The Pennsylvania Virtual Charter School *and* PA Virtual Charter Education Association, PSEA/NEA. Case 04–RC–143831

August 24, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The issues in this case are whether the Board has jurisdiction over a nonprofit corporation that operates a charter school in Pennsylvania, and, if so, whether we should nevertheless decline to assert that jurisdiction as a matter of our discretion. We answer those questions yes and no, respectively. Applying the Board's longstanding test,[1] we find that the Pennsylvania Virtual Charter School (PVCS or the School) is not exempt from our jurisdiction as a political subdivision of the Commonwealth of Pennsylvania within the meaning of Section 2(2) of the National Labor Relations Act.[2] Nor are there persuasive reasons for the Board to exercise its discretion to decline to assert jurisdiction in this case. We explain these conclusions below.

On January 5, 2015, the PA Virtual School Education Association, PSEA/NEA (the Union), filed a petition seeking to represent a unit of approximately 83 full-time and part-time kindergarten through grade 12 teachers and academic support staff at PVCS. PVCS opposed the petition, contending, under *Chicago Mathematics & Science Academy*,[3] that it is a political subdivision of the Commonwealth of Pennsylvania.[4] On February 11, 2015, after a hearing, the Regional Director applied *Hawkins County* and found that the School is not a political subdivision: he found that the School was neither created directly by the state so as to constitute a department or administrative arm of the government nor is it administered by individuals who are responsible to public officials or the general electorate. PVCS sought review of the Regional Director's decision.[5]

Our decision today is based on the facts of this case, which involves the operation of a cyber charter school in the Commonwealth of Pennsylvania established under the Pennsylvania Charter School Law. We are not announcing a bright-line rule asserting jurisdiction over charter schools nationwide.

Facts

Pennsylvania Charter School Law

The Pennsylvania Public School Code includes the Charter School Law (CSL), which was enacted in 1997 and provides the framework for the establishment and operation of charter schools, including cyber charter schools providing remote instruction in Pennsylvania. The CSL defines a "Cyber Charter School" as:

> [A]n independent public school established and operated under a charter from the [Pennsylvania] 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 to its students through the Internet or other electronic means. A cyber charter school must be organized as a public, nonprofit corporation. A charter may not be granted for a for-profit entity.

24 P.S. § 17-1703-A.

A cyber charter school in Pennsylvania may be established by individuals, by an organization such as a nonsectarian college or museum, or by a corporation or association. 24 P.S. § 17-1717-A(a). Cyber charter schools must admit any eligible student residing in Pennsylvania. 24 P.S. § 17-1724-A(a). Charter schools do not charge tuition, but receive most of their operating funds from public sources, primarily the students' home school districts. 24 P.S. § 17-1725-A.

Pennsylvania charter schools are exempt from certain state laws and regulations that otherwise pertain to public schools under the Public School Law, but are required to comply with the statutes and regulations specified in the CSL.[6] 24 P.S. § 17-1715-A.

Under the CSL, at least 75 percent of a charter school's teachers must be state certified. The CSL gives charter school employees the right to organize under the state's employee relations law, but they must do so in bargaining units separate from public school employees' bargaining units. The CSL also mandates that charter

[1] See *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (Hawkins County).

[2] Sec. 2(2) of the National Labor Relations Act provides that the term "employer" shall not include any state or political subdivision thereof.

[3] 359 NLRB 455 (2012).

[4] In *Chicago Mathematics*, the Board applied *Hawkins County* and determined that a private nonprofit corporation that established and operated a public charter school in Chicago, Illinois was subject to the Board's jurisdiction. Even though the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), rendered our decision in *Chicago Mathematics* a nullity, PVCS, anticipating that the Board would adopt its reasoning, continues to argue that the decision is distinguishable on its facts.

[5] On March 25, 2015, the Board granted the request for review, and PVCS subsequently filed a brief in support of its position.

[6] Those laws include the Pennsylvania Fair Educational Opportunities Act and the Antihazing Law, and certain provisions of the Public School Code relating to pupil attendance, student academic standards and assessment, prohibition against discrimination, civil rights, and services and programs for children with disabilities. 24 P.S. § 17-1732-A.

school employees be enrolled in Pennsylvania's Public School Retirement plan, and charter school employees must receive the same health care benefits as the public school employees where the school is located. 24 P.S. § 17-1724-A(a)–(d).

The CSL specifies the information to be provided in an application to create a charter school, including the curriculum and courses to be offered, the manner in which teachers will deliver instruction, the amount of online time to be required for students, the technology to be employed, and privacy and security measures to ensure student confidentiality. 24 P.S. § 17-1747-A.

Prior to 2002, applications to form cyber charter schools were submitted to and reviewed by local school boards. A 2002 amendment to the CSL, known as Act 88, now requires that applications be submitted to and reviewed by the Pennsylvania Department of Education. See 24 P.S. § 17-1741-A(a)(1).[7] The Department of Education also renews the charters of cyber charter schools. 24 P.S. § 17-1741-A(2).

Under the current structure, the Department of Education reviews an application based on such criteria as "the demonstrated, sustainable support for the cyber charter school plan by teachers, parents or guardians and students" and "the capability of the cyber charter school applicant, in terms of support and planning, to provide comprehensive learning experiences to students under the charter." 24 P.S. § 17-1745-A(f). Formal action approving or denying the application takes place after a public meeting, with advance public notice consistent with Pennsylvania's "Sunshine Act." 24 P.S. § 17-1745-A(e). Prior to the enactment of Act 88, upon approval of the application, the CSL provided that "[a] written charter shall be developed which shall contain the provisions of the charter school application and be signed by the local board of school directors of a school district . . . and the board of trustees of the charter school." With the enactment of Act 88, the charter is signed by the Secretary of the Department of Education and the school's board of trustees. Either way, the CSL provides that the written charter "shall act as legal authorization for the establishment of a cyber charter school." 24 P.S. § 17-1745-A(f)(3). Thereafter, the charter is legally binding on the reviewing entity, the cyber charter school, and its board of trustees. A charter is issued for a period of no less than 3 years and no more than 5 years. Id.

The CSL provides that a charter school's board of trustees shall have the authority to decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures consistent with the school's charter. The trustees also have the authority to employ the school's professional and nonprofessional employees, and establish their terms and conditions for employment. 24 P.S. § 17-1716-A(a) & 17-1724-A(a). The CSL further authorizes the trustees to appoint a chief executive officer or other administrator to oversee and manage the operation of the charter school. Under the CSL, a charter school's trustees and administrators are "public officials" for purposes of state ethics and financial disclosure laws. 24 P.S. § 17-1715-A(11), (12).

A charter school must submit an annual report to the Department of Education so the latter may review the school's performance on various standardized tests and other performance indicators to assure compliance and operation consistent with the school's charter and the CSL. 24 P.S. § 17-1728-A. The Department of Education has ongoing access to all records, instructional materials, and student and staff records of each charter school. Id. The CSL provides that a charter may be revoked or not renewed by the Department of Education if the school's financial or education obligations are not or cannot be met, or if the school commits a material violation of its charter agreement. 24 P.S. § 17-1729-A.

The Pennsylvania Virtual Charter School

PVCS operates a public cyber charter school that provides educational services over the internet to approximately 3000 students who reside within Pennsylvania. PVCS was founded in 2001 when several individuals, known as "the Founding Board" or "the Founding Coalition," organized and submitted a charter application to the Norristown Area School District.

On about January 16, 2001, the Founding Board incorporated PVCS as a Pennsylvania nonprofit corporation to operate for educational purposes. On February 12, 2001, the school district approved the application and entered into a Charter School Agreement with the School, which the parties understood to "constitute a charter within the meaning of the CSL." The charter agreement set forth the parties' rights and responsibilities, including the school district's access to the School's records to ensure compliance with the charter and the CSL, and the school district's commitment to provide consulting and administrative support to facilitate the funding for the School. Under the charter agreement, PVCS was required to prepare and provide to the school district a copy of its annual budget and an annual assessment of whether it was meeting its goals and objectives. The charter stated that PVCS and its governing board "shall operate in accordance with the terms and provisions of the Application, the duly adopted Bylaws and the CSL." The charter was issued for a 5-year term.

[7] We agree with the Regional Director that the 2002 amendment does not affect our analysis.

Pursuant to Act 88, the Department of Education renewed the School's charter in 2006 and again in 2011. The current charter expires June 20, 2016. The record includes the School's 2010 renewal application but not the original application or 2006 renewal application. PVCS's 2010 156-page renewal application includes comprehensive and detailed information about student achievement, including lesson plans and the school calendar, a teacher turnover and certification chart, the most recent financial statements and a copy of the annual audit, a list of the board of trustees and their dates of service and the capacity in which they served, enrollment information, an attendance policy, and the School safety plan. The 2010 renewal application also includes references to the original charter, as well as student achievement, enrollment, and financial data from the last 10 years of the School's existence.

PVCS' bylaws, last amended September 26, 2011, set forth the operating rules for the board of trustees—the School's governing board. Pursuant to its bylaws, PVCS' current six-member board of trustees decides all matters related to the School's operations, including setting the curriculum; hiring, firing, and disciplining employees; and setting wages for all staff. The board may consist of a minimum of five and a maximum of nine members, who serve 5-year terms with no term limits. Under the bylaws, the board also appoints and removes its own members, by majority vote of the trustees. PVCS employs a chief executive officer and a chief financial officer. Both the CEO and CFO were appointed by and report directly to the board of trustees. The board also has the authority to remove the CEO and CFO.

The initial board consisted of five trustees who were selected by the Founding Coalition, and the by-laws state that, to the extent possible, the board will continue to consist of at least a parent of a student at the School, a member of the business community, and a community leader. Trustees are not paid and are not employed by the School. The bylaws set forth grounds for a trustee's removal, including neglect of duty, self-dealing, or violating any of the obligations set forth in the charter school agreement or CSL.

The board is responsible for ensuring that the School is operated in compliance with the charter application and all applicable laws, and ensuring that the School remains financially viable. PVCS' board sets wages for the School's staff; hires, fires, and disciplines its employees; and establishes and maintains all policies and procedures related to employment. The board determines the School's curriculum, which cannot be changed without the board's approval and must be in compliance with the state's established standards. The board also approves and ratifies all contracts, authorizes all expenditures, and adopts the School's annual budget, which is prepared by the CFO in consultation with the board's Planning and Budget Committee.

