulkley & Henry M. Levin, *Can “Portfolio Management” Save Urban Schools?*, EDUC. WEEK (Oct. 4, 2010), <http://www.edweek.org/ew/articles/2010/10/06/06henig.h30.html> [<https://perma.cc/VQ33-TQ7B>] (“[T]he movement [seeks] to shift from a centralized bureaucracy that directly manages a relatively uniform set of schools toward a model in which a central office oversees a diverse portfolio of schools that might include traditional public schools, privately managed schools, and charter schools.”). This model is gaining momentum in Chicago, New Orleans, New York City, and Philadelphia. *Id.*

18. Federal School Improvement Grants provide qualifying Title I schools with additional funding for three years after “turning around” and reopening. See JULIA CORBETT, NAT’L ALL. FOR PUB. CHARTER SCHS., CHARTERING TURNAROUND: LEVERAGING PUBLIC CHARTER SCHOOL AUTONOMY TO ADDRESS FAILURE 5 (Aug. 2015), http://www.publiccharters.org/wp-content/uploads/2015/08/turnaround_web.pdf [<https://perma.cc/9KE6-JEV6>] (“[S]upplementary district and state funds, federal Title I funds, and federal Race to the Top funds have also been used to turn around the country’s lowest-performing schools.”). This funding allows the turnaround schools to provide more services than the previously district-run schools during the first three years they are open. Some turnaround schools use this increased funding to improve working conditions for teachers by hiring more staff or implementing behavior improvement systems for disruptive students. See Institute of Education Sciences, *Case Studies of Schools Receiving School Improvement Grants: Findings After the First Year of Implementation*, at ix, 82 (2014), <https://ies.ed.gov/ncee/pubs/20144015/pdf/20144015.pdf> [<https://perma.cc/MX3Y-2XHM>] (“Respondents from 15 of the 20 core sample schools that were implementing strategies to improve student behavior during school hours identified student behavior as part of the school’s performance problem.”).

19. See, e.g., FSG SOC. IMPACT ADVISORS, *THE SCHOOL TURNAROUND FIELD GUIDE 4–5* (2010), <http://www.wallacefoundation.org/knowledge-center/school-leadership/district-policy-and-practice/Documents/The-School-Turnaround-Field-Guide.pdf> [<https://perma.cc/DJ7K-685Y>] (defining turnaround models and cataloguing various forms of federal funding available for turnarounds).

20. *WAITING FOR SUPERMAN* (Paramount Vantage 2010).

21. See, e.g., JEFF KUTASH, EVA NICO, EMILY GORIN, SAMIRA RAHMATULLAH & KATE TALLANT, U. CHI. CONSORTIUM ON CHI. SCH. RESEARCH, *TURNING AROUND LOW-PERFORMING SCHOOLS IN CHICAGO 6* (2012), <https://consortium.uchicago.edu/sites/default/files/publications/12CCSRTurnAround-3.pdf> [<https://perma.cc/A9ZC-Z7CR>] (finding that turnaround schools “generally served the same students as before intervention”).

previous (public) school.²² Despite some charter schools' similarities to traditional neighborhood schools, recent NLRB decisions have asserted jurisdiction over charter-school teachers unions. Thus, turnarounds can be considered private employers that are subject to NLRB jurisdiction instead of the state labor board.²³

To decide its jurisdictional reach, the NLRB applies a test from *NLRB v. Natural Gas Utility District of Hawkins County*,²⁴ which determines whether an employer is a "political subdivision" exempt from the Act's protections.²⁵ An employing entity is a political subdivision subject to state labor law instead of the Act if it was "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."²⁶ In its cases relating to charter-school unions, the NLRB has recently taken a more narrow approach to what both parts of the test mean.²⁷ This approach has resulted in more charter schools being considered private employers subject to the Act's jurisdiction over their labor disputes.

At the charter movement's outset, charters were more clearly akin to private schools with public funding. Now, however, large-scale charter providers are taking over previously public neighborhood schools and reopening them as charter schools as they serve the same geographic catchment area.²⁸ Turnaround charter schools present

22. See, e.g., *Facts*, MASTERY CHARTER SCHS., <http://www.masteryturnaround.org/#!facts/fij4i> [<https://perma.cc/KD62-8C54>] ("Unlike regular charter schools, [schools converted under Philadelphia School District's "Renaissance Initiative"] are legally required to serve the same students from the surrounding neighborhood that they served while under District operation.").

23. See 29 U.S.C. § 152(2) (2012) ("The term 'employer' . . . shall not include . . . any State or political subdivision thereof.").

24. *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600 (1971).

25. *Id.* at 604–05.

26. *Id.* The NLRB may also decline jurisdiction if there is an insufficient link to commerce, but it rarely invokes this discretion. See 29 U.S.C. § 164(c)(1) (stating that the NLRB may "in its discretion . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers where, in the opinion of the board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction"); cf. 29 C.F.R. § 103.3 (2015) (stating that, as a rule, the NLRB will not assert jurisdiction over labor disputes involving horse racing and dog racing industries).

27. See *infra* Part II.

28. See Priscilla Wohlstetter, Joanna Smith, Caitlin Farrell, Guilbert Hentschke & Jennifer Hirman, *How Funding Shapes the Growth of Charter Management Organizations: Is the Tail Wagging the Dog?*, 37 J. EDUC. FIN. 150, 152–53 (2011) (describing how successful, scaled-up

more challenging working conditions that are leading to more union activity,²⁹ and the question of whether state or federal labor agencies have jurisdiction is especially salient now. In addition, the NLRB is in the midst of expanding the Act's protections to more employees and more activity,³⁰ making it unlikely that the NLRB will decline jurisdiction by finding an employer exempt from the Act. Such an exemption could limit the protections available to unionized employees more broadly under the Act, and the NLRB is seeking to expand those protections.³¹ Recent cases, although not fully settling the issue because the NLRB uses a case-by-case determination, indicate that the NLRB will assert jurisdiction over charter schools in most circumstances.

The NLRB's interpretation of the *Hawkins County* test for whether to assert jurisdiction over a labor dispute currently does not take into account the unique situation of charter schools. This Note argues that as it applies the *Hawkins County* test, the NLRB needs to account for this growing sector of public education, or it risks treating all charters alike and granting itself what is effectively blanket jurisdiction over charter schools. Part I outlines the history of the charter movement and the changes that made some charter schools more similar to public employers. Part II examines the current test used by the NLRB to determine jurisdiction. Part III illustrates why that test does not account for the changes to the nature of charter schools and why the test should be adjusted. Part IV proposes a revised test to determine whether a school provider is public or private for purposes of NLRB jurisdiction.

charter providers have been tapped to run turnaround schools under the Obama administration's education plan).

29. See *infra* Part I. Beginning in 2007 and 2008, the AFT set up a national charter-organizing division, and today has organizers in seven cities: Los Angeles, Detroit, Cleveland, Chicago, New Orleans, New York City, and Philadelphia. Cohen, *supra* note 15.

30. See *Q&A with Duke's Dan Bowling III*, LAW 360 (Oct. 20, 2015, 12:26 PM), <http://www.law360.com/articles/714655/q-a-with-duke-s-dan-bowling-iii> [<https://perma.cc/56C9-LY8L>].

31. For example, the NLRB has issued a series of decisions expanding § 7 to apply to employers' attempts to regulate employee social media use. See, e.g., *Costco Wholesale Corp.*, 358 N.L.R.B. 1100, 1101 (2012) (holding that a handbook rule violated the Act because it prohibited any online posting that could damage "any person's reputation"); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 WL 6800769, at *1-2, *4 (Dec. 14, 2012) (holding that the employer violated the Act by firing employees who responded to a coworker's criticism of their job performance by posting their own comments on Facebook).

I. CHARTER SCHOOLS AND TEACHERS UNIONS

This Part provides a backdrop for understanding the differences between traditional public schools and charter schools as well as emerging trends in the charter movement. It also explains the relationship between charter schools and teachers unions and why that relationship is now changing in a way that may increase the number of unionized charter schools.

A. *The Expansion of Charter Schools' Role in Public Education*

The idea for charter schools first came from the president of America's largest teachers union, the AFT.³² These schools were intended to free teachers, administrators, students, and parents from the bureaucracy of large school systems while maintaining public funding.³³ In these "laboratory" schools, teachers would have the space to experiment with new educational approaches that could later be adopted by their larger public counterparts.³⁴

Unions were initially considered integral to this vision. Union representatives would sit on charter-authorizing boards, and faculty decisionmaking would remain integral to charter functioning.³⁵ Some union protections were relaxed, however, to facilitate the schools' effectiveness as the charter vision became reality. For example, many teachers unions' collective-bargaining agreements place limits on the number of hours an employee can teach in a row without a break.³⁶ By relaxing this standard, charter schools can more easily schedule classes, which may help them save money on hiring additional staff.

The free-market movement quickly adopted the idea as a way to inject school choice into education.³⁷ The trade was simple: in exchange

32. See Kahlenberg & Potter, *supra* note 10. In his speech, the president outlined a "new type of school," and a few months later, he named his idea "charter schools," referring to "explorers" who received charters to seek new land and resources. *Id.*

33. Sandra Vergari, *Introduction to THE CHARTER SCHOOL LANDSCAPE* 1, 10 (2002).

34. Kahlenberg & Potter, *supra* note 10.

35. RICHARD D. KAHLENBERG & HALLEY POTTER, *A SMARTER CHARTER* 8 (2014).

36. See AGREEMENT BETWEEN THE BALTIMORE TEACHERS UNION AND BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS 26 (2010–2013), [http://www.baltimorecityschools.org/cms/lib/MD01001351/Centricity/Domain/243/PDF/BTU20102013FinalTeacher_Agreement\[1\].pdf](http://www.baltimorecityschools.org/cms/lib/MD01001351/Centricity/Domain/243/PDF/BTU20102013FinalTeacher_Agreement[1].pdf) [<https://perma.cc/48WR-3WZX>] [hereinafter BALTIMORE TEACHERS UNION CONTRACT] ("Secondary teachers shall not be required to teach continuously for more than three (3) periods, nor three (3) hours where double periods are used. Elementary teachers shall not be required to teach continuously for more than three (3) hours.")

37. See WEIL, *supra* note 11, at 213.

for the freedom to experiment with curriculum and structure, charter schools must produce results or risk losing their charter. The aforementioned freedom would lead to more competition and better choices for students and parents, while the additional accountability would increase the quality of each school.

Both sides of the political spectrum embraced charter schools as a solution for the problems they perceived to be plaguing public education in the United States.³⁸ The line of reasoning is now familiar: “Government-run schools, said a new generation of reformers, are ineffective because they are a monopoly; as such, they have no incentive to do better, and they serve the interests of adults who work in the system, not children.”³⁹ Versions of this rhetoric can be seen in entertainment media portraying charter schools as a solution to poorly run traditional public schools and the racial achievement gap.⁴⁰ Charter schools are usually operated by nonprofit boards⁴¹ while traditional public schools are run by school boards in some way accountable to the electorate.⁴²

There was one charter school in the United States in 1992.⁴³ By the 2013–14 school year, there were 6,465 charter schools⁴⁴ educating over 2.5 million students.⁴⁵ Some districts have an even higher ratio: after Hurricane Katrina, New Orleans almost completely dismantled its public education system and replaced it with a market-based charter system.⁴⁶ Nationwide, 61 percent of charter schools serve populations in which more than 60 percent of students qualify for free or reduced-

38. For a discussion of this phenomenon, see RAVITCH, *supra* note 15, at 9–10.

39. *Id.* at 10.

40. *See, e.g.*, WAITING FOR SUPERMAN, *supra* note 20; WON’T BACK DOWN (20th Century Fox 2012).

41. WEIL, *supra* note 11, at 350.

42. ALLAN C. ORNSTEIN, DANIEL U. LEVINE & GERALD L. GUTK, FOUNDATIONS OF EDUCATION 209 (11th ed. 2011).

43. Peter Jacobs, *Here’s How America’s First-Ever Charter School Got Off the Ground*, BUS. INSIDER (June 20, 2015, 2:52 PM), <http://www.businessinsider.com/inside-the-first-charter-school-in-america-city-academy-2015-6> [<https://perma.cc/G7F7-VWXF>].

44. Institute of Education Sciences, *The Condition of Education 2016*, at xxiv (2016), <http://nces.ed.gov/pubs2016/2016144.pdf> [<https://perma.cc/24D6-4N3R>].

45. *Id.* at xxiii.

46. *See* NAT’L ALL. FOR PUB. CHARTER SCH., *DETAILS FROM THE DASHBOARD: CHARTER SCHOOL RACE/ETHNICITY DEMOGRAPHICS 2* (2012), http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS-2010-2011-Race_Ethnicity-Details-from-the-Dashboard_20120516T152831.pdf [<https://perma.cc/5LN9-UGLQ>] (providing data for New Orleans’ charter market share suggesting that charter schools represented 70 percent of New Orleans schools in 2012).

price lunch under the federal National School Lunch Program, a measure that provides a rough approximation of the concentration of low-income students at a given school.⁴⁷ In the 2012–13 school year, black students made up 15 percent of the national student population attending traditional public schools, but they constituted 28.5 percent of the students attending charter schools.⁴⁸

Although initially intended as laboratories to provide the best aspects of both public and private education, charter schools have taken on a new role. Especially in large urban school districts, in which cash-strapped centralized leadership seeks out more economically feasible options, charter-school operators are being tapped to take over “failing” schools.⁴⁹ Charter schools are also growing larger in terms of population,⁵⁰ possibly due to the turnaround phenomenon or the increased demand among parents for charter schools.⁵¹ Moreover, in some cities, “charter chains” operate multiple schools or provide a

47. CTR. FOR EDUC. REFORM, SURVEY OF AMERICA’S CHARTER SCHOOLS 2014, THE ESSENTIAL GUIDE TO CHARTER SCHOOL OPERATIONS 9 (2014), <https://www.edreform.com/wp-content/uploads/2014/02/2014CharterSchoolSurveyFINAL.pdf> [<https://perma.cc/M6YD-5FTC>]; see also Institute for Education Sciences, *supra* note 44, at 111 (“In school year 2012–13, the percentage of students attending high-poverty schools—schools in which more than 75 percent of students qualify for free or reduced-price lunch (FRPL) under the National School Lunch Program—was higher for charter school students (36 percent) than for traditional public-school students (23 percent).”).

