UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of PACIFIC LUTHERAN UNIVERSITY, Employer, v. SEIU LOCAL 925, Petitioner.	)	Case No. 19-RC-102521

AMICUS BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CALIFORNIA ASSOCIATION OF PRIVATE SCHOOL ORGANIZATIONS, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, AZUSA PACIFIC UNIVERSITY, AND BRIGHAM YOUNG UNIVERSITY IN SUPPORT OF EMPLOYER ON REVIEW OF A DECISION OF THE REGIONAL DIRECTOR.

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INTRODUCTION

The threshold issue in this case is whether the Board may assert jurisdiction over Pacific Lutheran University, a religious university officially affiliated with the Evangelical Lutheran Church in America, or whether jurisdiction is precluded by the Supreme Court's decision in *Catholic Bishop of Chicago v. NLRB,* 440 U.S. 490 (1979). The Board has invited amicus briefs regarding various issues raised by this case, including what "test" and "factors" it should apply under *Catholic Bishop* "to determine whether self-identified 'religious affiliated

educational institutions' are exempt from the Board's jurisdiction." As schools and supporters of schools offering religious-based education, amici focus their brief on those critical questions.[1]

As discussed below, amici urge the Board to adopt and faithfully apply the three-part test formulated by the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), in order to implement the decision in *Catholic Bishop*. The *Great Falls* test, which has been uniformly followed by other federal courts, is constitutionally mandated because it faithfully applies the rationale of and concerns underlying *Catholic Bishop*. Moreover, the stated concern that some schools may attempt hold themselves out as being religious merely to escape Board jurisdiction is unfounded. Finally, because the *Great Falls* test is both clear and easily administered without prohibited governmental entanglement, it represents sound policy from the more parochial perspective of administrative law.[2]

This brief also will demonstrate that the alternative tests previously proposed by various labor unions are constitutionally impermissible. *See* amicus briefs filed by the AFL-CIO in *Saint Xavier University*, 13-RC-22025, and *Manhattan College*, 02-RC-23543. Those tests, which have no footing in *Catholic Bishop* itself, necessarily would entail impermissible

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[1] The February 10, 2014, Notice and Invitation To File Briefs in this matter solicited responses to 12 questions. This brief focuses solely on the first two—the proper application of *Catholic Bishop of Chicago.* Although not briefed, the amici on whose behalf this brief is being filed believe that a proper application of *Catholic Bishop* necessarily means that the Board should not assert jurisdiction over Pacific Lutheran University in this case.

[2] Amici contend that the dictate that governmental entities should not "troll" the beliefs of religious entities, and that a "bright-line" test must be employed, properly applies not only to religious schools relying on *Catholic Bishop*, but also to all religious entities relying on, for example, the First Amendment or the Religious Freedom Restoration Act. However, these issues are not raised, and therefore should not be resolved, here. Amici also note that the issue of whether *Catholic Bishop* applies in the case of non-faculty employed by religious schools is not before the Board in this case, although it is in *Saint Xavier University*, 13-RC-092296.

government entanglement in religious affairs and would result in impermissible discrimination against some religions. The brief further will demonstrate that any practical concerns underlying labor's position are, as required by the First Amendment, dealt with in a non-intrusive manner under the *Great Falls* test.

STATEMENT OF INTEREST

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents over 70,000 congregations with more than 18 million baptized members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,200 congregations with more than one million members. In addition to churches and related administrative offices, the denomination runs approximately 725 elementary schools with over 37,000 students, 109 secondary schools with roughly 13,000 students, 14 institutions of higher learning with over 27,000 students and 58 hospitals in the United States. These institutions are in all fifty states and thousands of local towns, municipalities and counties.

The Association of Christian Schools International ("ACSI") is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K – 12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. The calling of ACSI members relies upon a vibrant Christian faith that embraces

every aspect of life. This gives ACSI a particular interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it.

The California Association of Private School Organizations ("CAPSO") is a consortium consisting of twenty pre-collegiate, independent, and religious school organizations that endeavors to identify and address issues of common concern to California's private school community. CAPSO-member organizations provide a variety of educational services through approximately 1,400 individual private schools located across the state of California, offering instruction in any of grades K-12, inclusive. Schools affiliated with CAPSO-members educate roughly 80 percent of California's total K-12 private school enrollment numbering approximately 500,000 students. Religious orientations of schools affiliated with CAPSO-member organizations range from Episcopal, Lutheran, a wide array of other Protestant denominations, Roman Catholic, Islamic and Jewish.

The Council for Christian Colleges and Universities ("CCCU") is an international association of Christ-centered colleges and universities. The CCCU's mission is "[t]o advance the cause of Christ centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." Headquartered in Washington, D.C., the CCCU has 120 members in North America and 55 affiliate institutions in 20 countries. All CCCU members meet the CCCU's three core membership requirements: 1) all are fully accredited colleges and universities with curricula rooted in the arts and sciences; 2) all have Christ-centered missions; and 3) all hire as full-time faculty members and administrators only persons who profess faith in Jesus Christ. The 120 members of the CCCU are affiliated with 28 different denominations that have evolved over time from roughly four major strands of the Protestant Reformation: Anglican, Lutheran, Reformed; and Anabaptist. Almost 20 percent

of the CCCU's members are not officially affiliated with a particular Protestant denomination. The CCCU's members have over 400,000 students enrolled and almost 2 million alumni.