PVCS' board of trustees is subject to the Pennsylvania Sunshine Act and must take all official action in public meetings. The trustees, CEO, and other officials of the School must file annual financial disclosure statements and state ethics forms governing public officials.

The School's operating budget is funded almost entirely (97 percent) by the school districts where the students reside, which transmit a set percentage of their annual per capita student cost to PVCS. The remaining funding (3 percent) comes from federal programs such as No Child Left Behind and the Individuals with Disabilities Education Act.

The Regional Director's Decision

This case is governed by the Board's longstanding test for considering claims of "political subdivision" status. See *Hawkins County*, supra, 402 U.S. at 604–605. Under that test, an entity may be considered a political subdivision if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. Id. Here, the Regional Director found that PVCS is not exempt from the Board's jurisdiction under either prong of the *Hawkins County* test. Regarding the first prong, the Regional Director found that the record demonstrated that a group of private individuals originally applied to the local school district for the charter, and that the school district then granted the initial charter. The Regional Director rejected the School's contention that the Department of Education's two subsequent renewals of the School's charter demonstrated it had been created directly by the state, reasoning that "the initiative to establish the [School] was undertaken by private individuals, and thus there was no enabling action by the Commonwealth." The Regional Director further stated that even if the Department of Education, and not the school district, had granted the initial charter, he would still find that PVCS was not created directly by the Commonwealth. Rather, he found PVCS to be a corporate entity with a charter to function as an independent public school that acted more like a government subcontractor than a governmental department. The Regional Director further noted that in *Chicago Mathematics*, the Board found that the state's and local government's financial support of a charter school was not dispositive of political subdivision status.

Regarding the second prong of *Hawkins County*, the Regional Director found that the School's trustees and

administrators are not themselves public officials or responsible to public officials. Although the School's administrators, who are appointed by its board of trustees, are designated as "public officials" by the CSL (24 P.S. § 17-715-A(11)), the Regional Director observed that the designation is in the context of and for purposes of mandating compliance with state ethics and financial disclosure regulations. Citing *The Pennsylvania Cyber Charter School*, 6–RC–120811, 2014 WL 1390806 (April 9, 2014) (unpublished), the Regional Director reasoned that the CSL's reference to charter school trustees and administrators as "public officials" did not determine their status under the National Labor Relations Act. The Regional Director also relied in part on the fact that the School's teachers and administrators are subject solely to private appointment and removal. Finally, the Regional Director was unconvinced that the Department of Education's renewal of the charter was sufficient evidence that trustees are responsible to public officials in the sense contemplated by *Chicago Mathematics* and *Hawkins County* any more than a renewal of a government contract converts a private contractor into a public agency.

The Contentions of the Parties

PVCS argues that it satisfies both prongs of the *Hawkins County* test because the Pennsylvania Department of Education directly created it and it is administered by persons who are both public officials themselves and responsible to other public officials in state government.

Regarding the first prong, PVCS notes that although individuals submitted the application, the actual charter that establishes a school is issued by the Department of Education. PVCS relies on the CSL, which states: "The charter, *when duly signed*, shall act as legal authorization of the establishment of the charter school." 24 P.S. § 17-1745-A(f)(3) (emphasis added). Further, despite the assertedly ministerial requirement that Pennsylvania's cyber charter schools be incorporated as nonprofit corporations, PVCS argues that they do not gain status as a public school until such time as the Secretary of Education issues a charter.

PVCS also contends that the clear intent of the state legislature in enacting the CSL was that public cyber charter schools function as part of the public school system and as an administrative arm of the Commonwealth. PVCS claims that the statute's detailed policies regarding cyber charters' operation within the public school system support its view. For instance, state law places the employees of cyber charter schools within the public employee labor relations system. PVCS also relies on the fact that the Department of Education now has direct responsibility for granting and renewing applications for cyber charter schools.

Regarding the second prong of *Hawkins County*, PVCS argues that the Regional Director erred in concluding that neither the board nor the School's administration are accountable to any state or local public officials. PVCS argues that, under *Hawkins County*, whether PVCS meets the second prong is "based upon a totality of the facts and circumstances," which turns in large measure on the relevant state law. Under this approach, PVCS argues it is exempt for two reasons. First, it reiterates its argument that the CSL deems the board of trustees to be "public officials." 24 P.S. § 17-1715-A(11). Thus, PVCS argues that although the bylaws provide that new members are elected or removed by other members, those other members are acting in their capacity as public officials. PVCS further supports its view that PVCS is accountable to the general electorate by arguing that trustees (in its view, public officials) provide oversight and guidance to PVCS' administrators, hire and discharge employees, control the financial operations of the School, and are responsible for submission of the renewal applications to the Department of Education.

Second, PVCS argues the trustees—again, in its view public officials—directly oversee and are accountable to other public officials, primarily the Secretary of Education, by various means, including financial and audit reporting obligations, and the requirement to file an annual report to ensure the School's operations are in compliance with the charter, CSL, and applicable state and federal regulations. Further, the Secretary issues and renews the School's charter. PVCS notes that the entirety of the School's funding consists of public state and federal revenue, and that PVCS is required to make its budget accessible to the public. PVCS also relies on a Basic Education Circular (BEC) issued by the Department of Education on October 1, 2004; the BEC explains that the CSL provides the Department of Education with the power to revoke a cyber school's charter immediately if a material component of a student's education is not being provided or if the cyber charter has failed to maintain fiscal responsibility.[8]

Alternatively, if the Board finds PVCS is not a political subdivision, PVCS urges the Board to exercise its discretion and decline jurisdiction. It argues that there is only a de minimis impact on both commerce and employees, as there are only 14 cyber charter schools in Pennsylvania. PVCS notes that the Board has discretionarily declined jurisdiction over private schools.[9] Fur-

[8] The BEC, issued by the Department of Education, serves as a guide for charter schools, school districts, parents, and students regarding the CSL.

[9] Contrary to the School's argument, the Board has long exercised jurisdiction over both nonprofit and for-profit private schools. See *The*

ther, PVCS asserts that a decision of the Board to decline to assert jurisdiction would enable Pennsylvania to regulate its own labor relations, including its relationship with the collective-bargaining unit here and to retain control over its own state educational system, specifically school staffing. Exercising jurisdiction, however, would effectively remove the state's control over critical aspects of its own public education system.

The Union's position, articulated in its posthearing brief, is that PVCS is not exempt under either prong of the *Hawkins County* test. In addition to relying on the Regional Director's findings and conclusions, the Union notes that no conduct of the state is necessary or appropriate to initiate the creation of a charter school, and because no charter school would exist without the initiative of private individuals and the authority of Pennsylvania's nonprofit corporation law, the first prong of the *Hawkins County* test is not satisfied. Regarding the second prong, the Union notes that the CSL does not require a specific appointment/removal structure for trustees but is permissive with respect to how the charter applicant will organize it. As in *The Pennsylvania Cyber Charter School*, 6–RC–120811, 2014 WL 1390806, PVCS' board of trustees is appointed and removed entirely by fellow board members, as dictated by the School's bylaws. The Union notes that the School's bylaws address the grounds for removal of a trustee, all of which require a majority vote of the existing board, not any action by a state official. The Union contends that it is dispositive that trustees are appointed and subject to removal only by other trustees, and not any public official or public electorate.

Analysis

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include any state or political subdivision thereof. The term "political subdivision" is not defined in the Act. In *Hawkins County*, however, the Supreme Court observed that the legislative history revealed that Congress enacted Section 2(2)

> 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. In light of that purpose, the Board . . . has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of government, or (2) administered by individuals who are responsible to public officials or to the general electorate.

402 U.S. at 604–605 (footnotes omitted). Consistent with that understanding, the Board has held that "[t]he plain language of Section 2(2) 'exempts only government entities or wholly owned government corporations from its coverage—not private entities acting as contractors for the government.'" *Research Foundation of the City Univ. of New York*, 337 NLRB 965, 968 (2002), quoting *Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999). Applying these principles, we agree with the Regional Director and find that PVCS is not a political subdivision of the Commonwealth of Pennsylvania under either prong of the *Hawkins County* test.

PVCS was Not "Created Directly by the State"

In order to determine whether an entity is a political subdivision under the first prong of the *Hawkins County* test, the Board determines first whether the entity was created directly by the state, such as by a government entity, legislative act, or public official. If it was, the Board then considers whether the entity was created so as to constitute a department or administrative arm of the government.[10] Both of these subparts need to be met for the employer to be exempt from the Act. We find that PVCS fails the first prong of the *Hawkins County* test because it was created by private individuals and not by a government entity, special legislative act, or public official. Moreover, PVCS was not created to be an administrative arm of the government.

The Board has routinely found employing entities to be exempt political subdivisions where they were created by legislation or statute in order to discharge a state function.[11] The Board has also found the first prong of *Hawkins County* satisfied where the employing entity was created by an act of the judiciary, rather than the legislature.[12] In contrast, the Board has consistently held that entities created by private individuals as nonprofit corporations are not exempt under the first prong of *Hawkins County*.[13] Furthermore, an entity is not exempt simply

Windsor School, 200 NLRB 991 (1972); *Shattuck School*, 189 NLRB 886 (1971).

[10] *Hawkins County*, supra at 604; *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000).

[11] See, e.g., *University of Vermont*, 297 NLRB 291 (1989) (university created directly by special act of Vermont General Assembly); *New York Institute for Education of the Blind*, 254 NLRB 664, 667 (1981) (corporation formed by special act of New York State legislature); *New Britain Institute*, 298 NLRB 862 (1990) (institute incorporated by special act of Connecticut General Assembly and later established as public library in accordance with state statutes governing public libraries).

[12] See *State Bar of New Mexico*, 346 NLRB 674 (2006) (New Mexico Supreme Court's enactment of rule creating State Bar amounted to direct creation by state government).