48. NAT’L ALL. FOR PUB. CHARTER SCHS., *Total Number of Schools*, THE PUBLIC CHARTER SCHOOLS DASHBOARD (2012), <http://www.publiccharters.org/dashboard/schools/page/overview/year/2012> [<https://perma.cc/2DGE-ZDR3>].

49. See, e.g., David Uberti, *New Orleans’ Switch to Charter Schools After Katrina: A “Takeover” or a Success?*, GUARDIAN (Aug. 27, 2015), <http://www.theguardian.com/us-news/2015/aug/27/new-orleans-recovery-school-district-charter-schools> [<https://perma.cc/5LBE-TCVU>]. As Uberti explains:

[In November 2005.] [t]he legislature voted to raise the criteria that allowed the state to take over schools deemed ‘failing’, giving the [New Orleans Recovery School District] control of more than 100 of New Orleans’s public schools performing below the state average. The remaining high-performing schools stayed under control of the locally elected school board, creating a bifurcated governing structure.

Id.

Both nonprofit charter management organizations (CMOs) and for-profit education management organizations (EMOs) enter into contracts with schools or school districts to provide services to students, generally by operating a school or a smaller learning community within a school. CORBETT, *supra* note 18, at 5. To avoid confusion, this Note refers to both CMOs and EMOs as “charter providers” or “charter operators” and will differentiate between nonprofit and for-profit charter providers when salient to the analysis.

50. Institute of Education Sciences, *supra* note 44, at 78 (“[C]harter schools have generally increased in enrollment [T]he percentages of charter schools with 300–499, 500–999, and 1,000 or more students each increased”).

51. This observation is my own speculation as many turnaround charter schools are larger in size, which would skew the percentages of charter schools that are larger as opposed to smaller.

pathway for students to attend only schools within the charter operator's network.⁵² For example, Green Dot Public Schools (Green Dot) is a nonprofit charter provider that manages twenty-two schools in Los Angeles, Memphis, and Washington state.⁵³ Many charter chains are adding to their network of smaller, lottery-based charters by bidding to take over "failing" schools using the turnaround model.

Turnaround charter schools present different challenges from "new-start" charter schools.⁵⁴ For instance, new-start charter schools can use a lottery system to admit only students whose families have applied and won a slot.⁵⁵ They usually are not required to admit students just because they live in a certain neighborhood catchment zone, and they do not have to admit students throughout the school year.⁵⁶ They also typically start with one grade—for example, 8th grade or kindergarten—and add one grade each year rather than opening a full school.⁵⁷ New-start charters may also be permitted to expel students or counsel them to withdraw more easily than public schools

52. KIPP schools are one example of a successful "charter chain." The KIPP network includes 183 schools in 20 states and the District of Columbia. *Kipp Schools*, KIPP, <http://www.kipp.org/schools> [<https://perma.cc/P4B6-PPGX>]. KIPP has recently adapted its model to turnaround schools in Newark, New Jersey. See Leslie Brody, *Charter Market Makes the Grade in N.J. School*, WALL STREET J. (Oct. 25, 2015, 11:56 PM), <http://www.wsj.com/articles/charter-network-makes-the-grade-in-n-j-school-1445822242> [<https://perma.cc/8J8L-XND9>] (detailing the turnaround process at KIPP's Life Academy in Newark, New Jersey).

53. CORBETT, *supra* note 18, at 9. Some of Green Dot's charters are more "traditional" programs that build grade by grade, but in 2008, Green Dot began taking over existing public schools under California's charter-school "trigger" laws, which allow a takeover when 51 percent of tenured teachers vote to turn over the school to a charter operator. *Id.*

54. *Id.* at 4, 7.

55. See *id.* at 16 ("[N]ew start charter schools . . . determine enrollment through lottery if there are insufficient seats available and can choose whether or not to backfill empty seats.").

56. See *id.* at 11, 21 (noting that new-start charter schools do not have to accept students throughout the school year).

57. See *id.* at 9 (noting that in the traditional charter-school practice, one grade is added at a time).

can.⁵⁸ Expelled or “counseled out”⁵⁹ students then often transfer to traditional neighborhood public schools.⁶⁰ New-start charters may also not need to admit a new student to replace each expelled student.⁶¹ This allows the charter to establish and maintain school culture while limiting the negative effect of students coming and going throughout the school year.⁶² In contrast, a turnaround school may have to admit students from the neighborhood zone at any point in the school year—without a parent application or lottery—and may not have the authority to expel students except for extreme acts.⁶³ Turnaround schools also require the charter provider to take over all grades at once, so they may have students from grades 9–12 who were accustomed to

58. While some charter schools are required by the terms of their charter to follow the local school district’s expulsion policies, others have the freedom to create their own policies that make it easier to expel students. See Jaclyn Zubrzycki, Sean Cavanagh & Michele McNeil, *Charter Schools’ Discipline Policies Face Scrutiny*, EDUC. WEEK (Feb. 19, 2013), http://www.edweek.org/ew/articles/2013/02/20/21charters_ep.h32.html [<https://perma.cc/UF34-QG4M>] (“The fact that many charter schools set their own expulsion procedures means that it can be hard to get a neutral hearing, and many parents do not know their children’s rights” (quoting Professor Sarah Jane Forman)); see, e.g., Noreen S. Ahmed-Ullah & Alex Richards, *CPS: Expulsion Rate Higher at Charter Schools*, CHI. TRIB. (Feb. 26, 2014), http://articles.chicagotribune.com/2014-02-26/news/ct-chicago-schools-discipline-met-20140226_1_charter-schools-andrew-broy-district-run-schools [<https://perma.cc/EA4J-KB73>] (“[D]uring the last school year, 307 students were kicked out of [Chicago] charter schools, which have a total enrollment of about 50,000. In district-run schools, there were 182 kids expelled out of a student body of more than 353,000.”).

59. See Michael Winerip, *Message from a Charter School: Thrive or Transfer*, N.Y. TIMES (July 10, 2011), <http://www.nytimes.com/2011/07/11/nyregion/charter-school-sends-message-thrive-or-transfer.html> [<https://perma.cc/BW6A-3UF7>] (discussing a parent’s experience with a charter school that, after disciplining him multiple times, suggested she find a school with a smaller class size for her son, and then helped refer him to a public school); Zubrzycki, Cavanagh & McNeil, *supra* note 58 (referring to the practice of advising parents to seek another school for their children as “counseling out”).

60. See Zubrzycki, Cavanagh & McNeil, *supra* note 58 (presenting studies on this claim).

61. See *id.* (citing a study of KIPP schools that found that students who left KIPP “were not replaced, a fact that might benefit the KIPP network’s academic performance by creating a positive peer effect”).

62. See Sara Mead, *To Backfill or Not to Backfill?*, U.S. NEWS & WORLD REP. (June 11, 2015, 12:45 PM), <http://www.usnews.com/opinion/knowledge-bank/2015/06/11/charter-school-backfill-question-has-no-simple-answer> [<https://perma.cc/7T2F-7K4A>] (“Leaders in these schools argue that limiting enrollment to certain grade levels, or to the start of the school year, allows them to create and maintain a cohesive school culture and ensure that all students can meet high expectations.”).

63. See, e.g., CORBETT, *supra* note 18, at 9 (“At Locke HS we receive 10–15 new students a week every week, all the way until the last week of school. . . . [This] is indeed disruptive to the culture and classroom structures that have been set up.” (quoting Marco Petruzzi, CEO of Green Dot)).

their poorly performing school and now are under new leadership with new teachers.⁶⁴

These specific difficulties that turnaround charters face—as compared to new-start charters—along with administrators’ freedom from traditional school-district bureaucracy (something that all charters enjoy), make turnaround schools a particularly challenging place for teachers to work.⁶⁵ For example, a teacher at a turnaround school may teach eleventh graders who had spent two years in their traditional public high school before the turnaround, have unaddressed behavioral issues, and are academically behind by a grade level or more. Due to its designation as a “default” or “neighborhood school,” the charter provider would not be able to expel or refuse to admit any students with major behavioral issues, as opposed to new-start charters, which would.⁶⁶ At the same time, the turnaround-charter provider may demand more from the teacher than a traditional unionized public school. For example, the charter provider may base the teacher’s pay on her students’ performance on standardized tests⁶⁷ rather than the bargained-for “lockstep” pay method that many public schools have.⁶⁸ The charter provider may place thirty-five or forty students in her classroom⁶⁹ and require her to teach them for longer periods at a time than the bargained-for allotment at the traditional public school.⁷⁰ The charter provider will likely also be able to terminate her at will based

64. See *id.* at 10–11 (discussing the challenges turnaround schools face).

65. See Sarah Karp, *At Turnarounds, a Revolving Door for Most Teachers*, CATALYST CHI. (Apr. 17, 2014), <http://catalyst-chicago.org/2014/04/turnarounds-revolving-door-most-teachers/> [<https://perma.cc/2M78-LHYD>] (“At 16 of the 17 schools that underwent a turnaround between 2007 and 2011, more than half of teachers hired in the first year of the turnaround left by the third year.”).

66. See CORBETT, *supra* note 18, at 9 (discussing one turnaround charter and noting that “[s]tudents are accepted year-round in any grade . . . and with any disability; students are rarely expelled . . . ; students are enrolled as they register to attend the school, regardless of whether there are openings; and no application or lottery is required”).

67. See Sarena Goodman & Lesley Turner, *Teacher Incentive Pay and Educational Outcomes: Evidence from the NYC Bonus Program 5* (Harvard Kennedy Sch. Program on Educ. Policy and Governance Working Papers Series, PEPG 10-07, 2010), http://www.hks.harvard.edu/pepg/MeritPayPapers/goodman_turner_10-07.pdf [<https://perma.cc/KN39-QMET>].

68. See, e.g., BALTIMORE TEACHERS UNION CONTRACT, *supra* note 36, at 61–63 (detailing the schedule of teacher salary based on number of years or “steps” of experience the teacher has).

69. Cf. Courtney L. Malloy & Priscilla Wohlstetter, *Working Conditions in Charter Schools: What’s the Appeal for Teachers?*, 35 EDUC. & URB. SOC’Y 219, 232–33 (2003) (discussing the higher student-to-teacher ratio often found at charter schools).

70. See BALTIMORE TEACHERS UNION CONTRACT, *supra* note 36, at 26 (noting that class size is a bargained-for part of the contract).

on how she handles her students' behavioral challenges.⁷¹ These working conditions, although similar among charter schools, may be more arduous than both new-start charters and unionized public schools because turnaround schools cannot easily expel or refuse to admit students, making it difficult to maintain a stable school culture. This problem could lead charter-school teachers to want to form unions with their coworkers, even though the intent behind charter schools was to create an alternative to a unionized public school.

B. The Changing Relationship Between Charter Schools and Teachers Unions

Teachers forming or opposing unions within the public-school system is nothing new. Charter schools, however, add a novel element to the discussion because charter advocates have offered a union-free atmosphere as one of the benefits of charter schools. Understanding the connection between charter schools and teachers unions is important to understanding why not all teachers unions are alike and why labor law needs to account for these differences.

Charters and unions have had an uneasy relationship.⁷² There are a finite number of education jobs available, and in cities where charters enroll students who would usually go to traditional public schools, every new charter school means fewer jobs for unionized teachers.⁷³ In some cities, however, charter-school employees are entitled to representation by the same union that represents the traditional public-school teachers.⁷⁴ Hiring freezes have occurred in some cities because of decreasing public-school enrollment, due to charter-school growth, which has added to the tension between charter schools and teachers

71. See WEIL, *supra* note 11, at 425 (“[T]he management of anti-union charter schools insist that the only acceptable standard of employment is ‘at-will employment.’”).

72. See, e.g., Cohen, *supra* note 15 (quoting a charter-school teacher who questioned supporting a union that spent years attacking the charter-school movement in California).

73. See NAT’L CHARTER SCH. RESEARCH PROJECT, THE FUTURE OF CHARTER SCHOOLS AND TEACHERS UNIONS 1 (2006), <http://files.eric.ed.gov/fulltext/ED495839.pdf> [<https://perma.cc/8K7W-5AMV>] (discussing how teachers unions consider charter schools “direct threats to teachers unions, since charter school teachers generally do not need to join existing collective bargaining units”).

74. See, e.g., ALASKA STAT. § 14.03.270(b) (West 2015) (“All provisions of an existing negotiated agreement or collective bargaining agreement applicable to a teacher or employee of a district apply to that teacher or employee if employed at a charter school in that district, unless the district and the bargaining unit . . . agree to an exemption.”); Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL’Y 885, 931 & nn.237–38 (2007) (listing states submitting charter schools to existing collective-bargaining agreements).

unions.⁷⁵ As a result, new teachers who would join the public-sector teachers union now work at mostly non-union charters.⁷⁶

The two largest U.S. teachers unions, the AFT and the National Education Association (NEA), openly opposed charter schools once the charter movement began to tout union-free schools as better than unionized ones.⁷⁷ In a recent move that may reflect both pragmatism⁷⁸ and solidarity with charter teachers,⁷⁹ the AFT and NEA are organizing unions in charter schools. In 2007, the AFT began a national effort to organize charters and placed organizers in seven major cities.⁸⁰ The NEA also expressed support for organizing charters and has organized charter schools in New Jersey and California.⁸¹ Having initially fought the authorization of charter schools as a threat to the public-school system, unions have changed their stance. Charter schools are here to stay, but there is a lack of regulation and oversight of bad charter schools, which creates space for unionization as a potential disciplining tool for the charter system.⁸² Additionally, although 68 percent of K–12 public-school teachers belong to unions, only 7 percent of charter-school teachers do,⁸³ making charter schools ripe for new unions (and thus new members).

