STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BROOKLYN EXCELSIOR CHARTER SCHOOL AND NATIONAL HERITAGE ACADEMIES, INC.,

CASE NO. E-2429

Employer.

In the Matter of

BUFFALO UNITED CHARTER SCHOOL EDUCATION ASSOCIATION, NYSUT/AFT, AFL-CIO,

Petitioner,

CASE NO. C-5878

– and –

BUFFALO UNITED CHARTER SCHOOL,

Employer.

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION

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This *amicus curiae* brief is submitted on behalf of the Atlantic Legal Foundation, pursuant to the Board's notice and invitation dated June 2, 2010.

Interest of Amicus

Atlantic Legal Foundation, a public interest law firm, for more than a decade has supported parental school choice and charter schools. It has represented individual charter schools and charter school advocates in New York, where it is based, and elsewhere across the country. The foundation's board of directors includes current and retired chief legal officers of some of our nation's most respected corporations and members of prominent national law firms.

Charter Schools

In 1998, the New York Legislature authorized a system of charter schools, designed to operate "independently of existing schools and school districts." *New York Charter Schools Association, Inc. v. DiNapoli*, 13 N.Y.3d 120, 123 (2009). New York is currently the home of 198 charters and applications for more are in the approval process, which would allow up to 460 charters state-wide.

The charter school movement, according to many observers, has been prompted by the failure of too many public schools to educate adequately too many students.

> "The movement for charter schools has been fueled by the belief that public schools have failed and that at least part of the reason they have failed is because of their monopoly on providing education. Charter schools thus serve to break the monopoly of traditional public schools. They offer alternatives that empower parental choice in their children's education. Furthermore, it can be argued that by placing competitive pressures on traditional public schools, charters shock traditional schools out of their complacency and force them to change for the better.
>
> "Charter schools have been described as the idea everyone likes. They have bipartisan support, and charter advocates can be found among free market economists, civil rights leaders, religious fundamentalists, advocates for the poor,

> and public educators. Such broad support is possible because the charter school structure brings together three important motivations: the revolt against bureaucratization, the introduction of choice or market mechanisms in public schooling, and increasing teacher professionalism."

Martin Malin and Charles Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J. L. & PUB. POL'Y 885, 888–889 (2007).

Sometimes operated under contract by private management companies, charter schools have had a positive impact on improving public school education at the primary and secondary levels. As a professor of education reform at the University of Arkansas has written:

> "The highest quality studies have consistently shown that students learn more in charter schools. In New York City, Stanford economist Caroline Hoxby found that students accepted by lottery to charter schools were significantly outpacing the academic progress of their peers who lost the lottery and were forced to return to district schools."

Jay P. Greene, *The Union War on Charter Schools*, WALL ST. J., Apr. 16, 2009, at A15.

The New York Times has reported that Secretary of Education Arne Duncan views charter schools "as crucial in the fight to turn around failing schools." *Mr. Duncan and that $4.3 Billion*, N.Y. TIMES, Sept. 28, 2009, at A22.

Other federal officials similarly have praised the mission of charter schools: "outstanding charter schools are proving that low-income and minority kids can achieve at the highest levels, graduate from college and thrive as adults." Press Release, Committee on Education and Labor, Outstanding Charter Schools Provide Models to Help Students Succeed, Witnesses Tell Education House Panel (June 4, 2009) (quoting, U.S. Rep. George Miller, Chair, Committee on Education and Labor), *available at* http://edlabor.house.gov/newsroom/2009/06/outstanding-charter-schools-pr.shtml.

New York City Public Schools Chancellor Joel Klein is also enthusiastic about charters:

> "I am an unalloyed supporter of charter schools. From the day I arrived as Chancellor I made clear that charters are a critical leveraging force in public school reform. . . . The fundamental problem with our system is that it has misaligned incentives.
>
> "The charter model offers a solution to this problem. At their core, charter schools embody the three ingredients that are necessary for any successful school – leadership, autonomy, and accountability."

Joel Klein, Chancellor, New York City Public Schools, Address to the New York Charter School Association's Conference (Mar. 27, 2004), *available at* http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=110&subsecID=134&contentID=252665.

National Heritage Academies, Inc.

National Heritage Academies, Inc. ("NHA") is a private, for profit corporation incorporated under the laws of Michigan, in the business of managing charter schools. It operates sixty-one charter schools in New York and elsewhere, educating 38,000 children.