[13] For example, in *Regional Medical Center at Memphis*, 343 NLRB 346 (2004), the county commissioners dissolved the county hospital's authority contingent upon the formation of a not-for-profit health care corporation (the employer) and the execution of a contract providing that the "new" corporation would operate the previously-operated hos-

because it receives public funding or operates pursuant to a contract with a governmental entity, as does PVCS. The Board routinely asserts jurisdiction over private employers that have agreements with government entities to provide services.[14] As the Board stated in *Research Foundation*, supra at 968, the "plain language" of Section 2(2) does not exempt private entities acting as government contractors from the Board's jurisdiction. Further, "[t]he creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption."[15] Ibid.

Applying these principles here, we find that PVCS does not share the "key characteristic of political subdivision status" with those entities that the Board has found to be exempt. That is, PVCS was not created directly by any Commonwealth of Pennsylvania government entity, special statute, legislation, or public official, but instead by private individuals as a nonprofit corporation.

Here, the School was founded in 2001, when a group of private individuals, known as "the Founding Board" or "the Founding Coalition," organized and filed a comprehensive application for a charter from the Norristown Area School District. After applying for the initial charter, the Founding Board filed for nonprofit corporate status with the Pennsylvania Department of State. Thereafter, the charter was signed by the board of trustees and the school district. There is no evidence that the school district amended any part of the School's charter, or rejected the initial board of trustees. Thus, the Regional Director correctly concluded under the CSL and Board precedent that neither the school district nor any state agency initially created the School; rather, it was created by private individuals. See also *The Pennsylvania Cyber Charter School*, supra ("It may be that, absent the [CSL], the entity would not have been created, but that is not the relevant question under *Hawkins County* or *Chicago Mathematics*. No doubt many private entities would not exist but for the public contracts they carry out; they nevertheless are not 'administrative arms of the government' (in the words of *Hawkins County*)."). Nor, as the Regional Director correctly observed, is the Department of Education's involvement in the subsequent renewals of the School's charter significant. It does not change the fact that the School was established by private individuals.

Citing the CSL, PVCS argues that until a charter is signed by the Secretary of the Department of Education, there is no school, and that the Regional Director committed prejudicial error by not finding that state action is required to create a charter school. We are not persuaded by this argument. Although the CSL provides that the Department of Education issues the charter, we find that the Founding Coalition's incorporation of the School as a nonprofit entity and its promulgation of the School's governing and operating documents "created" the School. In sum, we conclude that PVCS was not "created directly by" the Commonwealth.

It is therefore unnecessary to examine whether PVCS is an administrative arm or department of the government. See *Regional Medical Center at Memphis*, 343 NLRB at 358 (upon finding that employer was not created by the State, Board stated that employer could be exempt under *Hawkins County* only under second prong

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pital facilities. The Board found that because the employer was created by private individuals as a nonprofit corporation, it was not established by the county, despite the actions of the county commissioners. Id. at 358.

The Board reached a similar conclusion in *Research Foundation*, supra at 965, where private individuals created the employer as a not-for-profit educational corporation under the New York State Educational Law. The Board stated that the "plain language" of Sec. 2(2) did not exempt private entities acting as government contractors. Id. at 968. Although the employer's purpose benefitted City University of New York (CUNY), a public university, there was no indication that the employer was intended to operate under the control of a public entity. The creation of the employer under the State Educational Law did "not constitute creation directly by the state or CUNY so as to constitute an arm of the state or CUNY." Ibid. See also *Truman Medical Center v. NLRB*, 641 F.2d 570, 573 (8th Cir. 1981) (medical center organized under Missouri not-for-profit statute); *Woodbury County Community Action Agency*, 299 NLRB 554 (1990) (community action agency incorporated by private individuals under state law as nonprofit corporation); *Economic Security Corp*., 299 NLRB 562 (1990) (same). In *Enrichment Services Program, Inc*., 325 NLRB 818 and fn. 13 (1998), the Board overruled *Woodbury* and *Economic Security Corp.* on other grounds, but did not disturb the principle that an entity must be created directly by the state to be exempt under the first prong of *Hawkins County*.

[14] See, e.g., *Connecticut State Conference Board, Amalgamated Transit Union*, 339 NLRB 760 (2003) (private employer that contracted with the state to provide public bus service); *Methodist Hospital of Kentucky*, 318 NLRB 1107 (1995), enfd. in relevant part sub nom. *Pikeville United Methodist Hospital of Kentucky v. United Steelworkers of America*, 109 F.3d 1146 (6th Cir. 1997), cert. denied 522 U.S. 994 (1997) (private business entity that performed health care services for the state); *Jefferson County Community Center, Inc.*, 259 NLRB 186 (1981), enfd. 732 F.2d 122 (10th Cir. 1984), cert. denied 469 U.S. 1086 (1984) (employer that contracted with or was licensed by the state to perform services for citizens with special needs); *NLRB v. Parents and Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989) (same).

[15] Two decisions by the Seventh Circuit are instructive on this issue. See *NLRB v. Parents and Friends of the Specialized Living Center*, supra (enforcing a Board order asserting jurisdiction over a not-for-profit corporation that operated a residential facility for adults with disabilities pursuant to a contract with a state agency); and *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 663 (7th Cir. 1990) (finding that a nonprofit corporation operating a foster home was not a political subdivision; observing that "[t]here are no public directors here. There is nothing but a state subsidy, and what is implicit in a state subsidy—that the enterprise is seeking to accomplish something that the state wants accomplished. That cannot be enough . . . .").

analysis i.e., "only if officials who are responsible to public officials or to the general electorate administer it"); *Enrichment Services Program*, 325 NLRB at 819 (same). Nevertheless, we find that PVCS fails this element of the prong one test, as well. To begin, we do not find merit in PVCS' reliance on the CSL's characterization of cyber charter schools as "independent public schools" or charter administrators as "public officials" to argue that PVCS is an administrative arm of the government. It is federal, not state, law that governs the determination of whether an entity created under state law is a political subdivision within the meaning of Section 2(2) of the Act. *Hawkins County*, 402 U.S. at 602–603. While state determinations about whether an entity is a political subdivision are "worthy of careful consideration," these determinations do not control whether a charter school was created so as to constitute a department or administrative arm of government and is thus a political subdivision for purposes of the National Labor Relations Act, especially where the state does not itself operate those schools. *Hinds County Human Resource Agency*, 331 NLRB at 1404, citing *Hawkins County*, 402 U.S. at 602. See also *The Pennsylvania Cyber Charter School*, supra.[16] The record supports the Regional Director's conclusion that "the [School] is a corporate entity which holds a charter to function as an independent public school, in a manner more akin to a subcontractor than a department of government."

Moreover, the School's governing body—its board of trustees—was established under the School's own charter. The trustees are appointed by other trustees, for a 5-year term, and are not subject to any term limits. In contrast, public school board members are elected by the voters in the school district for terms of 4 years. Under the CSL, the board oversees the day-to-day operations of the School, acts autonomously, and has the authority to decide all matters related to the operation of the School, consistent with the School's charter and applicable law. The CSL states that the board shall determine the level of compensation and all terms and conditions of employment of the staff. Additionally, matters such as quorum and regularity of meetings are within the discretion of the School's board of trustees, but are legislated for public schools.

The School's argument that the Department of Education's ability to revoke charters gives it more power over charter schools than it does over public schools is also unavailing. The power to revoke a charter is analogous to a state's decision to cease subcontracting work to a private employer that fails to satisfy the state's standards. It does not convert the contractor into a state entity. See, e.g. *Research Foundation*, supra, 337 NLRB at 968 (explaining that Section 2(2) does not exempt private entities acting as contractors for the government from coverage under the Act (quoting *Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999)).

Finally, we do not agree with the School's argument that the language of the CSL reflects the Commonwealth's intent to treat charter schools as part of its public education system. To the contrary, by providing that private individuals may establish and operate charter schools, the Commonwealth has shown its intention to permit *others* to establish and operate schools, albeit within a framework of regulations fashioned by the Commonwealth. Pennsylvania has, in effect, decided to provide K through 12 education partly through its own schools and partly through regulated private corporations operating as government contractors. As discussed above, for the purposes of the National Labor Relations Act, a government contractor is not an arm of the state.

PVCS Is Not Administered by Individuals Who Are Responsible to Public Officials or the General Electorate

Under the second *Hawkins County* prong, an entity will be deemed a political subdivision if it is "administered by individuals who are responsible to public officials or to the general electorate." In making this determination, the Board examines whether those individuals are appointed by or subject to removal procedures applicable to public officials . . . . '" *Hawkins County*, supra at 608. In some cases, the Board has also considered whether additional factors demonstrate a responsibility to public officials or the electorate. Here, for the reasons that follow, we find it dispositive that none of PVCS' governing board members are appointed by or subject to removal by any public official. Hence, no further inquiry is required.

Here, we draw on the reasoning of the decision in *Charter School Administration Services*, 353 NLRB 394 (2008) (*CSAS*),[17] finding that a private, for-profit corporation that managed and operated charter schools was not a political subdivision of the State of Michigan. The *CSAS* Board found that the members of CSAS's governing board were not responsible to public officials or the general electorate inasmuch as they were neither appointed, nor subject to removal, by public officials. Id. at

[16] Similarly, the fact that the CSL provides that employees of a charter school may organize pursuant to Pennsylvania's Public Employee Relations Act is not controlling in determining whether PVCS is an administrative arm of the government where the state itself is not operating the School. See id.

[17] The two-member decision in *CSAS* was invalidated by *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010).

397–398. We are persuaded by that reasoning and adopt it here.

We summarize the principles that the *CSAS* Board applied: in determining whether an entity is administered by individuals who are responsible to public officials or the general electorate, the "relevant inquiry" is whether a majority of the individuals who administer the entity—the governing board and executive officers—are appointed by and subject to removal by public officials.[18] The Board examines whether the composition, selection, and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents.[19] Id. at 397.

Where the appointment and removal of a majority of an entity's governing board members is controlled by private individuals—as opposed to public officials—the entity is subject to the Board's jurisdiction. See, e.g., *Research Foundation*, supra (no exemption where employer's bylaws, not state law, defined appointment and removal of members of the board of directors)*; St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988) (medical center not a political subdivision because there was no requirement that board of directors be public officials or appointed and removed by public officials); *Truman Medical Center v. NLRB*, 641 F.2d 570 (8th Cir. 1981) (hospital's governing body was self-perpetuating board of directors, majority of whom were not appointed by or subject to removal by public officials). Notably, in *Truman Medical Center*, the court pointed out that the responsibility of the board of directors to public agencies, "while undoubtedly heavy, derive[d] from the contractual relations between [the hospital] and these political subdivisions, and is not the sort of direct personal accountability to public officials or to the general public required to support a claim of exemption under § 2(2)." Id. at 573.