Azusa Pacific University ("APU") is an unaffiliated, comprehensive, evangelical, Christian university located near Los Angeles, California. APU is committed to God First and excellence in higher education. APU serves more than 10,000 students on campus, online and at seven regional centers, offering more than 100 associate's, bachelor's, master's and doctoral programs. APU employs approximately 500 full-time and part-time faculty. Each faculty member is required to integrate faith into their teaching. To assist the faculty in this regard, APU has established the Office of Faith Integration and supplies its faculty with a publication entitled "Faith Integration Faculty Guidebook."

Brigham Young University ("BYU") is a Utah nonprofit corporation and institution of higher education in Provo, Utah, that is founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints. BYU's mission is to assist individuals in their quest for perfection and eternal life. BYU aims to provide an education that is spiritually strengthening, intellectually enlarging, and character building, leading to life-long learning and service. More than 30,000 undergraduate and graduate students attend classes and study on BYU's campus, and many thousands more are enrolled in BYU's continuing education courses. BYU's 1,500 faculty members and 2,500 administrative and staff employees all agree to abide by the school's Honor Code and are expected to be role models of a life that combines the quest for intellectual rigor with spiritual values and personal integrity.

As evidenced by their amicus filings in the *Great Falls* and *Carroll College* cases, providers and supporters of schools offering religious-based education have a strong and obvious

interest in encouraging the Board to adopt a standard that provides proper Constitutional respect for the religious freedom rights of religious schools.

FACTUAL BACKGROUND

This case arises from a representation petition filed by SEIU Local 925, which claims to represent non-tenured contingent faculty members of Pacific Lutheran University. Slip Op. at 15. The University argued, based upon the Supreme Court's decision in *Catholic Bishop*, as applied by the D.C. Circuit in *Great Falls* and *Carroll College*, that the Board should not take jurisdiction. *Id.*

The Regional Director concluded that Pacific Lutheran University, which is affiliated with the Evangelical Lutheran Church in America and owned by its Region 1 congregants, nonetheless was not "a religious institution" within the meaning of *Catholic Bishop.* Slip Op. at 15, 16.

The Regional Director first analyzed the case under Board precedents that preceded the D.C. Circuit's decision in *Great Falls,* including the Board's *Great Falls* decision, which has been twice rejected by the D.C. Circuit. Slip Op. at 15. Specifically, the Regional Director applied a "substantial religious character" test, under which he "consider[ed] all relevant aspects of the school's organization and function, including 'the purpose of the employer's operations, the role of unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction." *Id.*, quoting *Univ. of Great Falls,* 331 NLRB at 1664-65.

Applying the very jurisprudence the D.C. Circuit had repudiated in *Great Falls*, the Regional Director based his decision, in large part, on his conclusion that the "the mission and purpose of the University is to educate students and that mission makes no mention of God, religion, or Lutheranism." Slip Op. at 16. He also placed great emphasis on his finding that

"faculty are subject to no religious requirements." *Id.* He also ignored substantially, if not entirely, the numerous documents in which the University had held itself out as religious to potential students.

The Regional Director then purported to analyze the case in the alternative under the three-part test applied by the D.C. Circuit in *Great Falls* and *Carroll College.* But he gave an inappropriately and inexplicably narrow application to that test. Contrary to the D.C. Circuit's admonition against "trolling" through the bona fides of an institution's religious beliefs, the Regional Director engaged in a very intrusive examination of the University's religious "record," before concluding it "likely" could not satisfy the "holding out" requirement of the D.C. Circuit's test. *Id.* at 17.

The Board granted the employer's request for review, conducted the election and impounded the ballots, and accepted additional briefing by the parties.

ARGUMENT

I. THE BOARD SHOULD ADOPT THE *GREAT FALLS/CARROLL COLLEGE* TEST FOR DETERMINING WHEN IT MAY PROPERLY EXERCISE JURISDICTION OVER RELIGIOUS SCHOOLS

The one point on which all parties seem to agree is that *Catholic Bishop* lays the groundwork for measuring the permissible scope of the Board's jurisdiction over religious-based schools. But that is where the agreement ends. The courts have consistently recognized that *Catholic Bishop* bars the Board from basing jurisdiction on its fact-intensive determination as to a school's relative religiosity. Nevertheless, the Board's prior decisions have read *Catholic Bishop* as permitting such inquiries. It is the position of amici that this inappropriate practice should be ended and that this case provides the Board an opportunity to do so.

Carefully read, *Catholic Bishop* bars the approach the Board has followed, which has been urged upon it by labor union briefs that simply cherry-pick isolated quotes from out of

their context in *Catholic Bishop.* In fact, that case enunciates a clear, bright-line standard that broadly bars the Board from entangling itself in religious education. The specific factors that the D.C. Circuit identified in *Great Falls* for implementing *Catholic Bishop* faithfully reflect the Supreme Court's precise rationale and holding, while the highly intrusive standards advocated by the labor unions in fact turn *Catholic Bishop*'s rationale upside-down. For those reasons, and because the *Great Falls* test is easily administered and yields correct results, it is the test which the Board should—indeed, must—adopt.

A. To Avoid Unnecessary Governmental Entanglement, *Catholic Bishop* Bars The Board From Asserting Jurisdiction Over Religious Schools That Teach Secular Subjects.

In *Catholic Bishop*, the Supreme Court granted certiorari to consider "whether teachers in schools operated by a church to teach both religious and secular subjects are within the [Board's] jurisdiction" under the NLRA. 440 U.S. at 491.