75. See, e.g., Danny Valentine, *To Deal with Cut in Funding, Hernando School District Implements Hiring Freeze*, TAMPA BAY TIMES (Apr. 3, 2014, 4:58 PM), <http://www.tampabay.com/news/education/k12/the-deal-with-cut-in-funding-hernando-school-district-implements-hiring/2173421> [https://perma.cc/6DJJ-YA6E] (“For the second time this school year, the Hernando County School District has implemented a hiring freeze to address budget concerns that are largely tied to the district’s declining enrollment.”).

76. See Winnie Hu, *Teachers Facing Weakest Market in Years*, N.Y. TIMES (May 19, 2010), <http://www.nytimes.com/2010/05/20/nyregion/20teachers.html> [https://perma.cc/G7WK-2MA9] (“Charter schools, which are publicly financed but independently run, are practically the only ones hiring in New York and elsewhere because of growing enrollments amid expanding political and economic support for school choice.”).

77. Cohen, *supra* note 15.

78. See *id.* (“Critics argue that unions’ newfound interest in charter teachers, then, is just a ploy to collect more membership dues.”).

79. See *id.* (“[The AFT and the NEA] recognized that such new national initiatives as the Common Core standards and President Obama’s Race for the Top meant that teachers at charter and traditional public schools faced similar challenges that the unions could help them address.”).

80. *Id.*

81. *Meet NEA’s Charter School Members*, NEA, <http://www.nea.org/home/60799.htm> [https://perma.cc/XF79-JNKE].

82. Elias Isquith, *Charter Schools’ Worst Nightmare: A Pro-Union Movement May Change Charters Forever*, SALON (July 18, 2015, 6:30 AM), http://www.salon.com/2015/07/18/charter_schools_worst_nightmare_a_pro_union_movement_may_change_charters_forever/ [https://perma.cc/6Y5M-RSEJ].

83. THE CTR. FOR EDUC. REFORM, *supra* note 47, at 13 (stating that of 7 percent of charter-school teachers who are unionized, half are unionized only because state law stipulates that they

By decentralizing union power into smaller bargaining units and working with individual charter providers to negotiate less entrenched contracts, independent charter-school unions may provide an opportunity to break up large, inefficient public-sector employee unions. Most charter-union contracts—devoid of the power built over time by the teachers union—provide an intermediate level of job protection to charter employees. They give more protection than the at-will contracts most charter teachers currently work under but less protection than the traditional public-school union contracts do.⁸⁴ This level of protection may address some of the ills that charter-school teachers face without the inefficiencies of the larger collective-bargaining unit.⁸⁵

This type of charter-by-charter unionizing could occur under either state or federal labor jurisdiction. Consider the following scenario: a teacher repeatedly speaks up in meetings to question an administrator's policy that a student who is out of uniform must automatically be suspended. Under an at-will contract common at most charter schools, the teacher may find herself without a job at the end of the school year, and the employer does not need to provide a justification for the decision.⁸⁶ Under a unionized-charter contract, the administrator may need to provide a reason for letting a teacher go or have formal meetings with the teacher that show she is not making progress according to predetermined standards.⁸⁷ Under a traditional union contract in areas where the teachers union has built up bargaining power over time, the teacher may be entitled to continue to work or wait in a “rubber room”⁸⁸ until a formal hearing, where the

follow their district's collective-bargaining agreement, and this number has dropped from 12 percent).

84. For an explanation of the spectrum of job protection under different types of contracts with teachers, see Kauffman, *supra* note 9, at 1412–13. I am indebted to Kauffman for his analysis of the New York City Teachers Union Contract, which informed this argument and pointed me to some of the provisions described below.

85. *Id.*

86. *Id.* The teacher will still have the same civil-rights protections and state employment-law protections. *Id.*

87. See UNITED FED'N OF TEACHERS, AGREEMENT BETWEEN THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND THE UNITED FEDERATION OF TEACHERS art. 21(A) (2014), <http://www.uft.org/files/attachments/moa-contract-2014.pdf> [<https://perma.cc/ZYB4-PQE2>] [hereinafter N.Y.C. TEACHERS UNION CONTRACT] (outlining the process for principals to document a teacher's poor performance to assign an “unsatisfactory” rating).

88. The “rubber room” refers to the practice of sending teachers accused of misconduct to a “temporary reassignment center” while the charges against them are pending. Steven Brill, *The*

administrator will have to present proof of the teacher's ineffectiveness or insubordination and the administrator's attempts to remedy the situation.⁸⁹

The landscape of laws governing charter-school unions differs from state to state. Twenty-four states and the District of Columbia exclude charter schools from school-district collective-bargaining agreements.⁹⁰ Other states explicitly *include* charter-school employees in the public-sector teachers union in their state.⁹¹ Still others outlaw public-sector employee unions but are silent on charter-school unions.⁹²

Charter-school providers' responses to unionization have varied. Some charter networks, such as Green Dot, have embraced unions and bargained with their teachers to create contracts that reflect the interests of both sides.⁹³ Others have engaged in protracted battles with

Rubber Room, NEW YORKER (Aug. 31, 2009), <http://www.newyorker.com/magazine/2009/08/31/the-rubber-room> [<https://perma.cc/F4RL-Y2UV>]. Brill describes a wasteful purgatory for teachers who are waiting for charges against them to be handled by an arbitrator:

The teachers have been in the Rubber Room for an average of about three years, doing the same thing every day—which is pretty much nothing at all. Watched over by two private security guards and two city Department of Education supervisors, they punch a time clock for the same hours that they would have kept at school—typically, eight-fifteen to three-fifteen. Like all teachers, they have the summer off. The city's contract with their union, the United Federation of Teachers, requires that charges against them be heard by an arbitrator, and until the charges are resolved—the process is often endless—they will continue to draw their salaries and accrue pensions and other benefits.

Id.

The official “rubber rooms” were shut down as part of an agreement between the city and the teachers union—no doubt in part due to the public-relations firestorm the practice caused—but New York City teachers are now being reassigned inside their own schools in so-called “solitary confinement rubber rooms.” Ben Chapman, *Troubled City Teachers Still Bouncing Around the Supposedly Shutdown ‘Rubber Rooms’ as City Wastes \$22 Million a Year*, N.Y. DAILY NEWS (Oct. 16, 2012, 3:00 AM), <http://www.nydailynews.com/new-york/education/city-schools-rubber-rooms-bounce-back-article-1.1184406> [<https://perma.cc/WYN3-TNYK>].

89. See N.Y.C. TEACHERS UNION CONTRACT, *supra* note 87, at art. 21(G) (discussing the “section 3020-a hearing” process for tenured teachers).

90. NAT'L ALL. FOR PUB. CHARTER SCH., MEASURING UP TO THE MODEL: A RANKING OF STATE CHARTER SCHOOL LAWS 11 tbl.14 (6th ed. 2015), http://www.publiccharters.org/wp-content/uploads/2015/01/model_law_2015.pdf [<https://perma.cc/TM4E-X8P5>]. Those states and territories are: Arizona, California, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Washington, and Wyoming. *Id.*

91. Malin & Kerchner, *supra* note 74, at 931.

92. *Id.*

93. See Rebecca Vevea, *Unions Move In at Chicago Charter Schools, and Resistance Is Swift*, N.Y. TIMES (Apr. 7, 2011), <http://www.nytimes.com/2011/04/08/us/08cncharter.html> [<https://perma.cc/GLB5-R9NV>] (describing Green Dot's response).

teachers seeking to unionize.⁹⁴ Some charter providers have even decided to walk away from their schools after the schools' teachers voted to unionize.⁹⁵ These varying responses all occur with the overlay of the jurisdictional question, and sometimes intersect with it, as either the union or the charter provider may use challenges to jurisdiction as a tool to get its way in negotiations.⁹⁶

II. THE NLRB'S CURRENT TEST FOR JURISDICTION AND ITS APPLICATION IN CHARTER-SCHOOL UNION CASES

To understand how federal jurisdiction over charter schools may have different effects, some background on the Act is necessary. In passing the Act, Congress intended to encourage collective bargaining.⁹⁷ The NLRB, which regulates collective bargaining,⁹⁸ has the primary responsibility of protecting employees' rights under the Act but also must balance these against the rights of the employer and the union as a whole.⁹⁹ Section 7 of the Act—the section pertaining to the rights of employees—offers broad protections to employees seeking to protest working conditions or to collectively bargain for terms and conditions of their employment.¹⁰⁰ This Note concerns the

94. *Id.*

95. *See, e.g.,* Kyle Feldscher, *Charter School Company Ends Relationship with School After Teachers Announce Unionization Vote*, MLIVE (Apr. 17, 2015, 3:19 PM), http://www.mlive.com/lansing-news/index.ssf/2015/04/charter_school_company_decides.html [<https://perma.cc/XCZ2-8VSM>] (“New Urban Learning [has announced it] will end its relationship with University Yes Academy. Teachers at University Yes Academy will be voting on whether to unionize on May 6.”).

96. *See infra* Part IV.B.

97. 29 U.S.C. § 151 (2012) (stating that the purpose of the Act is to “encourag[e] the practice and procedure of collective bargaining”).

98. The NLRB is composed of five Board members (appointed by the President), a General Counsel, regional directors, and administrative law judges. *See* 29 U.S.C. § 153(a)–(b) (discussing the NLRB’s structure). A three-member board decides routine cases, but the entire five-member Board decides more important cases. *See* AM. BAR ASS’N., *THE DEVELOPING LABOR LAW* 2826 (John E. Higgins, Jr. et al. eds., 6th ed. 2012).

99. *See* *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228–29 (1963) (recognizing the role of the courts in analyzing Unfair Labor Practices as “weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends”); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1536–37 (2002) (discussing the potentially conflicting protections afforded to employers and employees).

100. 29 U.S.C. § 157. Section 7 of the Act makes it an “unfair labor practice” for employers “to interfere with, restrain, or coerce employees” while employees are exercising their collective-bargaining rights. *Id.* §§ 151–169. After a union is certified to collectively bargain on behalf of its member-employees, employers are required by the Act to bargain in good faith on “wages, hours,

test the NLRB uses to determine whether these protections should extend to charter-school employee unions.

The protections of the Act do not apply to public employees. An employer may be exempt from NLRB jurisdiction if it is a “political subdivision” under § 2(2) of the Act.¹⁰¹ When employees seek the protection of the Act in an election,¹⁰² the employer may challenge the NLRB’s jurisdiction over the dispute.¹⁰³ An employer may claim that it is a “political subdivision” under § 2(2) and therefore exempt from the provisions of the Act. Section A of this Part explains the test for determining whether an employer is a political subdivision and traces the NLRB’s changing interpretation of that test as it applies to charter schools. Section B then discusses the Act’s coverage of charter schools under the NLRB’s current application of its jurisdictional test. Section C explores the implications for both employers and employees of applying the Act to charter schools.

A. *The Hawkins County Test*

The NLRB applies the test from *Hawkins County* to determine if an employer is a “political subdivision.”¹⁰⁴ Under *Hawkins County*, an

and other terms and conditions of employment.” If an employer fails to bargain on one of these subjects, it is considered an “unfair labor practice.” Additional unfair labor practices pertinent to teacher unionization include threatening to fire employees for union activity, *Schaeff Inc. v. NLRB*, 113 F.3d 264, 266 n.5 (D.C. Cir. 1997), surveilling union meetings, *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938), and offering “super-seniority” to employees who refuse to take part in union activity, *Erie Resistor Corp.*, 373 U.S. at 231. The adjudication of unfair labor practices is often where jurisdictional challenges arise. *E.g.*, *Instituto del Progreso Latino*, Case No. 13-RM-001771 (N.L.R.B. Dec. 30, 2010) (decision & order). Employees and their union representatives may file an unfair labor practice charge with the NLRB, which the Board then investigates. 29 U.S.C. §§ 159(c), 160(b), 161e; 29 C.F.R. § 102.9 (2011); *The NLRB Process*, NLRB, <https://www.nlr.gov/resources/nlr-process> [<https://perma.cc/3VKR-Q627>]. If the Regional Director finds merit in the charge, she will file a formal complaint against the employer, often first referring the case to arbitration. NLRB, *supra*. If the case is not settled, it goes before an Administrative Law Judge of the NLRB, whose decision can be appealed. *Id.*

101. 29 U.S.C. § 152(2).

102. Unions, employers, and employees may file a petition for an NLRB representation election. The petition must be supported by at least 30 percent of the employees in the bargaining unit. After a petition has been filed, the Regional Director investigates whether the NLRB has jurisdiction over the employer or if there are any other obstacles. If the Regional Director orders that an election be held, it is conducted by secret ballot by a representative of the regional office, with an appeal procedure if there is some error in the process. Jurisdictional challenges may also be filed in the appeals process. *Id.* § 159(c).

103. *See Id.* §§ 159(c), 160(b), 161; 29 C.F.R. § 102.9 (2011); NLRB, *supra* note 100. Jurisdictional challenges also typically arise when employees file Unfair Labor Practices with the NLRB to enforce the protections of the Act.