The Board's "sole focus" in *CSAS* was on the composition of the employer's board of directors and to whom those board members were accountable. The members of CSAS' board of directors were elected by the employer's shareholders, who could remove a director for or without cause. Furthermore, CSAS' corporate officers were elected or appointed by, and subject to removal by, the board of directors. No person involved in running CSAS' corporate enterprise—not its board of directors, executive board, or administrative staff—was appointed by or subject to removal by any public official, and there was no indication that the board of directors or corporate officers had any "direct personal accountability to public officials or the general electorate."[20] The *CSAS* Board concluded:

> Simply stated, no person affiliated with [the charter school], [the charter grantor], the relevant school district, the Michigan Department of Education, nor any other local or State official, has any involvement in the selection or removal of any members of [CSAS's] governing board . . . . The members of [CSAS's] board of directors are appointed by and subject to removal *only* by private individuals and not by public officials. Given the undisputed method of appointment and removal of board members, we find that none of the board members are responsible to public officials in their capacity as board members and that, therefore, [CSAS] is not "administered" by individuals who are responsible to public officials or the general electorate [emphasis in original].

Supra at 398. The *CSAS* Board declined to look to any other factors in making its determination, finding the nature of the board's appointment and removal dispositive.

Although PVCS operates only one school, and in that sense is not a charter school management organization as is CSAS, it is, nonetheless, a private corporation whose governing board members are privately appointed and removed. The method of selection of PVCS' governing board trustees is dictated by its bylaws, and not by any law, statute, or governmental regulation. Those bylaws provide that only sitting board members may appoint and remove other PVCS board members. And only board members may appoint and remove PVCS' administrators. Further, only board members may sit on PVCS' various committees, including the nominating and governance, finance, and personnel committees. The record contains no evidence that any local or state official has had any involvement in the selection or removal of any members of the board of trustees, or in the hiring of the School's staff, including its CEO or CFO. The bylaws list the reasons for which a trustee may be removed, all of which require a majority vote of the board.

We find no merit in PVCS' arguments that the trustees themselves are "public officials" under the CSL and that the board of trustees are accountable to the Pennsylvania Secretary of Education, a public official, merely because

[18] *Hawkins County*, supra at 605; *Aramark Corp. v. NLRB*, 156 F.3d 1087, 1093 (10th Cir. 1998), vacated in part on rehearing en banc 179 F.3d 872 (10th Cir. 1999); *Research Foundation*, 337 NLRB at 969, citing *FiveCAP, Inc.*, 331 NLRB 1165 (2000); and *Enrichment Services Program*, 325 NLRB at 819. "This requirement is consistently evidenced throughout Board decisions." *Regional Medical Center at Memphis*, 343 NLRB at 359.

[19] *Research Foundation*, supra at 969.

[20] *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986). In *Mar Del Plata Condominium Assn.*, 282 NLRB 1012, 1014 (1987), the Board found no exemption where the employer was a privately owned, operated and controlled corporation whose board of directors was chosen by the corporation's shareholders and responsible only to them.

the Secretary has oversight and authority to renew the School's charter. First, as discussed earlier, CSL's "public officials" designation alone fails to establish that trustees and administrators are in fact public officials for the purposes of the National Labor Relations Act, when the evidence demonstrates that PVCS' board was created and governed by its internal bylaws (the first board was selected by the private citizens comprising the Founding Coalition) and is a self-perpetuating entity. See *Charter School*, supra, 353 NLRB at 397; *Research Foundation*, 337 NLRB at 969 (in considering this prong, the Board considers whether the composition, selection, and removal of the employer's board of directors is determined solely by law or solely by the employer's own governing documents.)

Second, that the School is subject to oversight and regulation by the Secretary of Education is insufficient to find that the School is accountable to a public official. Critically, nothing in the bylaws allows the Secretary of Education or any other public official to elect or remove a trustee.

Given the undisputed method of appointment and removal of PVCS' board members, we find that none of them are responsible to public officials in their capacity as board members, and that, therefore, PVCS is not "administered" by individuals who are responsible to public officials or the general electorate.[21] We conclude, therefore, that PVCS is not a political subdivision under the second *Hawkins County* prong.

We recognize that the Board has, on occasion, referred to additional factors. But it has done so only after making a political subdivision finding based on its examination of the method of appointment and removal of an entity's governing board.[22] As the *CSAS* Board correctly observed, the reference to other factors merely supports or reinforces the Board's determination.[23] Supra at 398 fn. 17. Where an examination of the appointment-and-removal method yields a clear answer to whether an entity is "administered by individuals who are responsible to public officials or to the general electorate," the Board's analysis properly ends.

PVCS Is Not a Political Subdivision and the Board Should Not Decline to Assert Jurisdiction over PVCS[24]

In the alternative, PVCS argues that even if the Board has statutory jurisdiction over PVCS, the Board should nonetheless decline to assert jurisdiction over cyber charter schools. PVCS points out that there are only 14 cyber charter schools in Pennsylvania and asserts, on that basis, that they only have a de minimis impact on interstate commerce. Further, PVCS argues that if the Board exercises jurisdiction, it would effectively supplant state control over its own public education system and the state's ability to regulate labor relations at those schools. We reject those arguments.

Under Section 14(c)(1) of the Act, the Board 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." But Section

[21] Cf. *Oklahoma Zoological Trust*, 325 NLRB 171 (1997) (employer exempt from Board jurisdiction where city mayor appointed its governing trustees). Compare *Enrichment Services Program*, supra at 818 (employer not an exempt political subdivision where less than a majority of its members of board of directors was comprised of public officials or individuals responsible to the general electorate); *Connecticut State Conference Board*, 339 NLRB 760 (2003) (employer that had a contract with the state to provide public bus service was not an exempt political subdivision where its managers were not responsible to public officials or the general electorate); *Morristown-Hablen Hospital Assn.*, 226 NLRB 76 (1976) (privately incorporated entity that operated a nonprofit hospital not an exempt political subdivision where, inter alia, some trustees served on board of trustees because of their public positions, but majority of trustees were private citizens).

[22] For example, after finding that the University of Vermont was a political subdivision controlled by the State of Vermont because 12 of 21 trustees were publicly appointed, the Board noted "other factors indicating that the University is a political subdivision." *University of Vermont*, 297 NLRB at 295. See also *Regional Medical Center at Memphis*, 343 NLRB at 360; *Truman Medical Center v. NLRB*, 641 F.2d at 572–573 fn. 2; and *Cape Girardeau Medical Care Center*, supra at 1019 fn. 5. The Supreme Court in *Hawkins County*, although finding that the gas utility district was a political subdivision *primarily* because the commissioners administering the district were appointed by an elected county judge and were subject to removal at the request of the governor or county prosecutor, considered "other factors" in determining whether the district operated in a manner "so as to constitute [a] department[] or administrative arm[] of the government." 402 U.S. at 604, 608–609. The exception is *Rosenberg Library Assn.*, 269 NLRB 1173 (1984), in which the Board found that the employer was an exempt political subdivision under prong two even though its trustees and directors were not appointed by public officials. The Board did not discuss how the trustees and directors could be removed. Among other factors, the Board noted that the respondent's librarian also served as the county and city librarian, and the respondent's directors served as directors of the county library's board. Id. at 1175. Those unique circumstances are not present here, but to the extent *Rosenberg* can be read to conflict with our decision today, it is overruled.

[23] Although not necessary to our determination that PVCS is not a political subdivision under the second *Hawkins County* prong, additional facts supporting that finding are that PVCS hires its own employees and establishes their pay and benefits. Further, PVCS's board of trustees retains control over PVCS's operations, including selecting and removing and fixing the salaries of PVCS's officers, agents, and employees and entering into contracts on behalf of PVCS. Additionally, PVCS's finance committee is responsible for PVCS's overall financial management, and PVCS's board of directors approves PVCS's annual budget.

[24] In light of our finding that PVCS is not exempt from the Act as a political subdivision, it follows that PVCS is an "employer" within the meaning of Sec. 2(2) of the Act. See *Management Training Corp.*, 317 NLRB 1355, 1358 (1995).

14(c) of the Act manifests a congressional policy favoring the assertion of discretionary jurisdiction where "the Board finds that the operations of a class of employers exercise a substantial effect on commerce." *Cornell University*, 183 NLRB 329, 332 (1970). The Board has not hesitated to assert jurisdiction over nonprofit corporations and other entities merely because they perform work for state or local governments. See, e.g., *Boys and Girls Aid Society*, 224 NLRB 1614 (1976); *St. Aloysius Home*, 224 NLRB 1344 (1976).

Although PVCS suggests that the Board not exercise jurisdiction because cyber charter schools do not "exercise substantial effect on commerce," PVCS alone serves about 3000 students and its operating budget is in the millions of dollars each year. And it is but one of 14 cyber charter schools in Pennsylvania. All of those schools employ teachers and staff and purchase products and services in the private sector economy. Accordingly, we reject PVCS' claim that Pennsylvania's cyber charter schools do not substantially affect commerce.[25]

PVCS' further argument, that the Board's assertion of jurisdiction would supplant state control, is merely another way of asserting that PVCS is a state school. But it is not. Pennsylvania law does not *mandate* the establishment of charter schools as a means of fulfilling "the state's obligation to provide public education"; rather, it permits *others* to establish them as an alternative to the public schools. The Commonwealth having made that choice, PVCS is subject to the same federal regulation as are other private employers.[26]

Our dissenting colleague goes a step further than PVCS, arguing that the Board should decline to exercise jurisdiction over all charter schools under Section 14(c)(1), because, assertedly, charter schools have an insubstantial effect on interstate commerce and the exercise of jurisdiction would lead to instability and confusion.[27] We do not find those policy arguments persuasive.