Through a series of decisions, including the preliminary decisions in *Catholic Bishop,* the Board had developed a "policy [of] declin[ing] jurisdiction over religiously sponsored organizations 'only when they are *completely religious*, not just religiously associated.'" *Id.* at 493 (emphasis added). Under that policy, the Board consistently asserted jurisdiction over religious-sponsored or affiliated schools whenever they "perform in part the secular function of education" in addition to providing "religious education." 440 U.S. at 495 citing *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975).

The Supreme Court squarely held that the Board's "completely religious" jurisdictional policy was prohibited and unenforceable under the so-called "constitutional avoidance" doctrine. *Id.* at 507. Under that doctrine, a statutory construction or administrative policy that "would give rise to serious constitutional questions" must be avoided absent a "clear expression" that Congress intended that construction. *Id.* at 500.

Initially, the Court concluded the Board's exercise of jurisdiction over religiously affiliated schools would necessarily implicate each of several serious constitutional questions:

—The Court first focused on "the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Id.* at 501. As it explained, "religious authority necessarily pervades the school system," which would make it impossible to separate secular components of educational instruction from religious components without "excessive governmental entanglement in the affairs of the church-operated schools." *Id.*

The Court gave a practical example:

> "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."

Id. Likewise, while "a textbook's content is ascertainable," "a teacher's handling of the subject is not," further confounding any attempt to separate the secular from the religious. *Id.*

—Next, the Court held that the Board's inquiry into, and resolution of, unfair labor practice charges against a religious school would also likely engender inappropriate governmental entanglement. As the Court noted, schools frequently respond "that their challenged actions were mandated by their religious creeds." *Id.* at 502. "The very process" of even inquiring into the "good faith" of such positions and their "relationship" to the school's religious mission would, the Court explained, be constitutionally inappropriate. *Id.*

—Last, the Court concluded that undue entanglement also would likely ensue whenever the Board was asked "to decide what are 'terms and conditions of employment' and therefore mandatory subjects of bargaining" at a religious school. *Id.* at 503. Noting that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment,'" the Court regarded undue entanglement as "inevitabl[e]." *Id.*

Each of these separate concerns—the inherent integration of faith-based and secular instruction, as well as the inevitable relevance of religious doctrine to the resolution of unfair labor practice charges and the determination of terms and conditions of employment—led the Court to conclude: there could be "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." *Id.* at 504.

Having resolved that issue, the Court addressed the question of whether Congress intended the Board to wade into such religiously charged waters. Carefully examining the legislative history of the NLRA and its many amendments, the Court found "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." *Id.* Consequently, it "decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

Catholic Bishop thus repudiated the Board's "completely religious" standard for asserting jurisdiction, making clear the Board may not assert jurisdiction over religious schools because they also teach secular subjects.

B. The Jurisdictional Tests The Board Has Employed Subsequent To *Catholic Bishop* Are Flatly Prohibited By That Decision.

The Board has employed two different jurisdictional standards subsequent to *Catholic Bishop*—a "pervasively sectarian" test and a "substantial religious character" test. Both tests are substantially identical to the "completely religious" test that the Supreme Court invalidated in *Catholic Bishop.* Both tests have been authoritatively rejected by the federal appellate courts. Consequently, the Board may not permissibly adopt either test as its jurisdictional standard regarding religious schools.

1. Since *Catholic Bishop* was decided in 1979, and in an obvious effort to expand its jurisdiction, the Board has persistently resisted implementing that decision's core teaching. Initially, disregarding the Supreme Court's admonition against fact-intensive religious inquiries, the Board held that *Catholic Bishop* applied *only* to schools that were "pervasively sectarian," but did not apply to religious schools that *also* provide secular education. *E.g. University Central de Bayamon*, 273 NLRB No. 1110 (1984). Thus, the Board continued to assert jurisdiction based on its fact-intensive assessment of the school's relative degree of religiosity. *Id.*

The Board's insistence on asserting jurisdiction over religious schools initially was rebuffed by the First Circuit in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (en banc). Writing for half of an equally-divided en banc court, then-Judge Breyer concluded that the analysis in *Catholic Bishop* applies fully to a "college that seeks primarily to provide its students with a secular education, but which also maintains a subsidiary religious mission." *Id.* at 398-99.

As then Judge-Breyer explained, Board jurisdiction in such cases posed just as great a risk of the "kind of 'entanglement' arising out of the inquiry process itself" that the Supreme Court's decision in *Catholic Bishop* required the Board to avoid. *Id.* at 401 (internal punctuation omitted). To prevent such an impermissible inquiry, Judge Breyer recommended that the Board apply a three-part test virtually identical to the one eventually adopted in *Great Falls*. *Id.*

Subsequent to *Bayamon*, the Board has not again tried to apply its "pervasively sectarian" test. No party has suggested that the Board should re-adopt that repudiated standard and, plainly, it may not.

2. Rather than implement the substance of Judge Breyer's (correct) reading of *Catholic Bishop*, the Board simply changed the name of its test from "pervasively sectarian" to "substantial religious character." As the Board itself explained in *Great Falls*, "[s]ince *Catholic Bishop,* the Board has decided on a case-by-case basis whether a religion-affiliated school has "a substantial religious character," so as to preclude the exercise of Board jurisdiction. *Great Falls*, 331 NLRB No. 188, at 2. *See also, e.g.*, *Jewish Day Sch. of Greater Washington,* 283 NLRB 1308, 1309 (1987); *St. Joseph's College*, 282 NLRB 65, 68 (1986).