NHA's management agreements relevant to these cases have been summarized in the decisions of the administrative law judges. A.L.J. Fitzgerald found with respect to the Buffalo United agreement:

> "Consistent with the charter application, the management agreement provides that NHA is responsible for the implementation and administration of the educational program; management of all personnel functions; in consultation with the Board the leasing of a facility to house the school; all aspects of business and accounting operations; food, transportation and health services; marketing and development; and procurement of all insurance. NHA further has authority to recommend rules, regulations and procedures to the Board, and to enforce all

> such rules, regulations and procedures adopted by the Board; to implement pupil performance evaluations; and to provide all services and accommodations relating to special education and special needs of students.
>
> "In regard to personnel and training, the management agreement provides that NHA shall select and recommend to the Board qualified personnel to perform educational, administrative and non-educational services at the School. Compensation for personnel working at the School shall be paid in accordance with the budget. NHA shall have the responsibility and authority to determine staffing levels, assign, supervise and evaluate personnel, and with Board approval, hire, discipline, transfer and terminate personnel working at the School . . . [and] NHA shall arrange, coordinate and administer payroll and employee benefits for all personnel working at the School.
>
> "The agreement further provides, in regard to teachers, that NHA shall, subject to Board approval, select and hire qualified teachers and assign them to the grade levels and subjects as required for the School to operate in accordance with the terms of the Charter. The curriculum taught by such teachers shall be the curriculum prescribed by NHA and the Charter. Such teachers may, at the discretion of NHA, work on a full or part time basis."

Buffalo United Charter School Educ. Assoc., 43 PERB 4009 (2010).

As both the charters and management agreements make clear, NHA has complete power in the employment relationship, subject only to the general oversight of the charter boards.

Federal Preemption

Congress passed the National Labor Relations Act ("NLRA") to promote uniformity and avoid conflict and diversity amongst the states. *See Garner v. Teamsters, Chauffeurs & Helpers Local Union*, 346 U.S. 485, 490–491 (1953). Three-quarters of a century later, uniformity remains important. By granting exclusive National Labor Relations Board ("NLRB") jurisdiction, NHA and other charter management companies

will benefit from predictability of NLRB decisions, and be able to create uniform national policies for its charter school labor practices.

The Supreme Court and other courts have pointed out that the NLRB is to have the "fullest *jurisdictional* breadth constitutionally permissible under the commerce clause." *See NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (emphasis added); *see also NLRB v. Parents & Friends of Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989); *NLRB v. St. Louis Comprehensive Neighborhood Health Center, Inc.*, 633 F.2d 1268 (8th Cir. 1980).

The NLRB has held that the party asserting that the NLRB is without jurisdiction has the burden of persuasion. *See Civitas Schools, LLP v. Blackwell*, No. 1:09-cv-03304, 2009 WL 2236834, at *8 (N.D. Ill. June 1, 2009) ("the party asserting that the Board is without jurisdiction bears the burden of persuading the Board not to exercise its jurisdiction"); *Int'l Ass'n of Firefighters*, 292 N.L.R.B. 1025 (1989) (citing *NLRB v. Austin Develop. Ctr., Inc.*, 606 F.2d 785, 789 (7th Cir. 1979)).

According to *San Diego Bldg. Trades Council v. Garmon*, "When an activity is *arguably* subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the *exclusive* competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (emphasis added).

Although the NLRB has not been asked to exercise jurisdiction over NHA in these cases, the Public Employment Relations Board ("PERB") is nonetheless preempted. The Court articulated the rationale for such preemption in *New York Telephone Co.*:

> "The overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress not only demands that the NLRB's primary jurisdiction be protected, it also forecloses overlapping state enforcement of the prohibitions in § 8 of

> the Act . . . as well as state interference with the exercise of rights protected by § 7 of the Act."

New York Telephone Co. v. New York State DOL, 440 U.S. 519, 528 (1979) (internal citation omitted).

Section 7 of the NLRA unmistakably applies because these cases deal with the self-organization of labor. Section 7 states:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

National Labor Relations Act § 7, 29 U.S.C. § 157 (1935).

Even when § 7 or § 8 of the Act applies, the NLRA directs that employers "shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof." 29 U.S.C. § 152 (1935). To determine whether the employer is exempt from NLRB jurisdiction, the Court has applied a two-part test. If the entity is "(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" then it is a public subdivision, not subject to NLRB jurisdiction. *NLRB v. National Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 604–605 (1971). *See also New York Institute for Education of Blind v. United Federation of Teachers' Committee etc.*, 83 A.D.2d 390 (1st Dep't 1981), *aff'd*, 57 N.Y.2d 982 (1982) (acknowledging that "the issue of political subdivision status under subdivision (2) of section 2 of the National Labor Relations Board is not identical to the issue of public employer status under the Taylor Law").

NHA is not created by the state nor a department or administrative arm of the state. Nor is NHA accountable to public officials or the electorate. *Id.* Under the *Hawkins County* test, NHA is a private organization, not a public entity.

Two cases have addressed the question of whether NLRB has jurisdiction over private management companies operating charter schools. The NLRB determined that it had jurisdiction over private charter management companies where such companies were the sole employers. The Board cited numerous cases where it had found jurisdiction over "private employers who have agreements with government entities to provide certain types of services." *See Charter School Administration Servs., Inc. & Michigan Education Association/NEA*, 353 N.L.R.B. No. 35, at *5 (2008); *see also Civitas Schools, LLP v. Blackwell*, No. 1:09-cv-03304, 2009 WL 2236834, at *8 (N.D. Ill. June 1, 2009).