First, we disagree with our colleague's assertion that charter schools have an insubstantial effect on interstate commerce because K–12 education is "local in nature," and thus that labor disputes involving charter schools will have largely localized effects because of their "unique and special relationship" with the state. Our colleague reasons that these are the same types of considerations that the Board relied upon to exercise its discretion under 14(c)(1) to decline jurisdiction over the horse racing and dog racing industries. The Board's determination to decline to exercise jurisdiction over the racing industries, however, was a response to the unique character of those industries, including the extensive involvement of state regulatory bodies to preserve the integrity of those activities.[28] Thus, those decisions do not establish a general intent or inclination to decline jurisdiction over any industry that may be regulated by the state.[29] See also *Cornell University*, supra 183 NLRB at 332 (Section 14(c)(1) manifests a congressional policy favoring the assertion of jurisdiction where the Board finds that the operations of a class of employers exercise a substantial effect on commerce).

Furthermore, even though charter schools may be subject to state and local regulatory oversight, we find that in many, if not most, respects, charter school cases are not much different from other Board cases involving government contractors. Many government contractors are subject to exacting oversight by statute,[30] regulation, or agreement. Yet the Board routinely asserts jurisdiction over private entities that provide services, under contract, to governmental bodies.[31] "The plain language

[25] Moreover, we disagree with the dissent's suggestion that charter schools overall have an insignificant impact on interstate commerce. Charter schools are a significant, and growing, category of employers in the education sector. From the school year 1999–2000 to 2012–2013, the percentage of all public schools that were charter schools increased from 1.7 to 6.2 percent, and charter schools have generally increased in enrollment size over time. National Center for Education Statistics, *Fast Facts*, https://nces.ed.gov/fastfacts/display.asp?id=30 (last visited July 18, 2016).

[26] We note that the Commonwealth of Pennsylvania has not intervened or otherwise endorsed the School's position in this proceeding.

[27] The dissent does not address our finding that PVCS is not a political subdivision under the *Hawkins County* test.

[28] NLRB Rules and Regulations, § 103.3, 29 C.F.R. § 103.3 ("The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dogracing industries.").

[29] Although our dissenting colleague advocates that the Board decline jurisdiction over all charter schools, he also argues that the Board should decline jurisdiction over PVCS in particular because the statutes and regulations that govern Pennsylvania's charter schools create a "special relationship" between charter schools and the state similar to the "unique relationship" that led the Board to decline jurisdiction in *Temple University*, 194 NLRB 1160, 1161 (1972). We find the facts in *Temple University* to be clearly distinguishable from those here. Unlike PVCS, Temple University was designated by the Commonwealth of Pennsylvania as an instrumentality of the Commonwealth and a "State-related university"; the Commonwealth's involvement in the University's financial affairs is "substantial, if not controlling"; and the Commonwealth established the University's board of trustees, of which at least one-third are appointed by public officials.

[30] See, e.g., McNamara–O'Hara Service Contract Act of 1965 (SCA) (covering most federal contractors), 41 U.S.C. §§ 351–358.

[31] See, e.g., *Connecticut State Conference Board*, 339 NLRB 760 (2003) (employer managed and operated public bus system pursuant to contract with state); *Bergensons Property Services*, 338 NLRB 883 (2003) (private corporation performed road work for State of New Jersey); *Servicios Correccionales de Puerto Rico*, 330 NLRB 663 (2000), enfd. 234 F.3d 1321 (D.C. Cir. 2000) (Delaware corporation operated and managed prisons in Puerto Rico); *Correctional Medical Services*, 325 NLRB 1061 (1998) (private employer provided health care services at prisons pursuant to contract with state).

of Section 2(2) 'exempts only government entities or wholly owned government corporations from its coverage—not private entities acting as contractors for the government.'" *Research Foundation*, supra 337 NLRB at 968, quoting *Aramark Corp. v. NLRB*, 179 F.3d at 878.

Second, we are not persuaded by our colleague's contention that we should decline jurisdiction over charter schools because the fact-specific inquiry required under *Hawkins County* provides parties with no way to reliably predict whether they will be subject to the Board's jurisdiction. Every statutory coverage determination requires the Board to conduct an individual examination of the facts, on a case-by-case basis, to determine whether coverage is consistent with the Act. See, e.g., *FedEx Home Delivery*, 361 NLRB 610 (2014) (Board set forth an 11-factor test to determine whether an independent contractor is an employee under Section 2(3) of the Act); *Oakwood Healthcare*, 348 NLRB 686 (2006) (Board set forth multi-factor test to determine whether an employee is a Section 2(11) supervisor and thus excluded from the Act's coverage). Compare *Northwestern University*, 362 NLRB 1350, 1350 (2015) (in case of first impression, the Board declined to find university's football players to be statutory employees because doing so "would not serve to promote stability in labor relations"). The need for this case-by-case factual examination does not, alone, present a compelling reason to exercise our discretion to decline to assert jurisdiction over an entire class of employers. Moreover, we find that a categorical exemption of charter schools would not effectuate the purposes of the Act. Compare, e.g., *San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1062–1063 (2004) (finding categorical exemption for enterprises operated by Indian tribes not warranted and policy considerations favor assertion of Board's jurisdiction in particular case), enfd. 475 F.3d 1306 (D.C. Cir. 2007), with *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004) (exercising discretion to decline jurisdiction over nonprofit health services program governed by members of various Indian tribal governments). 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. See *San Manuel*, 341 NLRB at 1063.[32]

Contrary to the dissent, we find that in this case, policy considerations favor asserting jurisdiction. Declining jurisdiction would deprive PVCS and its employees of the benefit of being covered by the Act. Relying again on the racing industries rulings, the dissent claims that the Board can assume that, if it declines to assert jurisdiction over labor relations at charter schools, the states would be quick to assert their authority.[33] But the racing industries are sui generis, and there is no guarantee that Pennsylvania would act as the dissent presumes.

CONCLUSION

For all of these reasons, we find that PVCS is an employer within the meaning of Section 2(2) of the Act. As PVCS satisfies the Board's monetary jurisdictional standards, we find that the Board should assert jurisdiction over PVCS. Accordingly, we shall remand the case to the Regional Director for further processing.

ORDER

The case is remanded to the Regional Director for appropriate action.

MEMBER MISCIMARRA, dissenting.

Section 2(2) of the National Labor Relations Act (NLRA or Act) defines the term *employer* as "any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or *any State or political subdivision* thereof."[1] In

Moreover, courts of appeals have routinely agreed with the Board's assertion of jurisdiction over private employers who contract with government entities. See, e.g., *Aramark Corp. v. NLRB*, supra at 874 (private corporation contracted with county of Florida and with the Citadel, a military college owned and operated by State of South Carolina); *Pikeville United Methodist Hospital of Kentucky v. United Steelworkers of America*, 109 F.3d 1146 (6th Cir. 1997), cert denied. 522 U.S. 994 (1997) (private entity operated hospital under lease from the city); *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997) (private employer operated Job Corps Center under contract with Department of Labor); and *NLRB v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir. 1998) (private employer hired by Chicago Housing Authority to provide security services).

We are not saying, as the dissent asserts, that government contractor cases are exactly like charter school cases and therefore that the same analytical framework applies in both. Rather, we observe that the Board has routinely asserted jurisdiction over government contractors, who similar to charter schools, provide public services and are subject to government oversight and regulation.

[32] It is disingenuous for our colleague to rely on the Supreme Court's *Noel Canning* decision to suggest that a Board determination regarding Sec. 2(2) jurisdiction over a charter school will inevitably lead to a protracted dispute, leaving a charter school and its employees unsure about whether they are covered by the Act. 134 S.Ct. 2550 (2014). The issuance of *Noel Canning* required the Board to reconsider de novo all of the decisions, including *Chicago Mathematics*, decided by the Board when its membership included recess appointees whom the Court later determined were invalidly appointed as a matter of constitutional law. Id. at 2577. The circumstances underlying *Noel Canning* were, in a word, unique, and are unlikely to reoccur.

[33] *Hialeah Race Course*, 125 NLRB at 391. In fact, state regulation of the racing industries long preceded any party asserting that these industries were covered under the NLRA.

[1] Sec. 2(2) (emphasis added). Sec. 2(2) also excludes from the Act's definition of *employer* "any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when

NLRB v. Natural Gas Utility District of Hawkins County,[2] the Supreme Court held that entities are "political subdivisions" of a state if they are "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."[3]

In this case, I do not address my colleagues' finding that The Pennsylvania Virtual Charter School (PVCS or the School) fails to constitute a "political subdivision" under the test set forth in *Hawkins County*,[4] which would mean the NLRB has statutory jurisdiction over PVCS under Section 2(2) of the Act.[5] The existence of Section 2(2) jurisdiction here does not dictate the outcome of this case or other charter school cases, for two reasons. First, even if statutory jurisdiction exists under Section 2(2), the Board may nonetheless decline to exercise jurisdiction over charter schools as a class or category of employers, consistent with Section 14(c)(1) of the Act. Second, the existence of Section 2(2) jurisdiction in the instant case does not mean that the Board has Section 2(2) jurisdiction over *other* charter schools. Rather, under the *Hawkins County* test, the question of Section 2(2) jurisdiction over other charter schools depends on the particular facts of each case, which vary significantly because many different state and local laws govern the creation, structure and operation of charter schools. For example, I believe the Board *lacks* Section 2(2) jurisdiction in a different charter school case that has been decided today, *Hyde Leadership Charter School—Brooklyn*, 364 NLRB 1137, 1145 (2016) (*Hyde Leadership*) (Member Miscimarra, dissenting).

I believe the Board should decline to exercise jurisdiction over PVCS for two reasons, which are explained more fully below.

First, I believe the Board should decline to exercise jurisdiction here and in other charter school cases, consistent with Section 14(c)(1), because any dispute involving this "class or category of employers" will predictably have an insubstantial effect on interstate commerce. This conclusion is reinforced by the fact that state and local issues overwhelmingly predominate the creation, structure and operation of charter schools, which exist for the purpose of satisfying public education requirements between kindergarten and grade 12 (K–12) spanning elementary school, middle school and high school. Even if Section 2(2) jurisdiction exists over particular charter schools because they fail to qualify as "political subdivisions," their creation, structure and operation are subject to significant regulatory oversight by state and local authorities, which varies greatly depending on the jurisdiction and the particular charter school.