In determining whether a religious school has "a substantial religious character," the Board "considers such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Great Falls*, 331 NLRB No. 188, at 3. Thus, just like the "completely religious" test that the Supreme Court invalidated in *Catholic Bishop*, the Board's current "substantial religious character" test entails a constitutionally inappropriate fact-intensive inquiry into relative religiosity.

In *Great Falls*, the D.C. Circuit flatly rejected the Board's "substantial religious character" test. Emphasizing that the First Amendment prevents the Board "from trolling through a person's or institution's religious beliefs," it recommended that the Board adopt the three-part "holding out" test discussed in Part C below. 238 F.3d at 1342. Because the reasons cited by the D.C. Circuit for rejecting the "substantial religious character" test are constitutionally correct and authoritative, the Board may not adopt that test as its jurisdictional standard.

At the outset, the D.C. Circuit explained that the NLRB's "substantial religious character test" was flatly foreclosed by *Catholic Bishop* itself. That is because that test entailed

the precise "sort of intrusive inquiry that *Catholic Bishop* sought to avoid"—an "inquiry into the 'religious mission' of the University." *Id.* at 1341. Thus, the "substantial religious character" test "is so similar in principle to the approach rejected in *Catholic Bishop* that it is inevitable that we must reject this 'new' approach." *Id.*

The D.C. Circuit further explained that the Supreme Court's post-*Catholic Bishop* case law confirmed the invalidity of the "substantial religious character" test. For example, it noted the plurality in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), had explained "it is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." 278 F.3d at 1341-42 (citing cases).

Likewise, the "prohibition on such intrusive inquiries into religious beliefs underlay" the Supreme Court's decision in *Presiding Bishop v. Amos*, 483 U.S. 327 (1987), upholding an exemption in Title VII "as applied to the firing of a janitor by a church-owned gymnasium." 278 F.3d at 1342. *Amos* made clear "that a nonprofit institution owned or operated by a church should be exempted from 'a case-by-case determination whether its nature is religious or secular' under Title VII." *Id.* (citing *Amos*, 483 U.S. at 340, 345).

And the D.C. Circuit noted the Supreme Court also has concluded "'it is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.'" *Id.* at 1342-43, quoting *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990). As stated in *Smith*, "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" 494 U.S. at 886-87.

Simply put, the Board's "substantial religious character" test on its face requires the Board to conduct the precise "intrusive inquiry" that the Supreme Court has repeatedly condemned. Considering, for example, "*the degree* to which the school has a religious mission and curriculum" would impermissibly require the Board to judge the centrality and good faith of an institution's religious mission, contrary to *Catholic Bishop* and *Smith.* Likewise, considering "the involvement of the religious institution in the daily operation of the school" would impermissibly require the Board to attempt to segregate the sectarian and secular components of the educational instruction, an inquiry forbidden by *Catholic Bishop.*

Because the "substantial religious character" test is invalid under "*Catholic Bishop,* along with the Court's subsequent decisions in *Presiding Bishop v. Amos, Smith,* and *Mitchell,*" 278 F.3d at 1343, the Board may not now adopt that test as its jurisdictional standard.

C. The Board Should Formally Adopt The *Great Falls* Test Which Accurately Implements *Catholic Bishop* Without Improperly Judging Or Weighing Religious Values.

Endorsing the test applied in *Bayamon*, the D.C. Circuit held in *Great Falls* that the Board is precluded from asserting jurisdiction over an educational institution that (1) "'holds itself out to students, faculty and community' as providing a religious educational environment"; (2) "is organized as a 'nonprofit'"; and (3) "is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." 238 F.3d at 1343 (quoting *Bayamon*, 793 F.2d at 399-400, 403). A different panel of that court re-affirmed the *Great Falls* standard after the Board declined to adopt it as its own. *Carroll College v. NLRB,* 558 F.3d 568, 570 (D.C. Cir. 2009).

Historically, the Board has taken the position that it is not required to follow the decisions of intermediate federal appellate courts such as the D.C. Circuit, but only those of the

Supreme Court. Whatever theoretical merit this view might have, there are several reasons why the Board is constitutionally mandated to apply a test at least as stringent as (*i.e.*, a test that avoids intrusive inquiry into religiosity) as much as the *Great Falls/Carroll College* test for determining jurisdiction over religious schools.

First, as the D.C. Circuit itself explained, that test represents "a useful and accurate method of applying *Catholic Bishop*" because it creates a "bright-line" rule for determining jurisdiction "without delving into matters of religious doctrine or motive." 278 F.3d at 1344. As *Great Falls* simply implements *Catholic Bishop*, a refusal to follow that decision (and *Bayamon*) is, in essence, a refusal to follow binding Supreme Court precedent.

Second, the only portion of the *Great Falls* test that has been criticized is the first (or "holding out") factor, under which inquiry is limited to determining whether a school has represented in its public documents that it provides "a religious educational environment." No parties—not even the labor unions that oppose *Great Falls*—have criticized the second or third prongs of that test. Nor could they, as those factors—that a school be a nonprofit and have a religious nexus[3]—serve to *limit* the number of schools that are potentially outside the Board's jurisdiction.

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[3] The third prong of the *Great Falls* test—that the school have a religious nexus— is necessarily quite broad in scope. Under the nexus test, a religious school need only be "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion" 238 F.3d at 1343. It is not, as some might contend, limited to religious schools that are "affiliated" with other religious organizations. The purpose of this prong is to ensure that only bona fide religious institutions invoke *Catholic Bishop*. Consistent with this, under the *Great Falls* nexus test, the school itself may well be the "recognized religious organization."