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

employing entity is a political subdivision subject to state labor law, not the Act, if it was either “(1) created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.”¹⁰⁵ In *Hawkins County*, the Supreme Court examined the legislative history of the Act, observing that public employers were exempted from the Act to avoid protecting governmental employees’ right to strike.¹⁰⁶ The Court noted that federal law is controlling in the analysis of whether an employer is a political subdivision, but state law is given “careful consideration.”¹⁰⁷

The NLRB, in applying *Hawkins County*, has found a state’s characterization of the employer and its statutory scheme to be weighty factors in the political-subdivision analysis.¹⁰⁸ The NLRB, therefore, conducts a fact-specific analysis of the state’s legislation creating or enabling the employer in order to determine whether the employer meets the *Hawkins County* test.¹⁰⁹ Thus, the employer does not need to be a government agency to be an exempt political subdivision.¹¹⁰

As of the 2010s, the NLRB is pursuing expansion of its jurisdiction.¹¹¹ In the face of multiple states restricting protection of

105. *Id.*

106. *See id.* at 604 (“Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.”).

107. *Id.* at 602 (quoting Nat. Gas Util. Dist. of Hawkins Cty., 167 N.L.R.B. 691, 691 (1967)).

108. *E.g.*, *Hinds Cty. Human Res. Agency*, 331 N.L.R.B. 1404, 1404 (2000).

109. *See, e.g.*, *Research Found. of the City Univ. of N.Y.*, 337 N.L.R.B. 965, 968 (2002) (analyzing the CUNY structure, the state enabling legislation, the composition of the board of directors, and the extent to which the board of directors is responsible for enacting CUNY policies).

110. *See Hinds County*, 331 N.L.R.B. at 1404 (“It is well established that the National Labor Relations Board recognizes entities created by county governments pursuant to an enabling state statute, as having been directly created by the state under *Hawkins*.”). Even if the employer is not considered a “political subdivision,” the NLRB may also “decline to assert jurisdiction over any labor dispute . . . where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.” 29 U.S.C. § 164(c)(1) (2012). This practice is rare, however, due to the expansive definition of “commerce.” *See, e.g.*, *Mich. Eye Bank*, 265 N.L.R.B. 1377, 1380 (1982) (asserting jurisdiction over a nonprofit corporation engaged in distributing corneal transplant tissue).

111. For an exploration of this phenomenon in the religious-school context, see generally Christian Vareika, Note, *Further and Further, Amen: Expanded National Labor Relations Board Jurisdiction over Religious Schools*, 56 B.C. L. REV. 2057 (2015). Labor law, as compared to other bodies of law, is relatively unsettled. This is partially due to partisan appointments. *See* Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. (2013) 511, 511–12 & n.5 (describing the NLRB’s “changing positions on various issues depending on which party was in power”). Also, the NLRB has historically relied on

union activity, and perhaps motivated by partisan politics, the NLRB extended the protections of the Act to more and more employees, even including those who would be considered public.¹¹² This expansion of jurisdiction affects charter schools, which are a growing sector of unionized employees.¹¹³

B. Hawkins County *Applied to Charter Schools*

Whether the NLRB will assert jurisdiction over a labor dispute involving a charter school is a case-by-case determination.¹¹⁴ This Section clarifies the jurisdictional test the NLRB applies to decide whether to exempt a charter provider-employer from the Act's protections and the changes to the NLRB's interpretation of this test by reviewing several charter-school cases from the 2000s and 2010s, including two recent cases decided in 2016 that clarified the NLRB's approach to charter-school teachers unions.

adjudication, rather than formal notice-and-comment rulemaking, to make rules. *See* NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 817 (1990) (Scalia, J., dissenting) (“Despite the fact that the NLRB has explicit rulemaking authority . . . it has chosen—unlike any other major agency of the Federal Government—to make almost all its policy through adjudication.” (citation omitted)). This practice results in unsettled doctrine because unlike Article III courts, the NLRB's policies and decisions are not subject to stare decisis. NLRB v. Kostel Corp., 440 F.2d 347, 348 (7th Cir. 1971).

112. *See* LAW 360, *Q&A with Duke's Dan Bowling III*, *supra* note 30. Professor Bowling states:

The NLRB is in the midst of an aggressive expansion of the definition of concerted activity, one so broad as to bring virtually all private sector employees in the U.S. under the [Act's] protective umbrella. This includes everything from employees complaining about a boss on Facebook to employees chatting about work issues on the Internet with co-workers.

Id.

The NLRB has also created its own web page *encouraging* nonunion employees to file Unfair Labor Practices. *NLRB E-File*, NLRB, <https://apps.nlr.gov/chargeandpetition/#/> [<https://perma.cc/UY7E-RUXN>]. Additionally, the NLRB has liberalized other statutory definitions, such as who is a “joint employer,” in ways that may subject more employers to liability for unfair labor practices. *See* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, slip op. at 17 (Aug. 27, 2015).

113. For a discussion of the growth of charter-school unions, see *supra* Part I.

114. *See, e.g.*, Press Release, NLRB Office of Pub. Affairs, NLRB Invites Briefs Regarding Charter School Jurisdiction (Jan. 10, 2011), <https://www.nlr.gov/news-outreach/news-story/nlr-invites-briefs-regarding-charter-school-jurisdiction> [<https://perma.cc/3XVK-DP39>] (“State charter school laws vary, and NLRB regional directors have both asserted jurisdiction in some charter school cases and declined it in others. [*Chicago Mathematics*, a charter-school teachers union case up for NLRB review,] could provide further guidance as to when charter schools fall under NLRB jurisdiction.”). The NLRB's recent approach to charter cases suggests that it will assert jurisdiction in many, if not all, charter school cases. For further discussion on this point, see *infra* notes 145–87 and accompanying text.

Charter schools present a particular conundrum for applying the *Hawkins County* test: although charter schools may receive public funding or be authorized by state statutes, nonprofit boards composed of private individuals usually manage them.¹¹⁵ This factor differentiates them from public schools, which are managed by local school boards created by the state and made up of officials accountable to either the electorate or the state government.¹¹⁶ Additionally, charter schools are not all alike. They may be more like private schools (not exempt from the Act) or more like traditional public schools (exempt from the Act).¹¹⁷

The jurisdictional test was initially murky when charter-school unionization expanded. In early charter-school cases applying the *Hawkins County* test, as highlighted below, NLRB Regional Directors differed regarding the factors required by the test. This difference led to varied results depending on the factual scenario. In some cases, the charter school was considered exempt from the Act's jurisdiction; in others, the NLRB asserted jurisdiction. Now, however, the NLRB has narrowed its focus under *Hawkins County* such that no recent case has found a charter school an exempt political subdivision.

For an early example, in *Los Angeles Leadership Academy*,¹¹⁸ the teachers union, which was organized under the NEA, sought

115. *Facts About Charters*, NAT'L. ALL. FOR PUB. CHARTER SCH., <http://www.publiccharters.org/get-the-facts/public-charter-schools/faqs> [<https://perma.cc/T7VB-DHUG>].

116. In Philadelphia, for instance, the state legislature has taken over the school board and a "Reform Commission" appointed by the governor manages the city schools. *See generally* Eva Travers, *Philadelphia School Reform: Historical Roots and Reflections on the 2002–2003 School Year Under State Takeover*, 2 PENN GSE PERSP. ON URB. EDUC. 2 (2003).

117. The NLRB has encountered a similar issue to charter schools in deciding whether to extend protection to employees of private nonprofit schools that state and local governments have contracted with to provide special education services. This issue has been fairly settled since the 1970s. In these cases, the NLRB did not find jurisdiction over the employers. *E.g.*, Laurel Haven Sch. for Exceptional Children, Inc., 230 N.L.R.B. 1197 (1977); Overbrook Sch. for the Blind, 213 N.L.R.B. 511 (1974). The NLRB's reasoning in the special education cases weighed the public and private aspects of the employer. In *Overbrook*, the NLRB considered a school that provided educational services to the blind and deaf-blind students of the Philadelphia area. *Overbrook*, 213 N.L.R.B. at 511. Rather than using the *Hawkins County* test, it found that the "special relationship to the public school system" made the school essentially public, not private, and therefore not subject to the NLRB's jurisdiction. *Id.* at 513. The NLRB also emphasized substance over form in its opinion, looking to the school's activities and programming rather than its classification as a private, nonprofit school. *Id.* The NLRB has not used this same reasoning for its charter-school cases, however, which may be in part due to the changing composition of the NLRB based on the President appointing its members.

118. L.A. Leadership Acad., Case No. 31-RM-1281 (N.L.R.B. Mar. 2, 2006) (decision & order). This decision was issued by a Regional Director and is therefore nonprecedential to govern future NLRB decisions, but several other Board decisions have relied on its reasoning,

recognition under the California Public Employment Relations Board (PERB).¹¹⁹ That charter school was a new-start charter, not a turnaround school.¹²⁰ The charter school wanted the Act's coverage, contending it was a private employer subject to NLRB jurisdiction.¹²¹ The Regional Director¹²² concluded that the charter school was a political subdivision, exempt from the Act under § 2(2), and dismissed the employer's petition seeking NLRB jurisdiction.¹²³ Although the Regional Director's decision is not binding on other labor disputes, its reasoning is instructive to illustrate a broader reading of *Hawkins County*—one that would classify more charter schools as political subdivisions (similar to their public-school counterparts) and limit the Act's jurisdiction over charter schools.

The Regional Director applied the *Hawkins County* test and concluded that the charter school could be a political subdivision under either prong of the test.¹²⁴ Under the first prong (“created directly by the state”),¹²⁵ he found that the state's enabling legislation for charter schools,¹²⁶ the statutory scheme applying to the charter,¹²⁷ and the

and its interpretation of the *Hawkins County* test is more robust than the current test the NLRB uses.

119. *Id.* at 1.

120. *Id.* at 5 n.4.

121. *Id.* For a discussion of why a union or an employer might want the Act's coverage as opposed to state PERB coverage, and vice-versa, see *infra* Part II.C.

122. The NLRB's Regional Directors work within the NLRB's Office of General Counsel and head the field offices. Eileen B. Goldsmith, *The Role of Regional Directors in the National Labor Relations Board* 1 (2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/165.authcheckdam.pdf [<https://perma.cc/7E5D-S5BL>]. Their role is to substantively enforce the Act's provisions, and they have both investigatory and adjudicative responsibilities as delegated to them by the NLRB under the Act. 29 U.S.C. § 159 (2012); Goldsmith, *supra*. Although their authority is broad, the Regional Directors' decisions “are guided by the Board's case law and various internal guidelines, and are subject to varying degrees of review.” *Id.*

123. *Los Angeles Leadership*, Case No. 31-RM-1281, at 2.

124. *Id.* at 3.

125. *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 604 (1971).

126. See *Los Angeles Leadership*, Case No. 31-RM-1281, at 7 (“On March 12, 2002, [the Los Angeles Unified School District] finally approved the Academy's charter petition for a five-year term, the maximum time permitted under the [California Charter Schools Act of 1992].”); *id.* at 5 (“The California legislature unequivocally declared its intent that ‘Charter Schools are part of the Public School System, as defined in Article 9 of the California constitution.[.]’”).

127. *Id.* at 5.

public funding making up the majority of the school's revenue¹²⁸ pointed to the charter being a public entity.¹²⁹

Under the second prong (“administered by individuals who are responsible to public officials or to the general electorate”),¹³⁰ the Director examined the enabling statute,¹³¹ the Los Angeles Unified School District's oversight of the Academy's budget,¹³² and the Academy's reporting requirements¹³³ to determine that the charter was a political subdivision under the second prong of *Hawkins County* as well.¹³⁴ Other Regional Director decisions have found charter schools exempt under one or both prongs of *Hawkins County*.¹³⁵

Despite the Regional Directors' previous decisions finding charter schools exempt from the Act, in the more recent cases involving charter schools, the NLRB has used a narrower interpretation of *Hawkins County*. In these cases, the NLRB interpreted the *Hawkins County* test to determine that most charter schools are not political subdivisions, so they are considered “Employers” under the Act.¹³⁶ Although this is not a bright-line rule,¹³⁷ all of the NLRB decisions in this area since 2012 have found the charter schools to be “Employers” under the Act's jurisdiction.¹³⁸ The NLRB expounded on the legal

128. *See id.* at 8–9 (detailing the sources of the charter school's funding: \$2,175,097 from state funds, \$315,573 from federal funds, and \$469,900 from private sources).

129. *Id.*

130. *Hawkins Cty.*, 402 U.S. at 604–05.

131. *See Los Angeles Leadership*, Case No. 31-RM-1281, at 12–13 (quoting CAL. EDUC. CODE § 47612(a) (West 2013)).

132. *See id.* at 13 (detailing the layers of oversight of financial records and budget by LAUSD).

133. *See id.* (“While the Academy has a board of directors that makes governance decisions, the Academy is not excused from many regulations and reporting requirements that apply to all public schools.”).

134. *Id.* at 15.

135. *E.g.*, *Instituto del Progreso Latino*, Case No. 13-RM-1771 (N.L.R.B. Dec. 30, 2010) (decision & order) (finding the employer exempt under the second prong of *Hawkins County* because its administration is responsible to public officials or to the general electorate).

136. *E.g.*, *Hyde Leadership Charter School—Brooklyn*, Case No. 29-RM-126444, 364 N.L.R.B. No. 88 slip op. at 1 (N.L.R.B. Aug. 24, 2016) (board decision); *Pa. Virtual Charter Sch.*, Case No. 04-RC-143831, 364 N.L.R.B. No. 87 slip op. at 1 (N.L.R.B. Aug. 24, 2016) (board decision); *Pa. Cyber Charter Sch.*, Case No. 06-RC-120811 (N.L.R.B. Apr. 9, 2014) (board decision).

137. *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 1 (“We are not announcing a bright-line rule asserting jurisdiction over charter schools nationwide.”).