Second, separate from whether Section 2(2) jurisdiction exists here, there is little question that Section 2(2) jurisdiction will *not* exist in various other charter school cases (see, e.g., *Hyde Leadership*, referenced above). Moreover, based on the fact-specific inquiry required under *Hawkins County*, there is no way for parties to reliably determine, in advance, whether or not Section 2(2) jurisdiction exists, and this uncertainty will persist given the length of time that it takes to obtain a Board determination regarding Section 2(2) jurisdiction, not to mention the uncertainty associated with potential court appeals from any Board decision.

Therefore, even in the best circumstances, charter school bargaining pursuant to our statute will likely involve contrary views—or conflicting determinations—about whether bargaining is governed by the NLRA, on the one hand, or by relevant state or local labor laws applicable to public sector negotiations on the other. In the worst circumstances, parties may engage in bargaining for years pursuant to our statute—and resort to strikes, lockouts and other economic weapons—only to learn that (i) statutory jurisdiction under the NLRA does not exist, (ii) applicable state or local labor laws may have been violated by the conduct of bargaining or resort to economic weapons by one or both parties, or (iii) even if years of Board and court litigation have yielded a determination that Section 2(2) jurisdiction exists, this jurisdiction may have ceased in the meantime based on changes in state law or modifications to a school's governing charter, which may entail further Board and court litigation. Indeed, as described in Part B, the worst circumstances are evident here and in *Hyde Leadership*, resulting in a jurisdictional no-man's land for many years in the past, and—in all likelihood—many years yet to come.

The only certain outcome of the Board's exercise of jurisdiction here and in other charter school cases will be

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acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[2] 402 U.S. 600 (1971).

[3] Id. at 604–605.

[4] My colleagues find that the School was not "created directly by the state." Id. Although this makes it unnecessary to decide whether the School was created "to constitute [a] department[] or administrative arm[] of the government," my colleagues also find that the School is not a department or administrative arm of the government. Regarding the alternative *Hawkins County* test—whether an entity is administered by individuals who are responsible to public officials or to the general electorate—my colleagues find that the School was not administered by individuals who are responsible to the requisite parties. I do not reach or pass on the question whether Sec. 2(2) jurisdiction exists in the instant case. Even assuming it does, I would decline to exercise jurisdiction for the reasons set forth below.

[5] As set forth above, Sec. 2(2) excludes from the definition of the term *employer* "any State or political subdivision thereof."

substantial uncertainty and long-lasting instability. This has already been demonstrated in the two charter school cases decided today, as described more fully in Part B. Accordingly, I believe the Board should decline to exercise jurisdiction over PVCS, the charter school at issue in this case. In *Hyde Leadership*, which the Board also decides today, I have concluded that the Board does not have Section 2(2) jurisdiction; but even if Board jurisdiction existed in that case, I likewise believe the Board should decline to exercise jurisdiction for the reasons explained below.

DISCUSSION

A. Charter School Labor Disputes Do Not Have a Sufficiently Substantial Effect on Commerce to Warrant Exercising the Board's Jurisdiction

Section 14(c)(1) states that the Board may exercise its "discretion . . . [to] 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."[6]

In my view, charter schools constitute a class or category of employers over which the Board should decline to exercise jurisdiction, consistent with Section 14(c)(1). I agree with the reasoning of former Member Hayes, who observed in another charter school case, *Chicago Mathematics & Science Academy Charter School*,[7] that the Board has declined to exercise jurisdiction over other employers whose operations were "essentially local in nature," and where the states "exert substantial control . . . through extensive regulation, including State regulation of labor relations."[8]

The Board relied on these types of considerations when it exercised its discretion under Section 14(c)(1) to decline jurisdiction over the horse-racing and dog-racing industries. For example, in *Hialeah Race Course*,[9] the Board declined to exercise jurisdiction over horse racetrack employers because such operations "are essentially local in nature."[10] The Board reasoned that because racetrack operations "are permitted to operate by reason of special State dispensation, and are subject to detailed regulation by the States, we can assume that the States involved will be quick to assert their authority to effectuate such regulation as is consonant with their basic policy."[11] Subsequently, in 1973, the Board promulgated a rule establishing that the Board will not assert jurisdiction in "any proceeding . . . involving the horseracing and dogracing industries."[12] The Board reasoned in part:

> As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States[] and these industries[,] which is reflected by the States' continuing interest in and supervision over the industries. . . . [W]e have concluded that the operations of these industries continue to be peculiarly related to, and regulated by, local governments.

38 Fed. Reg. 9537, 9537 (1973).

Under Section 14(c)(1),[13] I believe charter schools—perhaps even more so than employers in the horseracing

[6] Sec. 14(c)(1) states that "[t]he Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, 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: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

[7] 359 NLRB 455, 466–468 (2012) (Member Hayes, dissenting). The Board decision in *Chicago Mathematics* was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), because some Board members who participated in *Chicago Mathematics* received recess appointments that were held to be unconstitutional in *Noel Canning*. Although *Chicago Mathematics* has no precedential value, Member Hayes was a Senate-confirmed Board member when he authored his dissenting opinion in *Chicago Mathematics*.

[8] Id., slip op. at 12 (Member Hayes, dissenting).

[9] 125 NLRB 388 (1959).

[10] Id. at 391.

[11] Id.

[12] Section 103.3 of the Board's Rules and Regulations.

[13] Congress enacted Sec. 14(c)(1) to restore the Board's power to decline jurisdiction over a class or category of employers after the Supreme Court in two decisions—*Office Employees Local 11 v. NLRB*, 353 U.S. 313 (1957), and *Hotel Employees Local 255 v. Leedom*, 358 U.S. 99 (1958)—held that the Board had no such power. See *New York Racing Assn. Inc. v. NLRB*, 708 F.2d 46, 52–53 (2d Cir. 1983). It has never been questioned that the Board has the separate authority to decline to exercise jurisdiction *in particular cases* when exercising jurisdiction would not effectuate the policies of the Act. See *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 684 (1951); *Northwestern University*, 362 NLRB 1350, at 1355 fn. 28 (2015).

Under a "particular case" analysis, the Board has declined to exercise its statutory jurisdiction over a quasi-public institution of higher education. See *Temple University*, 194 NLRB 1160 (1972). Although the Board did not apply Sec. 14(c)(1) in *Temple University*, its reasoning is supportive of my position here. In that case, the Board declined to assert jurisdiction over Temple University—a private, nonprofit university—after the Commonwealth of Pennsylvania enacted the Temple University-Commonwealth Act, which provided for "the establishment and operation of Temple University as an instrumentality of the Commonwealth to serve as a State-related university in the higher education system of the Commonwealth." Id. at 1160. The Board found that the university had a "unique" relationship with the state as a "quasi-public higher educational institution" serving the purpose of providing low-cost education for residents of Pennsylvania. Id. at 1161. Similar to the instant case, the Commonwealth of Pennsylvania oversees Temple's operations and finances, funding comes largely from

and dogracing industries—are "essentially local in nature" and have "a unique and special relationship" with the state, with responsibility for performing functions that are "peculiarly related to, and regulated by, local governments."[14]

The responsibility to provide public K–12 education is without a doubt a peculiarly state and local concern. The Supreme Court has recognized as much repeatedly. "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "By and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality [sic] of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741–742 (1974). "Providing public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

Charter schools are a relatively recent development in public education.[15] In varying ways, they may provide more options than have been afforded in the past by traditional public schools.[16] However, charter schools are an integral component of the K–12 system of public education. Like traditional public schools, charter schools must be tuition-free and open to all children.[17] Also like traditional public schools, charter schools are publicly funded on a per-student basis, and state and local authorities regulate and oversee charter schools.[18]

The charter school at issue here—PVCS—operates under substantial state regulation and oversight. The School is chartered under Pennsylvania's cyber charter school law, 24 P.S. §§ 17-1741-A through 17-1751-A, which applies to charter schools that educate children over the internet. The School must comply with state statutes and regulations concerning matters of fundamental importance in the operation of any school, including academic standards, teacher certification, student attendance, health, and safety.[19] The Pennsylvania Department of Education oversees compliance, and it evaluates compliance annually and, in more depth, every 5 years when determining whether to renew the school's charter.[20] The school's finances are also subject to annual state audit.[21] The Department of Education has "ongoing access to all records, instructional materials and student and staff records of each cyber charter school and to every charter school facility" to ensure compliance with the law and the charter.[22] The Department of Education may revoke any charter, even during its term, for noncompliance, poor student performance, and "failure to meet generally accepted standards of fiscal management or audit requirements."[23]

Pennsylvania's cyber charter school law also gives PVCS employees some of the rights of other public-school employees. The School's employees must have the same health care benefits as employees of the local school district, and if the School does not have its own retirement plan, employees must be enrolled in the Public School Employees' Retirement System.[24] Employees also have the right to form a union and bargain under Pennsylvania's Public Employee Relations Act.[25] Other states and locales exercise similarly pervasive regulation of and control over charter schools within their geographical jurisdiction.[26]

As stated above, Section 14(c)(1) of the Act gives the Board broad discretion to decline jurisdiction over labor disputes involving a class or category of employers when it believes "the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of

public sources, and employees have the right to organize under the state Public Employee Relations Act—all facts relied on by the Board in declining jurisdiction. Id. at 1160–1161. Charter schools' relationship with the state provides an even *more* compelling basis for declining jurisdiction over charter schools than the Board relied on in *Temple University* because charter schools provide K–12 education, an even more fundamental function of the state than university education.

[14] *Hialeah Race Course*, 125 NLRB at 391; 38 Fed. Reg. at 9537.

[15] In 1991, Minnesota enacted the first charter law, and the District of Columbia and 41 other states have since followed suit. National Alliance for Public Charter Schools, *Charter School Data Dashboard-National*, http://dashboard2.publiccharters.org/National (last visited June 27, 2016); see also 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 (2013).

[16] National Alliance for Public Charter Schools, *About Charter Schools*, http://www.publiccharters.org/get-the-facts/public-charter-schools (last visited June 27, 2016); The Center for Education Reform, *Just the FAQs—Charter Schools*, https://www.edreform.com/2012/03/just-the-faqs-charter-schools (last visited June 27, 2016).

[17] Id.