This approach correctly recognizes that a religious school can have a variety of relationships with other religious organizations, including no relationship at all. For example, the school may be owned directly by or affiliated with a formal church, or it may be part of a related organization such as a diocese. That no single relationship is required is likely a consequence of the fact that religious entities take a number of forms (religious corporations under laws such as

As to the "holding out" factor, apparently the concern is that the *Great Falls* test is too "hands-off" and thus could allow non-religious schools to improperly avoid Board jurisdiction. But this fear has no substance.

All concerned parties, including the religious parties that have signed this brief, agree that exclusion from Board jurisdiction is properly claimed *only* by those schools that are in fact religious. Obviously, some test must be employed to distinguish those schools that are

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California's unique Non-Profit Religious Corporation Law, Cal. Corp. §§ 9110 et seq., corporations sole, public benefit corporations, unincorporated associations and the like). Runquist & Frey, *Guide to Representing Religious Organizations* (American Bar Association 2009) at pp. 19-24; Bassett, Durham & Smith, *Religious Organizations and the Law* (West 2013) at §§ 1:6, 3:35-37.

The religious nexus test also appreciates that numerous religious schools, including many Evangelical and Islamic schools, are entirely free-standing, unaffiliated with a particular outside organization. These schools are not somehow less religious because they operate independently. So long as a school pursues a religious mission, it should be considered a bona fide religious school under *Catholic Bishop*. See *NLRB v. Bishop Ford Cen. Catholic High Sch.*, 623 F.2d 818, 823 (2d Cir. 1980) (holding that the Supreme Court in *Catholic Bishop* "intended no particular limitation in using the term 'church-operated' to describe religious schools" but rather employed it "as a convenient method of characterizing schools with a religious mission"). Moreover, often times the school itself can be classified as the "recognized religious organization," such as when the non-profit entity at issue is the school, whether it be a corporation, association, or some other business entity.

Along these lines, the Supreme Court has long condemned interference with the internal operations of a religious organization. *Hosanna-Tabor Evangelical Lutheran Church and School*, 132 S.Ct 694 (2012); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09, 713 (1976) (second-guessing church's defrocking of bishop would require court to "substitute[] its own inquiry into church policy and resolutions" for that of the church's, contrary to First Amendment); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (Free Exercise Clauses protects power of religious organizations "to decide for themselves, free from state interference, matters of . . . faith and doctrine.") The Court also has condemned the giving of preference to one religion over another. *Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). Dictating that a religious school must have a particular relationship with a "recognized religious organization" in order to qualify under *Catholic Bishop* would violate both proscriptions.

excluded from those that are not. The pertinent question, then, is how to draw that distinction accurately in a manner consistent with First Amendment values.

As *Catholic Bishop, Amos, Great Falls, Carroll College* and a number of other cases teach, "skeptically" examining the expressed religious mission of a school to assess its sincerity is not an accurate or permissible means of distinguishing "religious" from "non-religious" schools. All religious beliefs are entitled to First Amendment protection. Because sincere religious beliefs come in all sizes, shapes and forms, courts are neither competent, nor permitted, to judge the sincerity, validity or intensity of such claimed beliefs. *Amos*, 483 U.S. at 340, 345.

Nor would "trolling" through the curriculum of a school to assess its relative religious intensity or breadth provide an accurate or constitutionally appropriate test. Again, such value judgments not only are contrary to our First Amendment values, they cannot be made with any accuracy. *Catholic Bishop*, 440 U.S. at 401; Part D(3) below.

Conversely, the "holding out" test, by taking the written public representation of a college or university at its word, suffers from none of these problems. Obviously, it avoids the improper "trolling" and second-guessing required by more intrusive approaches. Likewise, it avoids improperly discriminating between different religions based on perceived differences in the intensity of their beliefs or missions.

And most importantly, the "holding out" test avoids these problems while providing the most accurate safe-guard against the improper invocation of the religious exemption. As the D.C. Circuit pointed out, the claiming of a religious mission in public representations—such as student recruiting materials— "comes at a cost." 278 F.3d at 1344.

"[S]uch public representations serve as a market check," for while "public religious identification will no doubt attract some students and faculty . . . , it will dissuade others." *Id.*

Third, the Board itself has no expertise in constitutional interpretation. *University of Great Falls*, 331 NLRB 1663 (2000) (Board may not pass upon constitutionality of federal statute); *Fashion Valley Mall v. NLRB*, 524 F.3d 1378 (D.C. Cir. 2005) (same). To the contrary, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *United States v. Nixon*, 418 U.S. 683, 703 (1974). Moreover, "the Board's interpretation of statutes outside its expertise" is entitled to no deference, *Hoffman Plastic Compounds, Inc. v. N.L.R.B*, 535 U.S. 137, 144 (2002); *Great Falls, supra,* (same). As an administrative agency with no judicial power, the Board is thus obligated to follow the constitutional adjudications of Article III courts, even intermediate appellate courts.

Finally, any flexibility the Board thinks it might enjoy to pick and choose between conflicting federal judicial authorities is not present here because *every* federal circuit court decision to consider the matter has either endorsed or closely approximated the approach reflected in *Great Falls.*

To illustrate, the D.C. Circuit in *Great Falls* adopted virtually verbatim the test the First Circuit had enunciated in *Bayamon.* 793 F.2d at 398-99. That test remains good law in that circuit. *New Life Baptist Church Academy v. East Longmeadow,* 666 F.Supp. 293 (D. Mass. 1987).