138. *E.g.*, *Hyde Leadership*, Case No. 29-RM-12644, 364 N.L.R.B. No. 88 (decision & direction of election); *Pilsen Wellness Ctr.*, Case No. 13-RM-001770 (N.L.R.B. Mar. 8, 2013) (board decision).

reasoning for protecting charter-school employees in twin decisions issued on August 24, 2016: *Pennsylvania Virtual Charter School*¹³⁹ and *Hyde Leadership Charter School—Brooklyn*.¹⁴⁰ These cases adopted the reasoning the NLRB used in *Chicago Mathematics & Science Academy Charter School, Inc.*,¹⁴¹ which was previously invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*.¹⁴² The reasoning behind this interpretation is different than the reasoning in *Los Angeles Leadership* discussed above.¹⁴³ Because Regional Directors are supposed to follow NLRB decisions, *Pennsylvania Virtual* and *Hyde Leadership* provide the analysis that Regional Directors will likely use in the future to determine whether the NLRB has jurisdiction over charter-school teachers unions.¹⁴⁴

139. Pa. Virtual Charter Sch., Case No. 04-RC-143831, 364 N.L.R.B. No. 87 (N.L.R.B. Aug. 24, 2016) (board decision).

140. Hyde Leadership Charter School—Brooklyn, Case No. 29-RM-126444, 364 N.L.R.B. No. 88 (N.L.R.B. Aug. 24, 2016) (board decision).

141. Chi. Mathematics & Sci. Acad. Charter Sch., Inc., 359 N.L.R.B. No. 41 (Dec. 14, 2012), *invalidated by* NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

142. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). In *Noel Canning*, the Supreme Court determined that the NLRB was improperly constituted when it ordered Noel Canning to execute a collective-bargaining agreement because the President had improperly used his recess-appointment power for three of the five members of the Board. *Id.* at 2558, 2578. The NLRB may not operate without a quorum of three properly appointed members. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010). The improperly constituted NLRB decided cases between January 2012 and August 2013, all of which may be invalid under *Noel Canning*. Some of these cases represented a departure from existing NLRB precedent according to some commentators. *See, e.g.,* Phillip Bauknight, Suzanne Peters, Michael Lotito, Tessa Gelbman, Janeen Feinberg & Brandon Gearhart, *Recent Developments in Employment Law and Litigation*, 49 TORT TRIAL & INS. PRAC. L.J. 157, 170–173 (2013). Two of the cases asserting NLRB jurisdiction over charter schools, *Chicago Mathematics* and *Pilsen Wellness*, were decided during this time period and were issued by improperly constituted boards, meaning it is likely that they are invalid. *See Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 3 n.7 (stating that *Noel Canning* rendered *Chicago Mathematics* invalid). So the decisions may not have precedential value because they are invalid for lack of quorum. Federal courts have treated decisions made without a lawful quorum as without precedential value. *See, e.g.,* San Miguel Hosp. Corp. v. NLRB, Nos. 08–1245, 08–1300, 2010 WL 4227318, at *1 (D.C. Cir. Sept. 20, 2010) (vacating the NLRB's decision). The properly constituted NLRB has, however, adopted the reasoning of the charter-school cases in subsequent decisions where it found jurisdiction. *E.g.,* Pa. Cyber Charter Sch., Case No. 06-RC-120811 (N.L.R.B. Apr. 9, 2014) (order).

143. *See supra* notes 119–35 and accompanying text.

144. At least one Regional Director had already considered the nullified reasoning in *Chicago Mathematics* to overturn the analysis that *Los Angeles Leadership* used to find that the school was not a political subdivision. John B. Stetson Charter Sch., an Aspira of PA Sch., Case No. 04-RC-151011, at 7 n.6 (N.L.R.B. May 14, 2015) (regional director's decision & direction of election) (“Since the decision was issued before the NLRB's decisions in *Chicago Mathematics* and *Pennsylvania Cyber*, I find it to be of limited value in evaluating the NLRB's current views.”).

Interestingly, in the two recent charter-school cases, the union and the employer were on different sides of the jurisdictional dispute, illustrating that the interests in unionization under national or state labor law do not always cut the same way. In *Pennsylvania Virtual*, the union contended that the NLRB had jurisdiction because the school was not an exempt political subdivision, and the employer opposed NLRB jurisdiction.¹⁴⁵ In *Hyde Leadership*, however, the parties were flipped: the union contended that the charter school was an exempt subdivision, and the employer favored NLRB jurisdiction.¹⁴⁶

These two charter schools presented somewhat similar factual scenarios, and under the NLRB's analysis, both were considered not exempt under the political-subdivision exemption to § 2(2) employers. In *Pennsylvania Virtual*, the school was a cyber charter school,¹⁴⁷ which had to admit any eligible student who qualified as an in-state resident under Pennsylvania law.¹⁴⁸ A nonprofit board operated the school under an agreement with a local school district.¹⁴⁹ The school received 97 percent of its funding from the school districts its students would otherwise attend but for their enrollment in the cyber charter school, and the remaining 3 percent came from federal sources.¹⁵⁰ The school was a new-start charter school, not a turnaround school.

In *Hyde Leadership*, the charter school was also a new-start charter, which opened in 2010 as a brick-and-mortar (not a cyber) school. As is common with New York schools, Hyde Leadership was "co-located"¹⁵¹ and operated in the same building as a traditional public elementary school in Brooklyn.¹⁵² A nonprofit board of trustees operated the school.¹⁵³ The school received 91 percent of its funding

145. *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 4.

146. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 4.

147. Cyber charter schools are charter schools operated remotely, with students attending online classes and activities. For an overview of cyber charter schools, see generally Luis A. Huerta, Chad d'Entremont & Maria-Fernanda Gonzalez, *Cyber Charter Schools: Can Accountability Keep Pace with Innovation?*, 88 PHI DELTA KAPPAN 23 (2006).

148. *Pa. Virtual*, 365 N.L.R.B. No. 87, slip op. at 1.

149. *Id.*, slip op. at 3.

150. *Id.*

151. STATE UNIV. OF N.Y. CHARTER SCH. INST., THE ROLE OF THE AUTHORIZER IN THE CO-LOCATION OF CHARTER SCHOOLS IN EXISTING PUBLIC SCHOOL SPACE IN NEW YORK CITY (2016), https://www.suny.edu/about/leadership/board-of-trustees/meetings/webcastdocs/IV_Co-Location%20Overview.pdf [<https://perma.cc/K3TR-9AN6>]

152. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 2.

153. *Id.*

from state sources, 8 percent from federal sources, and 1 percent from private donations or “other income.”¹⁵⁴

In *Pennsylvania Virtual*, the full NLRB, as opposed to a three-member panel, heard the case,¹⁵⁵ signaling its importance.¹⁵⁶ It applied the same analysis and reached the same result in *Hyde Leadership*.¹⁵⁷ In both cases, the NLRB reviewed¹⁵⁸ a Regional Director’s decision and affirmed it, concluding that the charter school was not an exempt political subdivision under either prong of the *Hawkins County* test.¹⁵⁹ Neither Pennsylvania nor New York allows charter-school employees to unionize in the same bargaining units as public-school employees’ bargaining units,¹⁶⁰ so the teachers could have organized under either state or federal labor law.¹⁶¹ Additionally, the NLRB rejected calls to decline jurisdiction as a discretionary matter.¹⁶² In its explanation of why it would not decline jurisdiction, it provided a more extensive discussion of the policy issues relating to charter-school teachers unions than it had previously given.¹⁶³

In both cases, when examining the first prong of *Hawkins County*, the NLRB found that private individuals—acting through private corporations—created charter schools through the framework provided by the enabling statute. Thus, the schools were not created by a public entity under this analysis.¹⁶⁴ The NLRB also compared the charter providers to government contractors, another group that is not

154. *Id.*, slip op. at 3.

155. *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 1.

156. *See supra* note 98. A three-member panel decided *Hyde Leadership*. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 1.

157. *See Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 5 (applying the test “[a]s stated in *Pennsylvania Virtual Charter School*”).

158. Any party may file a petition for the NLRB to review a regional director’s decision. 29 C.F.R. § 102.67(a)–(b) (2015).

159. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 1; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 3.

160. New York does allow charter-school employees in schools with fewer than 250 students to be represented by the same union as local school-district employees, but not the same bargaining unit. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 2 (citing New York Charter Schools Act of 1998, N.Y. Educ. Law. Ch. 16, Title II, Art. 56 (2014)).

161. *See id.* (discussing New York’s charter-school laws); *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 1 (discussing Pennsylvania’s charter-school laws).

162. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 7; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 9.

163. *See, e.g.*, *Chi. Mathematics & Sci. Acad. Charter Sch., Inc.*, 359 N.L.R.B. No. 41, at 1 (Dec. 14, 2012) (discussing only the *Hawkins County* test and its findings on this point).

164. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 5; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 5.

necessarily exempt from NLRB jurisdiction.¹⁶⁵ In *Pennsylvania Virtual*, the NLRB went a step further in its analysis, finding that the charter school was not created to be an “administrative arm of the government.”¹⁶⁶ Despite the state statutory scheme’s characterization of charter administrators as “public officials” and the schools as “public schools,” the NLRB stated that federal, not state, law governs whether an entity is an exempt political subdivision.¹⁶⁷ In *Hyde Leadership*, however, the NLRB declined to examine whether the charter school was an administrative arm.¹⁶⁸ The NLRB’s refusal to examine how the state characterized the charter school differed from *Los Angeles Leadership*, where the Regional Director considered the state’s characterization of the charter school to be an important factor.¹⁶⁹

Under *Hawkins County*’s second prong, the NLRB focused on the bylaws of the charter schools’ nonprofit boards, which in both cases did not allow public officials to elect or remove board members.¹⁷⁰ The NLRB gave “accountability” a literal meaning here: “accountability to public officials” meant that the NLRB officials needed to be removable by a public official.¹⁷¹ Thus, in *Hyde Leadership*, despite the fact that the New York Board of Regents has some power to remove a trustee of a charter school for malfeasance, the NLRB considered this power too limited to make the charter trustees responsible to public officials.¹⁷² This reasoning differs from the reasoning in *Los Angeles Leadership* that applied a broader view to “accountability,” including reporting requirements and special education statutes applying to the charter school, which would require charter school officials to answer to state entities.¹⁷³

After concluding that the charter schools were not political subdivisions under *Hawkins County*, in *Pennsylvania Virtual* and *Hyde Leadership* the NLRB provided policy reasons for asserting

165. See *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 5 (“The Board routinely asserts jurisdiction over private employers that have agreements with government entities to provide services.”); *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 5 (using the exact same language).

166. *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 6.

167. *Id.*

168. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 6 n.6.

169. See *supra* notes 125–29 and accompanying text.

170. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 6; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 8.

171. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 6; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 8.

172. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 7.

173. See *supra* notes 130–34 and accompanying text.

jurisdiction over the case instead of using its statutory prerogative to refuse jurisdiction.¹⁷⁴ In particular, the NLRB rejected arguments that asserting jurisdiction would “lead to instability and confusion.”¹⁷⁵ In *Pennsylvania Virtual*, the NLRB addressed this issue at length, disagreeing with the dissent that its test lacked predictability.¹⁷⁶ It stated, “Although a case-by-case analysis lacks the predictability of a categorical exemption, it results in greater fidelity to the Act in each case. And, as more cases are decided, predictability will no doubt emerge.”¹⁷⁷ While rejecting a bright-line determination on charter schools, the NLRB declared, “[A] categorical exemption of charter schools would not effectuate the purposes of the Act.”¹⁷⁸

In both *Pennsylvania Virtual* and *Hyde Leadership*, NLRB Member Miscimarra wrote dissents detailing why both schools should be considered exempt political subdivisions under both *Hawkins County* prongs. He noted that even if § 2(2) jurisdiction were found, the NLRB should decline to assert its jurisdiction in both cases.¹⁷⁹

In *Hyde Leadership*, the dissent emphasized that under *Hawkins County*’s first prong, New York’s statutory scheme characterized the charter school as an administrative arm of the state. Further, it stated that the school did not exist until the New York Board of Regents created the school through the issuance of a charter.¹⁸⁰ Additionally, the Board of Regents may terminate or choose not to renew the school’s certificate of incorporation if the school mishandles funds or fails in its educational mission.¹⁸¹ Under the second prong, the dissent opined that the Board of Regents appointed the school’s initial board of trustees because it technically provided the names of trustees in its certificate of incorporation.¹⁸² The Board of Regents may also remove

174. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 7–9; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 9–11; see *supra* note 26.

175. *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 9; see *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 8 (“[T]he Union argues that PERB retains jurisdiction over some charter-school employees, such as employees of pre-existing public schools that have been converted to charter schools, and that it would therefore be irrational to subject other charter-school employees to the jurisdiction of the NLRB.”).

176. *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 10.

177. *Id.*

178. *Id.*

179. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 9–16; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 11–18.

180. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 12.

181. *Id.*, slip op. at 13.

182. *Id.*

a board member if it finds she falsified her background or financial disclosure information.¹⁸³ Thus, according to the dissent's view of the facts, the charter school should be exempt under either prong of the *Hawkins County* test.

In both *Pennsylvania Virtual* and *Hyde Leadership*, the dissents argued that the NLRB should decline to assert jurisdiction over the charter schools as well as other similar charter-school cases.¹⁸⁴ The dissents emphasized that providing public education is primarily a state and local concern, so it should not be subject to the Act.¹⁸⁵ They also discussed the instability that the NLRB's decisions would create in this area¹⁸⁶ and predicted continued "protracted disputes that are not definitively resolved until many or most students (and many teachers and other employees) have come and gone."¹⁸⁷

Despite these policy concerns, the reasoning from *Pennsylvania Virtual* and *Hyde Leadership* appears to be what the NLRB will apply in future charter-school cases. This analysis uses a rule that looks primarily at the charter school's board of directors and whether they were elected or appointed by government officials. The two recent cases illustrate how the NLRB is broadly asserting jurisdiction over charter schools by narrowing the political-subdivision exemption for charter schools.

C. *Implications of Applying the Act*

A looming question is whether the Act should be applied to more employees nationwide in an era where unions are under attack. Although this Note does not seek to address this question, it discusses the implications of such an expansive view as concerning charter schools. This Section examines, through the lens of charter schools, why employees or employers may prefer unionization under either state labor laws or federal labor laws.