[18] Green, Baker, & Oluwole, supra; The Center for Education Reform, *Just the FAQs—Charter Schools*, https://www.edreform.com/2012/03/just-the-faqs-charter-schools.

[19] 24 P.S. §§ 17-1743A, -1749-A.

[20] 24 P.S. § 17-1742-A.

[21] 24 P.S. §§ 17-1719-A(9), -1749-A.

[22] 24 P.S. § 17-1742-A(3).

[23] 24 P.S. §§ 17-1729-A, -1749-A.

[24] 24 P.S. §§ 17-1724-A(c)-(d), -1749-A.

[25] 24 P.S. §§ 17-1724-A(a), -1749-A.

[26] See supra fn. 18.

its jurisdiction."[27] In *New York Racing Assn. Inc. v. NLRB*, 708 F.2d at 46, the Second Circuit explained that, when determining whether to decline jurisdiction pursuant to Section 14(c)(1), the Board should consider not only "the dollar volume of business in interstate commerce," but also whether "the states regulate a given industry" to an extent where "labor disputes in that industry might well be reduced to the point where their impact on commerce would be insignificant":

> Congress enacted no specific standards, nor did it require the Board to do so by regulation. The impact of labor disputes on commerce is, of course, the overall guide, but the dollar volume of business in interstate commerce is not the only yardstick that the Board can or should consider. Many other factors can be important. For instance, if the states regulate a given industry adequately, labor disputes in that industry might well be reduced to the point where their impact on commerce would be insignificant, whatever the volume of interstate commerce in the industry. In deciding whether to expend its limited resources to regulate one industry, the Board must inevitably consider the effect this will have on its efforts in other industries that are also involved in commerce. In formulating its policies on particular industries, the Board must look at the situation not just in one state, but nationwide. As the Supreme Court has noted, "where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms"—in this case, the words "sufficiently substantial to warrant the exercise of [the Board's] jurisdiction"—"the very construction of the statute is a distinct and profound exercise of discretion." . . . In short, when the Board decides whether the exercise of its jurisdiction is "warranted," it does far more than just measure the volume of commerce involved, taking jurisdiction over the largest industries and declining jurisdiction over the smallest.

New York Racing Assn. v. NLRB, 708 F.2d at 53–54 (quoting *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958)).

In my view, the key facts here are that—even when a particular charter school does not qualify as a political subdivision of a state under *Hawkins County*—charter schools operate as K–12 public schools, they are substantially regulated under state and local laws, and they are overseen by state and local authorities. Labor disputes involving charter schools will have largely localized effects because of the state-and-local nature of charter schools' operations. Moreover, because of the compelling state and local interest in ensuring that charter schools operate effectively to provide public education, state law often aims to minimize the disruptive effects of labor disputes involving charter schools. For example, many states either limit the right of public school teachers to strike or prohibit them from striking altogether.[28] States typically apply the same laws to charter school teachers.[29] By minimizing the disruptions incident to labor disputes, state laws necessarily diminish the effect of such disputes on interstate commerce.[30]

In short, state and local issues overwhelmingly predominate the creation, structure and operation of charter schools, which typically exist for the purpose of satisfying K–12 public education requirements spanning elementary school, middle school and high school. Even if a particular charter school fails to qualify as a "political subdivision," its creation, structure and operation are subject to significant regulatory oversight by state and local authorities, which varies greatly depending on the jurisdiction and the particular charter school.

My colleagues say that charter schools are little different from government contractors, in that both operate under governmental oversight. The comparison is misleading. Historically, the dispositive question regarding whether the Board would exercise jurisdiction over particular government contractors was whether the contractor had sufficient control over its employees' terms and

[27] The proviso requiring the Board to exercise jurisdiction in any event if it would assert jurisdiction over a labor dispute "under the standards prevailing upon August 1, 1959" is inapplicable here. There were no standards for exercising jurisdiction over charter schools on August 1, 1959. The first charter school was founded in 1992. See Peter Jacobs, *Here's How America's First-Ever Charter School Got Off the Ground*, Business Insider, June 20, 2015, http://www.businessinsider.com/inside-the-first-charter-school-in-america-city-academy-2015-6 (last visited June 27, 2016).

[28] FindLaw, *Teacher's Unions/Collective Bargaining: State and Local Laws*, http://education.findlaw.com/teachers-rights/teacher-s-unions-collective-bargaining-state-and-local-laws.html (last visited June 27, 2016).

[29] See Michael Rose, *Charter School Teachers Organizing Under Federal Labor Law*, Daily Labor Report, Apr. 13, 2016, http://www.bna.com/charter-school-teachers-n57982069787/ (last visited June 27, 2016) (quoting Professor Daniel DiSalvo as stating that "probably the biggest and most immediate advantage" a union would gain if it could organize charter-school teachers under the NLRA would be securing the right to strike). For example, New York prohibits strikes by employees of both traditional public schools and charter schools. See *Hyde Leadership*, 364 NLRB 1137, 1147 (Member Miscimarra, dissenting).

[30] Nothing prevents the states "from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to [Sec. 14(c)(1)], to assert jurisdiction." NLRA Sec. 14(c)(2). Even if some states do not presently give charter-school employees bargaining rights under state law and jurisdiction over their employers to a state agency, the Board can assume—as it did when it declined to exercise jurisdiction over racetrack employers—that "the States . . . will be quick to assert their authority to effectuate such regulation as is consonant with their basic policy." *Hialeah Race Course*, 125 NLRB at 391.

conditions of employment to enable it to engage in meaningful collective bargaining. See *Res-Care, Inc.*, 280 NLRB 670 (1986). The need to make that challenging determination vanished in 1995, when the Board rejected the *Res-Care* "extent of control" test. *Management Training Corp.*, 317 NLRB 1355, 1358 (1995). Thus, the extent of regulatory oversight is simply not an issue in cases involving government contractors.[31]

My colleagues assert that "there is no guarantee that Pennsylvania would act" to regulate charter school labor relations if the Board declines jurisdiction. But Pennsylvania has already acted. As discussed above, it has covered PVCS employees under its Public Employee Relations Act, and it has mandated that they receive the same retirement and health care benefits as employees of their local school district. Although my colleagues do not acknowledge it, their decision today, if upheld by the courts, will necessarily result in the preemption of the employees' current coverage under the Public Employee Relations Act. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). It is thus the majority's position, not mine, that "guarantee[s]" PVCS employees will *lose* some of the protections they currently enjoy under state law.

B. The Board Should Decline Jurisdiction over Charter Schools Because Any Other Approach Will Result in Inherent Instability and Uncertainty

Equally compelling, in my view, is the fact that declining to exercise jurisdiction is the only way that the Board can foster certainty and predictability in this important area. When parties seek to engage in collective bargaining pursuant to our statute, one of the Board's primary roles is to foster stability in bargaining relationships. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."); *Northwestern University*, 362 NLRB 1350, 1350 (2015) (declining to assert jurisdiction where the union sought to represent grant-in-aid scholarship football players because doing so "would not serve to promote stability in labor relations"). As the Supreme Court held in *San Diego Building Trades Council v. Garmon*,[32] the NLRA was intended to create a "single, uniform, national rule" displacing the "variegated laws of the several States."[33]

As illustrated by the instant case and *Hyde Leadership*, the objective of a "single" or "uniform" national standard[34] cannot possibly be achieved if the Board exercises jurisdiction over charter schools whenever Section 2(2) jurisdiction happens to exist. Based on the "variegated laws of the several States"[35] and their political subdivisions (most often, counties, and cities), it is impossible to reliably determine in advance whether the Board actually *has* statutory jurisdiction over any particular charter school.[36] Under the *Hawkins County* test, one charter school will fall under the Board's jurisdiction and the next one will not, depending in significant part on the laws of the state where the school is situated, potential local laws, details regarding the school's creation, and the content of the school's governing charter, among other variables.

I believe our involvement in these cases is destined to be self-defeating: the Board cannot possibly achieve "stability of labor relations,"[37] nor can there be any hope that a "single, uniform, national rule" will displace the "variegated laws of the several States."[38] Unless the Board exercises its discretion to decline jurisdiction over charter schools, the result will be a jurisdictional patchwork—federal jurisdiction here, state jurisdiction there—with inherent instability and substantial uncertainty for employees, unions, employers, and state and local governments.

(1) *Statutory NLRB Jurisdiction over Charter Schools Necessarily Varies from School to School and State to State*. My colleagues declare, as they must, that they "are not announcing a bright-line rule asserting jurisdiction over charter schools nationwide." This is a dramatic understatement.

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[31] In the "government contractor" cases cited by the majority, all of which post-date *Management Training*, the Board either conducted no *Hawkins County* analysis whatsoever—see *Recana Solutions*, 349 NLRB 1163 (2007); *Servicios Correccionales de Puerto Rico*, 330 NLRB 663 (2000), enfd. 234 F.3d 1321 (D.C. Cir. 2000); *R & W Landscape & Property Management*, 324 NLRB 278 (1997)—or required only the most perfunctory analysis to reject an obviously meritless claim by the contractor that it was a political subdivision of the state—see *Connecticut State Conference Board, Amalgamated Transit Union*, 339 NLRB 760, 763 (2003); *Correctional Medical Services*, 325 NLRB 1061, 1062 (1998). By contrast, *every* charter school case requires an exacting *Hawkins County* analysis.

[32] 359 U.S. 236 (1959).

[33] Id. at 239 (1959).

[34] Id.

[35] Id.

[36] For example, as shown in my dissenting opinion in *Hyde Leadership*, New York state law controls the determination that charter schools in New York State are created directly by the state. 364 NLRB 1137, 1146–1147 (Member Miscimarra, dissenting).

[37] *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. at 362–363; *NLRB v. Appleton Electric Co.*, 296 F.2d at 206; *Northwestern University*, 362 NLRB 1350, at 1350.

[38] *San Diego Building Trades Council v. Garmon*, 359 U.S. at 239.