Likewise, in *Carroll College,* a different panel of the D.C. Circuit strongly endorsed *Great Falls* and refused to enforce a jurisdictional order the Board had again based on its "substantial religious character test." 558 F.3d at 570. As that panel explained, "[i]n *Great*

Falls we held that the Board's approach involved just 'the sort of intrusive inquiry that *Catholic Bishop* sought to avoid." *Id.*

And in *Spencer v. World Vision*, 633 F.3d 723, 729 & n.6 (9th Cir. 2011), a majority of the panel, somewhat constrained by prior Ninth Circuit precedent on Title VII, nevertheless cited *Great Falls* with approval for "striking down an inquiry which 'boil[ed] down to 'is [an entity] sufficiently religious'" and properly avoiding "First Amendment concerns—discriminating between kinds of religious schools." *See also*, *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (citing *Great Falls* with approval in holding state may not discriminate between "pervasively sectarian" and other colleges in awarding scholarships).

In sum, *Great Falls* correctly and concisely implements the Supreme Court's seminal holding in *Catholic Bishop.* It has received universal approval in the case law. Indeed, no judicial decision has ever criticized it or offered a competing test for assessing Board jurisdiction over church-operated schools. The Board therefore should, indeed must, adopt the *Great Falls* test for determining jurisdiction and apply it in this case.

D. The Jurisdictional Test Proposed By The Labor Unions Is Impermissible Under *Catholic Bishop* and *Great Falls.*

In *Manhattan College*, 2-RC-23543, the AFL-CIO argued that *Catholic Bishop* does not apply to schools, but rather applies to teachers. AFL-CIO Br. at 4, 8.[4] It contends "the determinative question is not whether a particular college is religious in nature but whether the faculty members in the petitioned-for unit perform a religious function."[5] AFL-CIO Br. at 3.

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[4] The AFL-CIO brief in *Saint Xavier University*, 13-RC-22025, made the same types of arguments.

[5] Initially, the Board applied *Catholic Bishop* only to parochial schools, concluding that decision did not apply either to colleges or universities. *See St. Joseph's College*, 282 NLRB 65, 68

Similarly, the Manhattan College Adjunct Faculty Union argued that *Catholic Bishop* applies only if a school's mission is the "religious indoctrination" of its students. AFT/NEA Br. at 6. We assume that the unions will take similar, if not identical, positions in this case.

It is not entirely clear exactly what test the unions propose for determining jurisdiction. It is clear they believe the jurisdictional inquiry should entail evaluating the nature and relative religious content of particular course offerings. What is less clear is whether they believe the jurisdictional exclusion should extend only to those individual faculty members who "propagate" faith, or whether it is to be determined on a faculty-wide basis. Either approach, however, is flatly foreclosed by *Catholic Bishop.* Moreover, their approach would be administratively infeasible and would require the Board to disregard the integral role faith plays in the teaching of seemingly secular subjects at religious schools.

1. The premise of the unions' position—that jurisdiction is appropriate except where faculty members explicitly propagate religious faith—is explicitly foreclosed by the case law. Their proposed approach would require the exact "sort of intrusive inquiry" into religious beliefs "that *Catholic Bishop* sought to avoid," *Great Falls*, 278 F.3d at 1341, and that the Supreme Court has repeatedly condemned. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 ("inquiry into . . . religious views" "not only unnecessary but also offensive"); *Catholic Bishop*, 440 U.S. at 501.

Second, the unions' approach is vague and unworkable. It leaves unanswered such key questions as: What does it mean to propagate religion? How strenuously must religion be propagated? What portion of a course must be devoted to propagation to matter? These are

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(1986). However, nothing in *Catholic Bishop* itself supported that distinction, and the Board eventually reversed itself, correctly recognizing that *Catholic Bishop* applies equally to all educational levels. *Id.*

precisely the types of qualitative judgments that courts cannot make without "excessive governmental entanglement in the affairs of the church-operated schools." *Id.; see also, Amos*, 483 U.S. at 336 (same). Simply put, "propagation" or "indoctrination" cannot, consistent with First Amendment values, be defined, measured or evaluated by the courts, let alone by a review board of an administrative agency.

Third, the proposed approach is discriminatory on its face. All religious beliefs are entitled to constitutional protection. But not all religions proselytize or believe educational instruction should explicitly be directed to the propagation of religious faith, and perspectives about proselytization and propagation differ even within the same religion. Limiting the jurisdictional exclusion to religions that "propagate" would impermissibly discriminate based on religious belief or practice.

Not surprisingly, the case law relied on by the unions does not support their proposed approach. Their principal case simply holds (incorrectly) that *Catholic Bishop* does not apply to non-faculty, blue collar workers employed by a school, *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991), while their other case limits *Catholic Bishop* to the educational setting. *Denver Post of the National Society of Volunteers v. NLRB*, 732 F.2d 769 (10th Cir. 1984).

Neither issue is presented here. Even more importantly, neither case remotely sanctions the unions' proposed intrusive inquiry into the nature, content, pervasiveness, or relative intensity of the religious content in particular course offerings.

2. The unions' proposed test is not only constitutionally infirm, it would create an administrative nightmare for the Board. In *Great Falls,* the D.C. Circuit set out a

"bright-line," almost mechanical, test for determining jurisdiction "without delving into matters of religious doctrine or motive." 278 F.3d at 1345.