There are costs and benefits to seeking the protections of the Act, and charter providers and teachers may be on opposite sides of the jurisdictional debate depending on a particular state's statutory

183. *Id.*, slip op. at 14.

184. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 14; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 12.

185. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 14; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 13.

186. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 15; *Pa. Virtual*, 364 N.L.R.B. No. 87, slip op. at 16.

187. *Hyde Leadership*, 364 N.L.R.B. No. 88, slip op. at 15.

overlay.¹⁸⁸ For instance, in a state where public-sector employee unions have been abolished by statute, charter-school teachers may seek the protections of the Act and want their school to be declared a private employer.¹⁸⁹ Some commentators argue that an expansion of jurisdiction could benefit teachers unions in the long run because the NLRB may frustrate right-to-work statutes,¹⁹⁰ which authorize employees to decide whether to join an existing union rather than automatically being considered a part of the bargaining unit upon accepting a job.¹⁹¹

On the other hand, when state law makes it easier to initially organize a union, teachers may prefer state law.¹⁹² For instance, in some states, a union may win recognition by the state labor board by showing that a majority of the employees have signed union membership cards.¹⁹³ This process is colloquially referred to as a “card-check” election and may be easier to win than a secret-ballot election, because it does not require employees to vote in a potentially contentious environment. Additionally, employees may sign their cards before employers have the chance to make their case against unionization in a “captive audience” presentation.¹⁹⁴ Therefore, employers in these

188. In *Hyde Leadership*, 364 N.L.R.B. No. 88, the United Federation of Teachers (AFT, AFL-CIO) wanted state (New York) jurisdiction over the matter. In the Pennsylvania cases, the AFT-affiliated unions sought federal jurisdiction.

189. This scenario presents federalism concerns, which will be briefly addressed *infra* Parts III and IV.

190. *E.g.*, Malin & Kerchner, *supra* note 74, at 931.

191. *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1082 (9th Cir. 2008).

192. The longer an election period, the greater the potential for union campaigns to stall or fail. See Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 78* (Sheldon Friedman et al. eds., 1994) (finding that the union win rate was higher the sooner the election was held, and stating that “if certification could be achieved by card checks rather than elections, union win rates would nearly double” in campaigns where a majority of workers had signed cards); *cf.* Steven Abraham, Adrienne E. Eaton & Paula B. Voos, *Card Check vs. NLRB Elections: Stock Market and First Contract Effects* (Rutgers Sch. of Mgmt. and Labor Relations Research Brief No. 7, 2009) (discussing stock market responses to union organizing efforts in card check and NLRB elections).

193. *River W. Dev. Ltd. P’ship*, 311 N.L.R.B. 591, 595 (1993).

194. See Bronfenbrenner, *supra* note 192, at 82 (finding that captive audience meetings decrease union win rates). See generally Christopher Beam, *Uncivil Union: Does Card Check Kill the Secret Ballot or Not?*, SLATE (Mar. 10, 2009, 7:09 PM), http://www.slate.com/articles/news_and_politics/politics/2009/03/uncivil_union.html [<https://perma.cc/2HBN-ZNKE>] (discussing “card-check” elections and the secret ballot).

states may prefer the election processes of the Act to the state-level card-check election process.¹⁹⁵

In addition to the initial union-certification process, which may be more difficult for unions under federal rather than state law,¹⁹⁶ state law may also prove substantively better or worse for postcertification union activity. For instance, in case of an impasse in contract negotiations, state law may require employers to participate in mediation or binding-interest arbitration to obtain a final contract.¹⁹⁷ The Act imposes no such requirement on employers and may allow employers to make unilateral changes in the event of an impasse.¹⁹⁸ Therefore, if an employer has bargained in good faith, it can unilaterally implement its last offer to the union if an impasse in negotiations is reached, whereas state law may be more favorable to the union.¹⁹⁹

In contrast to state laws on impasse that may favor unions, the Act is more favorable to strikes than some state labor laws. The Act protects employees' right to strike,²⁰⁰ a practice that many states have

195. The Act provides for a secret-ballot election process, which may be lengthier than the card-check authorization process. Some states, including Arizona, South Carolina, South Dakota, and Utah allow employers to challenge card checks with a secret-ballot election. Thus, even if the union has shown a majority of employees support it under a state law card-check process, the employer may order ballot election. *See* Press Release, NLRB Office of Pub. Affairs, NLRB Advises Attorneys General in Four States that Secret-Ballot Amendments Conflict with Federal Labor Laws (Jan. 14, 2011), <https://www.nlr.gov/news-outreach/news-story/nlr-advises-attorneys-general-four-states-secret-ballot-amendments> [<https://perma.cc/4AZR-GFMA>].

196. In some cases, such as where public-sector employee unions have been outlawed under state law, certification may only be possible under federal law, and by classifying the employer as *not* a political subdivision. *See* 29 U.S.C. § 152(2) (2012) (providing that “employers” shall not include political subdivisions).

197. *E.g.*, N.Y. CIV. SERV. LAW § 209 (McKinney 2016).

198. *NLRB v. Katz*, 369 U.S. 736, 745 (1962).

199. State law may provide such advantages as requiring a mediation, a fact-finding hearing, a published report, and a public hearing, all of which would pressure employers to settle. *See* N.Y. CIV. SERV. LAW § 209 (establishing formal, state labor board-monitored procedures to help resolve negotiating impasses).

200. 29 U.S.C. § 142(2).

outlawed by statute.²⁰¹ Beyond strikes, the Act also protects a broader class of employee actions even if there is no union in the first place.²⁰²

Another key difference is the Act's exclusion of supervisors from the bargaining unit.²⁰³ Under the Act's logic, supervisors owe undivided loyalty to the employer because they are considered to be on the management "team," meaning they would not have to be represented by a union. Under some state laws, supervisors may gain representation as long as they are in a different bargaining unit from the employees they supervise.²⁰⁴ This difference may cut in favor of unions wanting state jurisdiction because their union could include not only employees but also supervisors, strengthening their union's bargaining power and clout.

For example, in a charter-school setting, "teacher coaches" or department chairs—who are not principals but still have some authority—may be considered "employee supervisors" because they have the authority to evaluate or monitor teachers. This kind of accountability is a hallmark of charter schools. Under state law, these supervisors could become part of their own union. Under the Act, however, these supervisors could be excluded from the union and considered "management."

The protections described above envision industrial unionism,²⁰⁵ but they may not be suitable for where the charter-school movement is headed. In the long term, the Act may be a poor vehicle to advance teachers' rights because it anticipates industrial unionism, in which

201. *E.g.*, N.Y. CIV. SERV. LAW § 210 (barring public employees from striking and instituting penalties against unions and employees for violating the provision); *see* MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES (2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/Q58W-CA29>] (providing data on state regulation of public employees' rights under state law).

202. 29 U.S.C. § 157. The Act guarantees employees the right to engage in protected "concerted activities," such as engaging peacefully in activity for their "mutual aid or protection" relating to terms and conditions of their employment. *Id.* One example would be refusing to work past a certain time as a protest to show administration the value of the unpaid work that many teachers do outside of their official contractual hours.

203. *Id.* § 152(3) (defining employees who receive protection as "any employee . . . but shall not include any individual . . . employed as a supervisor").

204. *E.g.*, N.Y. CIV. SERV. LAW § 201 (excluding managers with significant control over employees from the bargaining unit).

205. Malin & Kerchner, *supra* note 74, at 899 ("[Under the industrial union model] a worker's role is to obey and not to think.").

workers seek protection from abusive management policies.²⁰⁶ Many charter-school teachers want something more than industrial unionism. Some are interested in an evolving role for unions in social justice.²⁰⁷ Others express interest in “professional unionism,”²⁰⁸ which uses the union as a disciplining and educational force on the members’ professional activity rather than spending resources to protect ineffective teachers with only small improvements in working conditions.²⁰⁹ Much of the literature encouraging charter-school teachers to organize uses language such as “having a voice” in management decisions.²¹⁰ The Act, however, delineates between management and employees, and if charter-school teachers want a “voice” in decisionmaking, the Act may not protect some of their activity because it would bring them closer to a management role.²¹¹

III. THE CURRENT TEST’S WEAKNESS WHEN APPLIED TO CHARTER SCHOOLS

As of the publication of this Note, the nature of the public-school system is changing, especially in large urban areas. The number of students enrolled in charter schools is growing annually, and larger charter providers are actively seeking out contracts to “turn around”

206. *Id.* This is a long-term view based on changes in charter teachers’ interests; in the short term, teachers may simply want protection from arduous working conditions. See *supra* notes 69–71 and accompanying text.

207. See, e.g., Cindy Long, *Social Justice Activism Is Forming a More Perfect (and Enduring) Union*, NEA TODAY (Sept. 28, 2015), <http://neatoday.org/2015/09/28/social-justice-activism-is-forming-a-more-perfect-and-enduring-union> [<https://perma.cc/2Y82-ELT6>] (discussing unionized teachers’ interests in activism beyond “bread and butter” (in other words, wages and hours) concerns, including professional development, increasing resources for students and families, and anti-racism education).

208. See Charles T. Kerchner & Julie E. Koppich, *Organizing Around Quality: The Frontiers of Teacher Unionism*, in *CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM* 281, 290 (Tom Loveless ed., 2000) (discussing an increased emphasis on peer review among union reformers).

209. Professional unionism emphasizes “police your own”-style measures. See *id.* (noting an Ohio teachers’ contract “in which the teachers agreed to police the ranks of their veterans in return for the right to review new teachers”). Such measures may include teachers reviewing each other’s work (rather than administrators reviewing their work), and they affirm a “legitimate role for teachers in establishing and enforcing standards in their own occupation.” Malin & Kerchner, *supra* note 74, at 904.

210. See, e.g., *AFT and Charter Schools*, ACTS CHICAGO, <http://www.chicagoacts.org/about-us/aft-and-charter-schools> [<https://perma.cc/R997-YH3M>] (“A strong teacher voice supported by a union is essential to achieving fairness in the workplace and improving academic outcomes.”).

211. For an explanation of why the Act is potentially ill-suited to address charter-school teachers’ interests in unionization, see Malin & Kerchner, *supra* note 74, at 899.

public schools and reap the benefits of public funding for such efforts. Additionally, the largest teachers unions—the AFT and the NEA—are devoting resources to organizing staff at charter schools. Although the current number of organized charter employees is relatively small, challenging working conditions at turnaround schools and other charters with less independence may lead to an increase in organizing activity. Such a change could lead to larger numbers of teachers protected under the Act rather than by state law. This Part examines the problems with the NLRB’s current application of the *Hawkins County* test, namely how it hurts employers and employees while also harming the federal–state balance.

Despite the NLRB’s efforts to disavow a bright-line jurisdictional rule for charter schools, its current interpretation of *Hawkins County*’s first prong²¹² seems unlikely to ever exempt nonprofit charter providers in public education. Under the current test, as long as private individuals create a nonprofit board, a nonprofit charter will not satisfy the first prong of *Hawkins County* no matter how closely they resemble public schools.²¹³ Charter schools are usually managed by nonprofit boards created by private individuals,²¹⁴ so they are unlikely to ever be considered “public” under the NLRB’s interpretation in *Pennsylvania Virtual* and *Hyde Leadership*.

Additionally, charter schools are highly unlikely to pass the NLRB’s interpretation of the second prong of *Hawkins County* because the members of a nonprofit board are unlikely to have positions where they are directly appointable or removable by public officials.²¹⁵ Although the NLRB emphasized it did not create a bright-line test, the realities of charter schools mean that it has: the NLRB will exert jurisdiction over labor disputes involving charter schools managed by private boards.

As a policy matter, the NLRB’s current interpretation of the *Hawkins County* test as applied to charter schools also implicates the federal–state balance. Public education has traditionally fallen under

212. For a description of this line of cases, see *supra* Part II.B.

213. For instance, imagine a community group creates a nonprofit board that applies for a contract to operate a school that will be the “default” school for students in a particular neighborhood. Further, suppose that school receives 90 percent of its funding from public sources and retains all the same teachers as the previous public school. Under the first prong of *Hawkins County*, this school would still not be considered a public employer.

214. WEIL, *supra* note 11, at 350.

215. For a discussion of the Board’s narrowing of its interpretation of the second prong of the test, see *supra* notes 130–35 and accompanying text.

the states' police power.²¹⁶ States have varying approaches to public-sector teachers unions, from outlawing them entirely²¹⁷ to affording them limited protections compared to the Act²¹⁸ to granting broader protections and allowing them to strike.²¹⁹ By providing coast-to-coast protections for teachers working at charter schools, the Act may allow for experimentation in states where public-sector unions have traditionally been outlawed.²²⁰ This experimentation may be beneficial to invigorating the labor movement by testing the proposition that guaranteeing labor rights has a positive effect on the public education system. On the other hand, although a patchwork of labor laws may be less desirable for unions (and potentially employers) in general, a state's validly enacted legislation on a subject inherently within its powers should still be respected.

If public-school systems continue to seek out "portfolio" style management emphasizing turnaround schools, and teachers continue to want union protection, many new schools will fall under the Act that otherwise would have been governed by state labor acts in their previous iterations as traditional public schools.²²¹ This shift in

216. See, e.g., *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States."); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition.").

217. E.g., N.C. GEN. STAT. § 95-98 (2015); VA. CODE ANN. § 40.1-57.2 (2014). I am grateful to Professors Malin and Kerchner for their analysis, which led me to the state statutes mentioned in this Section.

218. For example, Arizona makes bargaining with a representative a majority of employees has selected only optional, rather than required. Malin and Kerchner, *supra* note 74, at 912.

219. E.g., *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237, 247 (Colo. 1992) (en banc) (interpreting Colorado's Industrial Relations Act to provide a qualified right to strike).