The two cases decided by the Board today illustrate the variables that overwhelm any effort to produce uniformity in the exercise of Board jurisdiction over charter schools. I do not address my colleagues' finding that the Board has Section 2(2) jurisdiction over PVCS, but even assuming they are correct in this regard, I believe the Board should decline to exercise this jurisdiction under Section 14(c)(1). In *Hyde Leadership*, however, I believe it is clear that the Board *lacks* statutory jurisdiction under Section 2(2) of the Act, which would mean the Board does not even have the option of choosing whether or not to decline to exercise jurisdiction under Section 14(c)(1).[39] My colleagues find otherwise, and the question of Section 2(2) jurisdiction over Hyde Leadership Charter School will likely be litigated for additional years before the parties receive a definitive answer to the question whether the NLRA applies or whether union representation and collective bargaining are governed by state or local laws.

The problem in this area is not created merely by disagreements among NLRB members regarding statutory interpretation or policy issues. Rather, the possibility of any "bright-line rule" is foreclosed by (i) the nature of the *Hawkins County* test, which governs whether the Board possesses jurisdiction over particular charter schools under Section 2(2) of the Act, and (ii) the immense factual variation in the creation, structure, and operation of different charter schools, which are continuing to evolve, and which vary widely depending on the particular state, county, city, or school district.

As explained above, the NLRB can exercise statutory jurisdiction under Section 2(2) only if a particular charter school is *not* a "political subdivision" of a state. Under *Hawkins County*, a charter school is a "political subdivision" of a state—divesting the Board of jurisdiction—if the school either was "created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government," or is "administered by individuals who are responsible to public officials or to the general electorate."[40]

My colleagues find that PVCS—at least under current applicable state law and relevant circumstances—was neither "created directly by the state" nor is "administered by individuals who are responsible to public officials or to the general electorate."[41] As to the former, the record reveals that PVCS was incorporated by private individuals before it secured its charter (although the School contends this sequence of events does not preclude a finding that it was "created directly by the state"). Regarding whether PVCS is "administered by individuals who are responsible to public officials or to the general electorate,"[42] my colleagues find that the appointment and removal of the School's trustees are governed by the private bylaws of the PVCS board and that the record fails to establish that PVCS trustees are responsible to public officials or to the general electorate.

By comparison, in *Hyde Leadership*, I believe Hyde Leadership Charter School satisfies the *Hawkins County* "created directly by the state" test. Indeed, under New York law, the charter-school entity could not and did not exist until the governing body of the New York State Education Department incorporated and thereby created it. It also appears clear that Hyde Leadership Charter School is "administered by individuals who are responsible to public officials or to the general electorate."[43] As explained more fully in my dissent in *Hyde Leadership*, the record in that case establishes that public officials appoint and possess the authority to remove the charter school's trustees; the state body that created the charter school appointed the initial trustees; the New York City Schools Chancellor has to approve any new trustees; and the state or city can remove trustees under a variety of circumstances. Under *Hawkins County*, the Board is divested of statutory jurisdiction if a charter school satisfies *either* of the "political subdivision" tests; in *Hyde Leadership*, the record establishes that *both Hawkins County* tests have been satisfied, which means the Board lacks Section 2(2) jurisdiction.

The above discussion admittedly provides a highly selective, oversimplified summary of facts relevant to determining jurisdiction under Section 2(2) of the Act and *Hawkins County*. However, this case and *Hyde Leadership* have two things in common. First, each case demonstrates that the determination of whether a charter school qualifies as a "political subdivision" of a state under the two-part *Hawkins County* standard requires a detailed, fact-intensive analysis. Second, regardless whether a particular charter school qualifies as a "political subdivision" of a state, these two cases demonstrate that charter schools owe their existence to and are governed by a wide variety of state and local laws and regulations, as to which the Board has no expertise.

(2) *Unless the Board Declines Jurisdiction over Charter Schools, the Only Certain Outcome Will Be Instability and Uncertainty*. The instant case, and the Board's decision in *Hyde Leadership*, illustrate another consider-

[39] In my view, it is clear that the charter school in *Hyde Leadership* is a political subdivision of New York State. See *Hyde Leadership*, 364 NLRB 1137, 1145–1150 (Member Miscimarra, dissenting).

[40] *Hawkins County*, 402 U.S. at 604–605.

[41] Id.

[42] Id.

[43] Id.

ation that, in my view, warrants a decision by the Board to decline to exercise jurisdiction over charter schools: there is no effective way to reliably determine in advance whether the Board has Section 2(2) jurisdiction over any charter school, and unless the Board declines jurisdiction over charter schools generally, the inescapable result will be years of uncertainty for charter school employees, responsible officials, and state and local governments regarding whether federal, state or local laws govern questions about union representation and collective bargaining. In some instances, states will refrain from acting in the face of uncertainty over whether the Board will exercise jurisdiction; other situations may involve conflicting determinations about the applicability of the NLRA versus state and local laws; and state agencies or courts may decline to apply state or local laws based on a concern that any contrary NLRB determination will be controlling.

Here as well, the two charter school cases decided today illustrate these problems. In this case, the record reveals that Pennsylvania law gives charter school employees the right to form a union and bargain under Pennsylvania's Public Employee Relations Act.[44] Yet, a hearing examiner for the Pennsylvania Labor Relations Board (PLRB) dismissed two proceedings in 2013 involving Pennsylvania charter schools similar to PVCS,[45] relying on an NLRB case decided in 2012—*Chicago Mathematics*—where the NLRB majority, over one member's dissent, purported to exercise NLRB jurisdiction.[46] However, the United States Supreme Court decided in 2014 that certain recess appointments to the Board were unconstitutional,[47] which rendered the NLRB's *Chicago Mathematics* decision invalid. Consequently, the Board's refusal to decline jurisdiction over charter schools generally has not only produced years of uncertainty regarding the applicability of federal law, employees have been denied years of protection they otherwise would have had under Pennsylvania state law.

In *Hyde Leadership*, the record establishes that New York law gives charter school employees the right to form a union and bargain under the New York Public Employees' Fair Employment Act,[48] and New York's Public Employment Relations Board (PERB) decided in 2011 that it has jurisdiction over New York charter schools.[49] After the PERB decision was upheld by a state trial court, a further appeal to the Appellate Division of the New York Supreme Court was held in abeyance after an NLRB majority in *Chicago Mathematics* asserted jurisdiction over the charter school in that case.[50] In 2013, the Appellate Division stayed the PERB appeal indefinitely "pending a determination of the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB's jurisdiction."[51] In 2014, as noted above, the United States Supreme Court's *Noel Canning* decision resulted in the invalidation of the NLRB's decision in *Chicago Mathematics*,[52] and even if *Chicago Mathematics* had not been invalidated, it would not control the jurisdictional determination in *Hyde Leadership*, which depends on the particular facts presented in that case. Although the events in *Hyde Leadership* have taken a different route than those in this case, the destination is the same: the NLRB's efforts to assert jurisdiction over charter schools have *deprived* employees of the protection they otherwise would have had under state law.[53]

The delays and uncertainty associated with my colleagues' effort to assert jurisdiction over charter schools will not be materially diminished by the Board's decisions today in *Hyde Leadership* and this case. There is immense factual variation in the creation, structure, and operation of different charter schools, depending on the particular state, county, city, or school district, and this variation affects the Board's jurisdictional determinations under Section 2(2) and *Hawkins County*. And even after the Board decides whether it has jurisdiction over a particular charter school, the jurisdictional situation may evolve based on changes in state law, applicable regulations, or the school's charter, and the school itself may be replaced by a new or successor entity. The Board's effort to assert case-by-case jurisdiction cannot possibly result in uniformity. Rather, in most situations, parties are likely to experience a jurisdictional no-man's land, and the existence or non-existence of NLRB jurisdiction under Section 2(2) of the Act will remain a moving target even after the Board renders a decision.

[44] 24 P.S. §§ 17-1724-A(a), -1749-A.

[45] See *New Media Technology Charter School*, 45 PPER 8 (2013); *Agora Cyber Charter School*, 45 PPER 6 (2013).

[46] See *Chicago Mathematics*, supra fn. 7.

[47] *NLRB v. Noel Canning*, supra fn. 7.

[48] N.Y. Civ. Serv. §§ 200-214. See New York Charter Schools Act of 1998, as amended, § 2854(3)(a).

[49] See *Brooklyn Excelsior Charter School*, 44 PERB ¶ 3001 (2011).

[50] Supra fn. 7.

[51] *Buffalo United Charter School v. New York State Public Employment Relations Board*, 107 A.D.3d 1437 (N.Y. App. Div. 2013).

[52] See explanation in fn. 7, supra.

[53] My colleagues attribute the delays in this case and *Hyde Leadership* to *Noel Canning* and the resulting need for the Board to reconsider a number of cases, including *Chicago Mathematics*. Certainly *Noel Canning* exacerbated the delays. However, because political subdivision cases invariably require careful analysis of state law, they are not, as the majority would have it, comparable to other statutory coverage determinations. Indeed, the difficult interplay between federal and state law has previously spawned collateral litigation and attendant delays similar to the delays seen here. See *Independence Residences, Inc.*, 355 NLRB 724 (2010).

Charter schools remain relatively new, and the states—along with local governments and school districts—have been laboratories for experimentation.[54] Based on the approach embraced by my colleagues today, employees concerned about their working conditions will not know what set of rules apply to them or to whom to turn if the employer infringes on their rights, and employees are likely to face years of delay if they try to secure relief from the NLRB. Unions and employers will have difficulty understanding their respective rights and obligations, given the uncertainty about whether federal, state, or local laws apply. Most poorly served will be the students whose education is the primary focus of every charter school. In most instances, the likely result will be protracted disputes that are not definitively resolved until many or most students (and many teachers and other employees) have come and gone.

[54] See, e.g., Christopher A. Lubienski & Peter C. Weitzel (eds.), The Charter School Experiment: Expectations, Evidence, and Implications (Harvard Educ. Press 2010).

CONCLUSION

I believe that the Board's effort to assert jurisdiction over charter schools is not likely to advance any policy goal under the National Labor Relations Act. Although I do not address my colleagues' finding that the Board has statutory jurisdiction in this case under Section 2(2) of the Act, I believe the Board should decline to exercise jurisdiction over charter schools consistent with Section 14(c)(1). By declining to exercise jurisdiction here and in other charter school cases, the Board would permit state and local governments to regulate charter school labor relations. This will provide much greater certainty and predictability than could ever be afforded by the NLRB in this area, and the rights of charter school employees would more closely align with those afforded to public school employees under state and local laws.