The NLRB also has addressed its jurisdiction in cases of a "joint employer" relationship where one party is clearly private. In *Management Training Co*. the NLRB determined that it had jurisdiction where the state is a joint employer. The Board reasoned,

> "Whether the private employer and the exempt entity are joint employers is irrelevant. The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control."

Management Training Corp., 317 N.L.R.B. 1355, 1358 (1995). By granting NLRB jurisdiction in cases where private actors are a party, including joint employer situations, the Board has furthered the policy objective of creating uniformity for labor relations involving private actors.

The Board need not address the question of whether Brooklyn Excelsior is a private or public entity. NHA is stipulated to be a private corporation, and it shares

employment responsibilities with the Brooklyn Excelsior board. Applying *Management Training Co.*, NLRB unmistakably has jurisdiction over NHA. Under *Garmon*, it is beyond arguable that the NLRA preempts PERB from exercising jurisdiction.

Administrative Law Judges' Decisions

In *Brooklyn Excelsior*, A.L.J. BLassman rejected the argument that the NLRA divested PERB of Jurisdiction. Applying *National Gas Utility Dist. of Hawkins County*, 402 U.S. at 604–605, the A.L.J. found that Brooklyn Excelsior was a governmental entity operating a public charter school. *Brooklyn Excelsior Charter School & National Heritage Academies Inc.*, 42 PERB 4010 (2009). The A.L.J. made no such finding with respect to NHA.

We submit that the A.L.J.'s decision in *Brooklyn Excelsior* was flawed in two respects. Her decision preceded the Court of Appeal's decision in *DiNapoli*, 13 N.Y.3d at 131, where the court agreed with the contention that "charter schools are not political subdivisions of the State." Given that pronouncement of state law, there can be no question that the NLRB "arguably" has jurisdiction, even assuming, without conceding, that Brooklyn Excelsior was created directly by the state rather than by its several private applicants who requested a charter from the State Board of Regents. A.L.J. Blassman discounted the substantial operative role of NHA, although the Charter School Act explicitly allows private corporations to operate and manage charters, N.Y. Education Law § 2851(1), and the Brooklyn Excelsior charter and management agreement spell out in detail NHA's extensive participation in the management and operation of the school.

A.L.J. Fitzgerald, decided *Buffalo United* after *Brooklyn Excelsior* and *DiNapoli*, and found it unnecessary to determine the NLRA's preemption due to the status of Buffalo United as a governmental entity or subdivision. Instead, she examined the role of NHA. She explained:

> "PERB has jurisdiction only over public employers, and employees whose terms and conditions of employment are in substantial respects controlled by a private entity, either as the sole or joint employer, are not employees covered under the Act."

Buffalo United, 43 PERB 4009 (2010). The A.L.J. ruled that by allowing private entities, such as NHA, to conduct the school's operations, the Legislature "provided the framework whereby charter schools may enter into relationships by which a private entity could attain joint employer status over the school's employees." *Id.* Reviewing the terms of the charter and management agreement, A.L.J. Fitzgerald went on to find that NHA has "substantial control over the employees' terms and conditions of employment . . . such that meaningful collective bargaining could not occur without NHA's participation," and that Buffalo United was a joint employer with NHA. *Id.*

With respect to NHA's "substantial control," the A.L.J. concluded:

> "In assessing the control exercised by NHA, I find that its authority as set forth in the charter as well as the management agreement is substantial in regard to both economic and non-economic terms and conditions of employment. Buffalo United's Board is responsible for oversight of the school and insuring that it is operating in accordance with its charter and all applicable laws. It approves school policies and regulations, reviews and approves the annual budget, and reviews reports regarding operations and the achievement of the school's goals. The Board also approves hiring of recommended personnel. Beyond that, NHA has primary responsibility for the operation of the school and management of the employees. All of Buffalo United's funds are transferred to NHA to operate the program, and NHA proposes the annual budget, sets employees' compensation, and recommends all hiring. It also determines and proves all employee benefits, which are consistent among each of the schools NHA operates, and issues employees' paychecks. NHA determines staffing levels, assigns and evaluates employees, and determines the terms and conditions of employment as set forth in the employee handbook."

Buffalo United, 43 PERB 4009 (2010).

Given the pervasive authority granted to NHA regarding virtually every facet of the employment relationships (subject only to oversight by the Buffalo United board) the A.L.J.'s conclusion that PERB is without jurisdiction cannot be faulted.

Conclusion

Federal law is unmistakable: the NLRB has exclusive jurisdiction when private employers are in place. Jurisdiction of PERB is likewise preempted when, pursuant to state law, a private entity is a joint employer with a "public" employer. PERB has no jurisdiction with regard to union organizing efforts by employees of Brooklyn Excelsior and Buffalo United.

Respectfully submitted,

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Certificate of Service

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