A key virtue of this approach—apart from its sensitivity to constitutional values—is its simplicity. "To determine whether [a school holds] itself out as 'providing a religious educational environment,'" the Board need only take a non-skeptical look at "its course catalogues, mission statement, student bulletin, and other public documents." *Carroll College, supra*, 558 F.3d at 572, citing *Great Falls,* 278 F.3d. at 1345. Such an examination is both straight-forward and finite, with no need to resort to conflicting, subjective testimony.

In contrast, examining the content of individual courses frequently would require just such a subjective, fact-intensive inquiry. And the inquiry would necessarily be both detailed and open-ended, for while "a textbook's content is ascertainable," "a teacher's handling of the subject is not." *Catholic Bishop*, 440 U.S. at 501.

What do the unions expect to occur at their proposed hearings? Will the Board review course syllabi? Will professors be required to testify as to the link between the secular and sectarian portions of their lectures? Will the Board take testimony from students regarding their opinions on the religious content and orientation of the courses?[6] To even raise such possibilities is to demonstrate the absurdity of the unions' proposed approach. And the delay in the processing of a representation petition by a teacher-by-teacher, course-by-course analysis, would be totally at odds with the Board's current desire to speed up the election process.

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[6] The unions seem to contend that a school cannot be religious if it accepts students from other religions. They are wrong. Their contention overlooks the fact that many religions believe in evangelism, or bringing religious awakening to non-believers. And it overlooks the fact that such students have chosen to immerse themselves in a religious community. *See, generally,* David S. Dockery, *Renewing Minds: Serving Church and Society through Christian Higher Education.* B&H Publishing Group (2008). *See, also, http://www.apu.edu/about/evangelical/*

http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-proposes-amendments-improve-representation.

The Board's decision in *Catholic Social Services* highlights the problems that the unions' approach would cause. There, the Board exercised jurisdiction over instructors at a Catholic Church-operated center, even though the Center's Mission Statement and employment contracts explicitly referenced its religious orientation and commitment to Biblical values. It did so based on its conclusion that the Center's instructors "do not [explicitly] teach or inculcate religious values." *Catholic Social Services,* 355 NLRB No. 167 at 4. *See also Salvation Army*, 345 NLRB 550 (2005); *Carroll College*, 345 NLRB 254, n. 8 (2005).

Not only does this approach entail the impermissible "trolling" and "skepticism" that "*Catholic Bishop* itself sought to avoid," *Carroll College,* 558 F.3d at 572, it also is administratively unworkable. As the NLRB's case report itself demonstrates, the hearing entailed a wide-ranging inquiry into deeply subjective areas, and turned in large part on testimony that was very much in the eye of the beholder[7]—hardly a good use of the agency's limited resources.

3. Finally, the unions' proposed approach is fundamentally at odds with the Supreme Court's recognition that religious doctrine will necessarily be inculcated into the education at religious schools, even when those schools offer seemingly secular subjects. In summarizing the Court's decisions, Justice Souter explained that "long experience" had led it to:

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[7] Similarly, in *Manhattan College*, the Regional Director spent seven pages analyzing the religious pedigree and status of Manhattan College before concluding that "the purpose of the College is secular and not the 'propagation of a religious faith.'" Slip Op. at 19. In this connection, he concluded that the College's commitment to "academic freedom" was more significant than "its [expressed] commitment to a continued relationship with [the Institute] of the Christian Brothers." *Id.* Such judgments cannot be made in a value-neutral fashion, a point the unions simply disregard in their briefs.

> conclude[] that religious teaching in such schools is at the core of the instructors' individual and personal obligations, and that individual religious teachers will teach religiously. [Accordingly, a]s religious teaching cannot be separated from secular education in such schools or by such teachers, we have concluded that direct government subsidies to such schools are prohibited because they will inevitably and impermissibly support religious indoctrination.

Mitchell v. Helms, 530 U.S. 793, 886-87 (2000) (Souter, J. dissenting) (case citations omitted).[8]

Such observations are well-grounded in reality. For example, commentators have demonstrated that a seemingly secular subject like mathematics necessarily requires examination of religious questions when taught in a religious environment. Students will ask, consider and receive insight from faculty and students alike on questions such as "What contribution does the discipline of mathematics make to our understanding of the nature of the world God has created?" or "What is the significance of the fact that so many processes in the world can be given precise mathematical description . . . [while] some events and processes seem to defy mathematical analysis?" Hasker, *Faith-Learning Integration: An Overview*, Christian Scholar's Review; *see also, e.g.* Harris, *Answering Objections to the Integration of Faith and Learning at Christian Colleges*, Cascade Books (2004).

> The noted poet, T.S. Eliot, made a similar point:
>
> > The purpose of a Christian education would not be merely to make men and women pious Christians: a system which aimed too rigidly at this end alone would become only obscurantist. A Christian education must primarily teach people to be able to think in Christian categories.

T.S. Eliott, *Christianity and Culture* (New York: Harcourt Brace 1940), 22. Or as explained by a contemporary academician, a religious world view necessarily "shapes our view of education, pedagogy, and the social sciences, for all must answer the question: what is it that motivates

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[8] The majority in that case disagreed with Justice Souter's conclusion as to the ultimate outcome of that case, but did not disagree with his demonstration that the Court's jurisprudence had long recognized that religious values are necessarily inculcated in church-operated schools.

humans?" David Dockery, *Integrating Faith & Learning in Higher Education.* www.cccu.org/professional_development/resource_library/2004/integrating_faith__.