220. For a discussion of some of these implications, see Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *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, 317-18 (2014).

221. Tim Walker, *NEA Steps Up Organizing Efforts in Non-Union Charter Schools*, NEA TODAY (July 8, 2013, 10:25 AM), <http://neatoday.org/2013/07/08/nea-steps-up-organizing-efforts-in-non-union-charter-schools> [<https://perma.cc/MBL3-D6GT>] (describing the "portfolio" approach and how it is encouraging labor organizing). The trouble with asserting jurisdiction over a traditional state matter is the effect on the regulatory scheme that already applies to schools receiving public funds. For instance, an educator's role in the student-discipline process can be addressed in collective bargaining because it is a term and condition of employment. This condition may be pertinent for teachers at a charter school designated specifically for students with disciplinary issues within the public-school system, but managed by a nonprofit board. If union employees at a charter school organized under the Act file charges for failure to bargain over student discipline, the NLRB can order the school to bargain, and under the Supremacy Clause, the parties have to heed the order. If the state has chartered the school and addresses student discipline in the charter, the employer may have to violate the state charter to comply

coverage would strengthen the Act's reach and provide more protections to the newly formed charter teachers unions, such as the right to strike, but at the expense of the states' choice of labor policy.

IV. A REINVIGORATED *HAWKINS COUNTY* ANALYSIS FOR CHARTER SCHOOLS

The NLRB's current interpretation of its test for when an employer is an exempt political subdivision leads to only one result for most charter schools: NLRB jurisdiction over the labor dispute.²²² This Part proposes an adjusted test for whether an employer is an exempt political subdivision, explains the benefits of a reinvigorated test, and applies the test to two existing decisions from Pennsylvania.

Before the *Chicago Mathematics* case, some NLRB Regional Directors used a more robust measure to determine whether a charter school was a political subdivision. This fact-bound analysis used more criteria than whether the administration of the charter school was directly appointable or removable by government officials.²²³ A more robust, settled test would avoid the result of too many charter schools falling under NLRB jurisdiction while also allowing charter providers to account for the body of labor law applying to their schools without having to file repeated jurisdictional challenges.

A more detailed view of both *Hawkins County* prongs would better address the changing scope of charter schools.²²⁴ Although a variety of facts may weigh on the NLRB's decision under either prong, several emerge as the most likely to differentiate among types of charters and preserve the jurisdictional balance between state and federal labor agencies.²²⁵

In applying *Hawkins County*, the NLRB should focus on, to a greater extent, the factors that track the similarities or differences

with federal labor law. I borrowed the idea for this hypothetical from the AFT, AFL-CIO, and NEA's amicus brief in *Hyde Leadership*. Brief Amicus Curiae of the American Federation of Teachers, AFL-CIO and the National Education Association at 12–13, *Hyde Leadership Charter School—Brooklyn*, Case No. 29-RM-126444 (N.L.R.B. Aug. 24, 2016).

222. See *supra* Part III.

223. E.g., L.A. Leadership Acad., Case No. 31-RM-1281, at 3 (N.L.R.B. Mar. 2, 2006) (decision & order).

224. Although the NLRB has weighed many of these factors in its analysis, it has placed the most emphasis on factors that are unlikely to differentiate between charter schools, such as whether the board of directors was appointed directly by government officials. See *supra* notes 164–73 and accompanying text.

225. For a discussion of these factors, see *supra* Part III. The Board's current test has placed heavy weight on factors that are unlikely to differentiate among charter schools.

between charter schools and traditional public schools. The particular facts the NLRB should consider most salient—because they are the easiest way to distinguish whether a charter school is more like a public or private school—under *Hawkins County*'s first prong (created by a state or administrative arm of government) are: (1) the state's characterization of the charter employer in its enabling legislation and overall statutory scheme, (2) the percentage of public funding the school receives, and (3) the school's status as a default or "neighborhood" school for children in a certain catchment zone.

The first two characteristics under this prong are unlikely to differentiate among many charters due to their ubiquity in most state charter-school schemes,²²⁶ but they should still be considered because they bear on whether a charter employer is an "administrative arm" of government. Many charter schools are likely to be characterized as "public" in state legislation.²²⁷ Additionally, many charter schools receive a large amount of public funding²²⁸ although charters receiving significant amounts of private funds—compared to the public funding they receive—would be more difficult to classify as an administrative arm. As a consequence, the third factor, whether the school is the default education provider²²⁹ for a given set of students, should weigh heavily on the analysis and differentiate between the increasingly various types of charter schools. It is here that the "administrative arm" is most visible, because the school is fulfilling the state's statutory obligation to provide a free education to students.

The most salient facts that the NLRB should consider under the second prong (administered by individuals responsible to public officials or the general electorate) of *Hawkins County* are: (1) the degree of government oversight of the charter-school board and (2) the

226. For a description of state enabling statutes and funding schemes, see WEIL, *supra* note 11, at 80–82, 93–94.

227. For an examination of different state characterizations, see Green et al., *supra* note 220, at 305–07.

228. See WEIL, *supra* note 11, at 96 ("Although state funding formulas vary, they all attempt to provide a fair share of public funds for each student who wishes to attend a charter school."); CTR. FOR EDUC. REFORM, *Just the FAQs—Charter Schools*, <https://www.edreform.com/2012/03/just-the-faqs-charter-schools> [<https://perma.cc/2HLLK-2GPC>] ("Like district public schools, they are funded according to enrollment (also called average daily attendance, or ADA), and receive funding from the district and the state according to the number of students attending.").

229. The "default-education-provider" factor would consider the extent to which the school is required to serve certain students, by the district or the state. Thus the facts to consider would be whether the school may compose the student body by choice or lottery, or whether the enabling charter or school district determines the student body. For a discussion of how this differentiates among charter schools, see *supra* notes 54–64.

charter school's reporting requirements. These factors are meant to elicit an examination of how similar a charter school is to the public schools in the area. Usually, local officials have limited supervisory powers over charter schools,²³⁰ but local school-district agreements with turnaround schools may infuse more accountability into the process. Because the nature of charter schools is changing, a more robust test will allow charter schools that act more like private schools to fall under NLRB jurisdiction while schools that act more like traditional public schools will fall under the pertinent state labor board. This Part outlines a more rigorous *Hawkins County* test for charter schools in Section A, and it then applies the suggested test to two Philadelphia charter schools in Section B.

A. *Costs and Benefits of a Reinvigorated Analysis*

This suggestion for reinvigorating the NLRB's analysis does not envision a wholesale retooling of the current test. Rather, it provides more teeth to areas of analysis that are likely to differentiate between traditional and newer forms of charter schools. This Section presents the benefits that a more robust *Hawkins County* analysis for charter schools would provide, namely benefits to the administration of the Act, to the federal–state balance, and to employers and employees themselves.

First, a test that refocuses on what makes charters different from each other rather than what makes them different from public schools is more likely to yield meaningful results that account for the factual differences between charter schools. The NLRB's current interpretation of the *Hawkins County* test does, in practical effect, create a bright-line rule for charter schools.²³¹ A bright line is easy to apply, but so far it has led to nothing on the other side of the line. A more robust test would still protect the employees that the NLRB is seeking to protect, while simultaneously allowing employees who work for schools that have more in common with their public-school counterparts to seek the protections of their state labor laws.

This benefit interlocks with the preservation of the federal–state balance. Given the factors that may lead to an expansion in

230. Frederick M. Hess, *The Political Challenge of Charter School Regulation*, 85 PHI DELTA KAPPAN 508, 509 (2004) (“The essential ‘deal’ implicit in charter schooling is that, in return for being freed from many of the rules and regulations endured by traditional district schools, charters are to be held accountable for their results.”).

231. *See supra* Part III.

unionization among charter teachers,²³² a meaningful preservation of the federal–state balance for jurisdiction over union charter schools is necessary to avoid imposing federal labor law on a large sector of issues that have been traditionally left to the states.²³³ The NLRB’s *Chicago Mathematics* decision has already caused state labor boards to surrender jurisdiction over charter-school cases.²³⁴ This surrender has the effect of a feedback loop: if state labor agencies think the federal agency will exert jurisdiction and the state declines to exert jurisdiction, the federal agency will exert jurisdiction because the state did not. Especially given the NLRB’s current interest in expanding employee protections,²³⁵ a state declining jurisdiction over a dispute invites the extension of the national Act’s protections to that set of employees. Thus, although the NLRB stated that it was not creating a bright-line rule for charters, in effect, it has. In a state whose labor laws mirror the Act, this may have little effect on the employees themselves. In a state with considerable differences,²³⁶ however, the federal agency could trample the choices of elected officials and voters.

Finally, there are benefits for employers and employees—not to mention students, teachers, and parents—when jurisdiction is clear and not continually challenged at both the federal and state level. Employers may not want to litigate jurisdiction due to the expense involved, and the public-relations concerns related to continuous fights with a union representing the majority of its employees.²³⁷ Union organizing is already divisive at charter schools in particular, where employees are encouraged to see themselves on the same “team” as

232. See *supra* Part II.

233. Labor disputes between state public-sector employers and their employees are typically governed by state labor laws. See 29 U.S.C. § 152(2) (2012) (excluding public-sector employers from the NLRB’s jurisdiction).

234. See, e.g., *Agora Cyber Charter Sch.*, Case No. PERA-C-12-146-E, at 1 (Pa. Labor Relations Bd. June 13, 2013) (referring to the NLRB’s decision in *Chicago Mathematics* and finding that “[b]ecause the National Board has asserted jurisdiction over private charter schools in the Commonwealth of Pennsylvania, Agora is not a public employer, within the meaning of PERA”).

235. See *supra* note 112.

236. For a discussion of potential differences between state labor laws and the Act, see *supra* Part II.C.

237. See Daniel Denvir, *Aspira Offers No Answers on Charter School Financial Anomalies*, PHILA. CITY PAPER: THE NAKED CITY (Apr. 8, 2014), <http://citypaper.net/Blogs/Aspira-offers-no-answers-on-charter-school-financial-anomalies> [https://perma.cc/3WTU-QH47] (describing the public-relations issues a charter provider has exposed itself to by continuing to fight unionization at one of its schools).

management in order to improve efficiency and student outcomes.²³⁸ Prolonged conflicts about which agency has jurisdiction risk deepening divisions in ways that do not benefit students²³⁹ or parents²⁴⁰ and that use limited education money to attempt to avoid unionization.²⁴¹

With the benefits of a more rigorous test for jurisdiction in mind, some examples show that this test is more appropriate for addressing the changing charter-school landscape than the NLRB's current interpretation of *Hawkins County*.

B. Applying a Revised Test to Two Philadelphia Charter Schools

This Section applies the revised jurisdictional test described above to two charter schools in Philadelphia, Pennsylvania.²⁴² The two schools, John B. Stetson (Stetson) and Agora Cyber Charter (Agora), were selected because they are two types of charter schools that do not fit the traditional, quasi-private charter model described above in Part II and because their teachers have attempted to organize unions. Stetson was a neighborhood public middle school managed by the School District of Philadelphia until it was turned over to ASPIRA, a charter operator in Philadelphia, to continue operations as a

238. See Malin & Kerchner, *supra* note 74, at 892 (“Managers share decision-making responsibility with employees, and function as coaches, facilitators, and integrators.”).

239. See Cassandra M.D. Hart & Aaron J. Sojourner, *Unionization and Productivity: Evidence from Charter Schools* 15 (Inst. for the Study of Labor Discussion Paper Series, Discussion Paper No. 7887, 2014), <http://ftp.iza.org/dp7887.pdf> [<https://perma.cc/H3PQ-YZHB>] (“While there is some evidence that student performance dips around the time of unionization, it seems to rebound to previous levels within a few years.”).

240. See Vevea, *supra* note 93 (“[F]or students and parents at Chicago Math and Science Academy, perhaps the most important concern is not whether teachers unionize, but rather what the conflict is doing to the school.”).

241. See Denvir, *supra* note 237 (“Aspira has paid . . . a law firm with expertise in fighting unionization efforts, at least \$72,163.33 for Olney-related matters, according to seven 2013 invoices.”).

242. As compared with other cities, and similar to Chicago, Philadelphia has experienced an increase in organizing activity in charter schools. This increase may be partially explained by the rapid expansion of the charter model in the city as well as the school district actively seeking to convert its existing public schools to charters. See *012: Renaissance Schools Initiative Policy*, SCH. DIST. OF PHILA., <http://www.phila.k12.pa.us/offices/administration/policies/012.html> [<https://perma.cc/6QCA-YD37>] (“[T]he School District is seeking innovative ways to transform low-performing schools through new school models that include . . . external partnerships.”). Additionally, the American Federation of Teachers has several union organizers in Philadelphia, and this capacity helps charter-school teachers to unionize more easily. Cf. Cohen, *supra* note 15 (describing union organizing efforts in Philadelphia and other cities).

neighborhood school.²⁴³ Agora is a cyber charter school, a model that is growing in popularity for parents who do not want to send their children to a brick-and-mortar school or for students who want to make up significant numbers of class credits to graduate.²⁴⁴ In cyber charter schools, students take classes online and attend either by reporting to a computer lab that is monitored by teachers, or by attending cyber classes taught by teachers at a remote location, from computers in their home.²⁴⁵

Under a reinvigorated *Hawkins County* test, as explained below, the first school, Stetson, would be found to be a public employer (exempt from the Act), while the second school, Agora, would be found to be a private employer (subject to the Act).

1. *John B. Stetson Charter School.* In the case of Stetson, a Regional Board Director found the charter school was *not* a political subdivision.²⁴⁶ An analysis under this proposed test, however, would lead to the charter provider, ASPIRA, being considered a political subdivision and therefore falling under state labor law similar to existing public schools.