The seamless integration of faith into seemingly secular education confirms the wisdom of the *Great Falls* approach. First, the difficulty, if not impossibility, of accurately measuring the degree to which religious education triggers, implies or demands such inquiry provides practical support for *not* engaging in the type of fact-intensive "trolling" reflected in the Board's jurisdictional jurisprudence. *Catholic Bishop*, 440 U.S. at 501.

The common-place integration of secular and sectarian educational components also provides practical support for taking at face value a school's public representations as to the religious nature of its education. Many schools—ranging from seminaries that train future clergy, to schools that provide pervasively sectarian education, to schools that integrate faith into seemingly secular liberal education—state in their public documents that they provide religiously based education. *See, e.g.,* websites listed at http://www.apu.edu/faithintegration/resources/links.

Some schools state in their public documents that religion is the foundation of their educational mission. For example, Amicus Brigham Young University states in its Mission Statement:

> "The mission of Brigham Young University—founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints—is to assist individuals in their quest for perfection and eternal life. . . . To succeed in this mission the university must provide an environment enlightened by living prophets and sustained by those moral virtues which characterize the life and teachings of the Son of God."

BYU Mission Statement (http://aims.byu.edu/mission_statement). *See also* Aims of a BYU Education (http://aims.byu.edu/aims) ("A BYU education should be (1) spiritually strengthening, (2) intellectually enlarging, and (3) character building, leading to (4) lifelong learning and service.").

The Seventh-day Adventist philosophy of education is Christ-centered. Adventists believe that under the guidance of the Holy Spirit, God's character and purposes can be understood as revealed in nature, the Bible, and Jesus Christ. The distinctive characteristics of Adventist education—derived from the Bible and the writings of Ellen G. White—point to the redemptive aim of true education: to restore human beings into the image of their Maker. *A Statement of Seventh-day Adventist Educational Philosophy.* http://education.gc.adventist.org/publications.html.

Consistent with this, Loma Linda University, a Seventh - day Adventist University located in Loma Linda, California, has adopted the following Mission statement:

> "Loma Linda University, a Seventh-day Adventist Christian health sciences institution, seeks to further the healing and teaching ministry of Jesus Christ 'to make man whole' by: Educating ethical and proficient Christian health professionals and scholars through instruction, example, and the pursuit of truth...."

http://www.llu.edu/central/mission/index.page.

Amicus Azusa Pacific University has created an Office of Faith Integration, which exists to facilitate the dialogue between academics, the knowledge of their discipline and/or profession, and the Christian faith by resourcing faculty in their efforts to bring faith to life in their research, their teaching, and their scholarship. http://www.apu.edu/faithintegration. The Office of Faith Integration is the co-author of the 80 page Faith Integration Faculty Guidebook, which is designed to help faculty integrate faith into their professional roles as APU. http://www.apu.edu/faithintegration/resources.

Baylor University, which is affiliated with the Baptist General Conference of Texas, and is the world's largest Baptist university, has, like other religious schools, adopted a mission statement that leaves no doubt the role that religion plays in its operations.

> "The mission of Baylor University is to educate men and women for worldwide leadership and service by integrating academic excellence and Christian commitment within a caring community....Established to be a servant of the church and of society, Baylor seeks to fulfill its calling through excellence in teaching and research, in scholarship and publication, and in service to the community, both local and global. The vision of its founders and the ongoing commitment of generations of students and scholars are reflected in the motto inscribed on the Baylor seal: Pro Ecclesia, Pro Texana — For Church, For Texas."

http://www.baylor.edu/about/index.php?id=88781.

Other religious schools emphasize that religious values are central to their educational environment, but in different ways.[9] In each instance, the manner in which the school decides to emphasize its religious values is merely a reflection of different religious values and priorities, and not a statement that the school believe that it is less religious than another school. Regardless of the mode of religious expression utilized by a given school, given the potential economic consequences that could flow from the religious representations, there is no practical reason to doubt their authenticity.

Simply put, application of the *Great Falls* "holding out" test provides the most accurate and administratively feasible means of identifying those schools that provide religious education, while avoiding excessive entanglement.

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[9] *See e.g.,* Mission Statement of Corban University, a non-denominational Christian university ("To educate Christians who will make a difference in the world for Jesus Christ. Matthew 28:19-20. To foster a transformative learning culture where a sustainable biblical worldview takes shape. To build a Christian community that promotes worship, creative expression and activities that reflect God's character. To cultivate a life of stewardship and service toward God, humanity and creation.") http://undergrad.corban.edu/about; Cornerstone University Mission Statement ("The Professional & Graduate Studies Division of Cornerstone University exists to empower the adult learner to influence the world by providing a distinctive and academically excellent education from a Christian worldview.") https://www.cornerstone.edu/pgs-faqs.

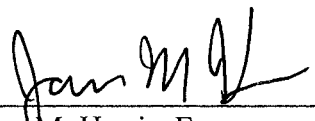
CONCLUSION

For the reasons expressed above, the Board should adopt and apply the three-part test enunciated by the D.C. Circuit in *Great Falls* in reviewing the Regional Director's decision to exercise jurisdiction over Pacific Lutheran University. And the Board should recognize that *Great Falls* establishes a "bright-line" test that shields religious schools from intrusive and "skeptical" governmental "trolling" into the bona fides of their religious commitments.

Respectfully submitted,

DATED: March 27, 2014

SEYFARTH SHAW LLP

By 

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CERTIFICATE OF SERVICE

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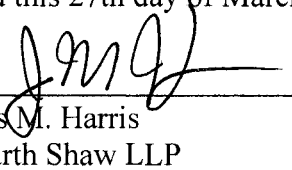

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