First, Pennsylvania law provides for the establishment of charter schools, which are authorized by the local school district, under the Pennsylvania Charter School Law.²⁴⁷ Stetson is a turnaround school, which means it was created by converting an existing public school.²⁴⁸ The local classification of the charter school is also pertinent here. The School District of Philadelphia, through its “Renaissance Initiative,” introduced a portfolio model in which eligible “low-performing” public schools were identified and—through a process requiring stakeholder consent—were turned over to charter providers.²⁴⁹ These schools were required to continue to serve the students within their defined geographical boundary in an attempt to bring the perceived benefits of

243. John N. Mitchell, *Charter Schools Showing Promise*, PHILA. TRIB. (Sept. 29, 2011, 12:00 AM), http://www.phillytrib.com/news/charter-schools-showing-promise/article_0e02b0bc-6df7-5f3e-9de1-71efc7c95748.html [https://perma.cc/8F32-FGB6].

244. See generally Huerta, d’Entremont & Gonzalez, *supra* note 147 (explaining the basic characteristics of cyber charter schools and some issues with holding them accountable for student outcomes).

245. *Id.*

246. John B. Stetson Charter Sch., Case No. 04-RC-151011, at 1 (N.L.R.B. May 14, 2015) (decision and direction of election).

247. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1729-A (West 2016).

248. *Id.* § 17-1729-A(b)(1).

249. SCH. DIST. OF PHILA., *supra* note 242.

charter schools to more students.²⁵⁰ The School District of Philadelphia then provided funding, resources, and training to aid the turnaround.²⁵¹

Furthermore, Stetson receives most of its funding from the state.²⁵² In fiscal year 2013, Stetson received \$9,450,666 in revenues for its general fund²⁵³ from local, state, and federal sources.²⁵⁴ It received \$1,583 from “other sources.”²⁵⁵ This revenue amounts to .016 percent of its total funding. By contrast, other charter schools receive significant funding per pupil from private sources.²⁵⁶

Stetson’s classification as a “turnaround,” rather than a “new-start” charter, also bears on the analysis. The fact that the School District of Philadelphia turned over an existing “underperforming”²⁵⁷ public school to ASPIRA would weigh in favor of the school being considered a political subdivision. In this case, rather than starting a new charter school, Stetson is the default neighborhood school for students in the catchment area.²⁵⁸ This classification means that students who live within a certain zone in North Philadelphia will attend Stetson unless their parents enroll them elsewhere.²⁵⁹ The District website lists Stetson as a public school with the same name as

250. See Paul Socolar, *Renaissance Schools: The Basics*, PHILA. PUB. SCH. NOTEBOOK (Jan. 27, 2010, 3:51 PM), <http://thenotebook.org/articles/2010/01/27/renaissance-schools-the-basics> [<https://perma.cc/S936-G7MB>] (“The District has committed to accomplishing these ‘school turnarounds’ while serving the same students at these schools.”).

251. *Id.*

252. WITHUMSMITH+BROWN, PC, JOHN B. STETSON CHARTER SCHOOL, AN ASPIRA, INC. OF PENNSYLVANIA SCHOOL: FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION 10 (2013), <http://aspirapa.org/wp-content/uploads/2015/01/Stetson-audit-FY-13.pdf> [<https://perma.cc/4B32-8AV2>].

253. The school receives additional funding from state and federal sources to provide free and reduced school lunches and from other local sources for student activities. *Id.*

254. *Id.*

255. *Id.*

256. For example, a study of KIPP’s schools showed that they received \$5,700 per pupil, on average, from private sources in 2008. Valerie Strauss, *Separating Fact from Fiction in 21 Claims About Charter Schools*, WASH. POST (Feb. 28, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/28/separating-fact-from-fiction-in-21-claims-about-charter-schools> [<https://perma.cc/BW7V-T79W>].

257. John B. Stetson Charter Sch., Case No. 04-RC-151011, at 4 (N.L.R.B. May 14, 2015) (decision & direction of election).

258. See John B. Stetson Charter Sch., Case No. 04-RC-151011, at 12 (N.L.R.B. May 19, 2015) (employer’s request for review of the Regional Director’s decision and direction of election) (discussing the Renaissance Initiative’s policy of requiring the turnaround charters to remain neighborhood schools enrolling from a specific catchment area).

259. This was a decision by the Philadelphia School District as part of the its “Renaissance Schools” initiative, designed to take the first steps toward a portfolio model and bring the purported benefits of charter schools to more students in the district.

the original John B. Stetson public school, and its charter requires it to enroll students from within a defined catchment area.²⁶⁰

Under the second prong of *Hawkins County*, government officials are more involved in Stetson's affairs than in other, more traditional charter schools. Its charter requires it to report to the Philadelphia School District about progress in certain metrics, whereas other schools do not have to report progress.²⁶¹ School District officials also have more leeway to cancel Stetson's charter.²⁶² This heightened oversight illustrates that a more detailed analysis under the second prong can capture and account for some of the facts that make a turnaround charter school like Stetson different from a traditional new-start charter.

Under the application of either prong of a revised *Hawkins County* test, Stetson—as a turnaround charter with more similarities to existing public neighborhood schools—would be considered an exempt political subdivision, and its labor dispute would be subject to Pennsylvania's Public Employee Relations Board.

2. *Agora Cyber Charter.* Unlike Stetson, Agora should be considered a private employer subject to the Act. Under the first prong of a reinvigorated *Hawkins County* test, Agora presents facts similar to most traditional public schools. Agora is not a traditional brick-and-mortar charter school, but Pennsylvania Law explicitly provides for the creation of cyber charter schools and defines them as “public,” just as it does brick-and-mortar charter schools.²⁶³ Moreover, Agora receives

260. See *id.* at 21 (quoting Stetson's charter agreement with the school district that it must “enroll all students who reside in the Stetson School catchment area . . . [and] may not enroll any students who live outside the Attendance Zone”).

261. *Id.* at 14. For instance, Stetson was notorious for being the only middle school on Pennsylvania's “persistent dangerous schools list,” and its progress in being taken off the list was one of the reports it had to make to the school district. *Id.*

262. *Id.* (quoting testimony from the regional board director hearing that the school district could revoke the charter mid-term, unlike other charter schools which can only be revoked at the five-year-renewal mark). In fact, at the time this Note was written, the School District had issued several warnings to Stetson to be more transparent with its financials or risk having its charter revoked. Regina Medina, *School District to ASPIRA: Fix Up Your School*, PHILA. DAILY NEWS (Mar. 5, 2015), http://articles.philly.com/2015-03-06/news/59812735_1_charter-renewal-charter-school-office-charter-office [<https://perma.cc/N7PC-YJMW>].

263. See 24 PA. STAT. AND CONS. STAT. ANN. § 17-1703-A (West 2016). The statute defines a cyber charter school as

an independent public school established and operated under a charter from the Department of Education and in which the school uses technology in order to provide a significant portion of its curriculum and to deliver a significant portion of instruction . . . through the Internet or other electronic means.

its funding from state and federal sources²⁶⁴ and from Pennsylvania school districts under a formula that provides Agora with the district's avoided cost of educating a student.²⁶⁵ Other sources of funding were not listed on Agora's financial report.²⁶⁶

Therefore, the dispositive factor in differentiating Agora from Stetson is its status as a quasi-private charter school whose student body is composed by the choice of the parents and students. Unlike a traditional public school, Agora does not serve a given geographic area; it enrolls students who choose to attend it.²⁶⁷ So Agora is not required to enroll students by default based on their residence.²⁶⁸ There is also no provision of the Pennsylvania state law that would allow for a public school to be converted into a cyber charter school, so Agora would not be eligible for turnaround status.

Pertinent to the second prong of *Hawkins County*, Agora is run by a for-profit charter provider, K12 Inc.²⁶⁹ Although this factor is not dispositive in an analysis of whether a charter school is an administrative arm of the government, it should matter in terms of

Id.

264. Notably, even though it is a cyber charter, Agora receives the same amount of money per pupil from the local school district to pay for the cost of educating an individual student as brick-and-mortar charter schools do. Agora, however, has been sending a large amount of this taxpayer money to its for-profit charter operator parent. See Kevin McCorry, *Temple Prof: Pa. Cyber Charters Turning Huge Profits, Sending Tax Dollars out of State*, NEWSWORKS (Jan. 6, 2014), <http://www.newsworks.org/index.php/local/education/63557-temple-prof-pa-cyber-charters-turning-huge-profits-sending-tax-dollars-out-of-state> [https://perma.cc/CV5T-RLET] (“Agora has a management contract with the national for-profit K-12 [sic] Inc. [Professor] DeJarnatt found that Agora paid K-12 [sic] Inc. \$14,967,243 in 2010.”).

265. MAILLIE LLP, AGORA CYBER CHARTER SCHOOL: ANNUAL FINANCIAL REPORT, YEAR ENDED JUNE 30, 2013, at 6, <http://www.k12.com/sites/default/files/pdf/Agora-audit-report-063013-042114.pdf> [https://perma.cc/Y7RC-M8WQ].

266. *Id.* This could be due to the fact that Agora does not require outside funding to educate its students remotely.

267. See *Enrollment*, AGORA CYBER CHARTER SCH., <http://www.agora.org/enrollment> [https://perma.cc/DAJ4-FQ8W] (defining enrollment eligibility only by age and successful completion of the enrollment application).

268. *Id.*

269. Agora Cyber Charter Sch., Case No. PERA-C-12-146-E, at 1 (Pa. Labor Relations Bd. June 13, 2013). Agora may not be run by a for-profit in the future, as it is seeking to cut its ties with K12 and be managed by a nonprofit company to increase its chances of being re-chartered by the state. See Bill Raden, *Cyber Charter Revolt Against K12 Inc. Continues*, CAPITAL AND MAIN (Sept. 3, 2014), <http://capitalandmain.com/features/california-expose/cyber-charter-school-revolt-against-k12-inc-continues> [https://perma.cc/3JHY-7HCT] (citing a teacher's statement that Agora's board president told staff about “current conversations that are happening between the Pennsylvania Department of Education and the Agora board . . . without K12, our application looks better” (emphasis added)).

whether the board of directors has accountability to shareholders in addition to accountability to public officials and the general electorate. This distinction would matter if, for instance, a decision about whether to implement certain practices to improve test scores—a form of business outcome—would have negative impacts on Special Education students or English Language Learners. The divided accountability means that the school seems more similar to a private school than an administrative arm of government.

Additionally, although Agora has reporting requirements as a cyber charter and is overseen by the Pennsylvania Department of Education,²⁷⁰ its requirements are not as stringent as those of local public schools. Pennsylvania established uniform rules for charter oversight, including cyber charter schools, but local school boards may retain greater oversight for turnaround schools, as Philadelphia does for Stetson and its other “Renaissance Schools.”²⁷¹ These more stringent rules do not apply to Agora as a cyber charter. Therefore, government officials’ oversight of Agora does not differ from traditional charter schools in a way that would make Agora’s board of directors responsible to public officials or the general electorate. Thus, under either prong of a revised *Hawkins County* test, Agora would be considered a private employer and therefore subject to the requirements of the Act.

The NLRB’s current test, with its blunt emphasis on whether the charter school board members are appointable or removable by government officials, would not differentiate between Stetson and Agora. Both would be considered private due to the composition of

270. See PA. DEP’T OF EDUC., BASIC EDUCATION CIRCULAR: CYBER CHARTER SCHOOLS (Sept. 1, 2006), <http://www.education.pa.gov/Documents/Codes%20and%20Regulations/Basic%20Education%20Circulars/Purdons%20Statutes/Cyber%20Charter%20Schools.pdf> [<https://perma.cc/6TBU-7W6N>]. The Basic Education Circular notes that

section 1741-A has established certain powers and duties upon PDE. Those duties include annually assessing:

1. whether a cyber charter school is meeting the goals of its charter;
2. whether a cyber charter school is in compliance with its charter; and,
3. the cyber charter school’s performance on . . . standardized tests . . .

Id.

271. See, e.g., Socolar, *supra* note 250. Socolar notes that

[e]ach Renaissance School will be required to meet annual targets for accelerating academic achievement and for improving school climate, student retention, promotion rates, parent and student satisfaction, and (for high schools) college readiness and graduation rates. . . . If the District determines that annual targets are not being met, the superintendent may replace the turnaround team or return the school to being a regular District school.

Id.

their boards. Under a reinvigorated analysis, however, Stetson’s union would be governed by state labor laws because it is more similar to a traditional public school, and Agora’s would be governed by the Act because it is more similar to private schools.

CONCLUSION

The rapid expansion of the charter-school model calls for reexamination of the existing legal frameworks governing charters. Labor law is one such framework. Charter schools—although initially considered laboratories for innovation and experimentation in smaller, less restrictive settings—have increasingly taken on the role of the traditional public education system. In cities like New Orleans—where the public education system has struggled for entire generations of students—the “portfolio model” of turning over public schools to charter providers has become increasingly popular. When these charters unionize, the agency with jurisdiction over the labor dispute should be clear to the employer as well as the employees.

The current NLRB jurisdiction test is not robust enough to differentiate between traditional charter schools and these new turnaround charters. Charter schools’ stories are rich with detail and cannot be limited to simply looking at the composition of the charter school’s board and whether its members are appointable or removable by government officials. A change to the current test will require examining whether the charter school is the default education provider in a given area or if it is another choice, making it more similar to a private school. This change will effectively differentiate between those schools that are serving the function of an “administrative arm” of government and those that are attempting to offer parents the choice of a private school. One of the main benefits that charters offer is an approach to education that is not one-size-fits-all. A parent can choose between sending his child to Stetson or Agora. Thus, the NLRB’s interpretation of the *Hawkins County* test for jurisdiction should effectively account for the types of choices that make the charter movement a viable alternative to traditional public schools. This differentiation will in turn allow employers and employees to better understand the law that may apply to their actions while minimizing unnecessarily prolonged unionization battles and preserving state jurisdiction over public-sector employee unions.