UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAINT XAVIER UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	13-RC-22025
	)	
SXU ADJUNCT FACULTY ORGANIZATION, IEA-NEA,	)	
	)	
Petitioner	)	

PETITIONER'S BRIEF IN SUPPORT OF REGIONAL DIRECTOR'S DECISION

The crux of Respondent's appeal is that this Board's use of the "substantial religious character" test is unconstitutional under the First Amendment because it requires an unnecessarily intrusive investigation into the "religious nature" of the institution and its mission. The Respondent urges the Board to adopt the D.C. Circuit's "bright line" test for examining whether it is appropriate to assert jurisdiction over employees in the academic institution in question, arguing that such a test would obviate the intrusion that the Employer finds objectionable. Employer's Brief p. 1. However, the D.C. Circuit's test is based upon a fundamental misinterpretation of the U.S. Supreme Court's decision in *Catholic Bishop.* The U.S. Supreme Court's holding in *Catholic Bishop* concerned the entanglement issues that arise when the state attempts to regulate parochial school teachers who are expressly required to inculcate students with a particular religious faith, leading to an inherent "conflict of function." As the Court noted:

> [I]n terms of potential for involving some aspect of faith or morals *in secular subjects*, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspect of pre-college education. The conflict of function inheres in the situation.

Catholic Bishop, 440 U.S. 490, 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617) (emphasis in original).

The fundamental concern of *Catholic Bishop* is not implicated here, for the academic instructors in question present no inherent "conflict of function". By mandate of the institution's Articles of Incorporation, the academic instructors have absolutely no obligation whatsoever to partake in any religious activities, and they have no responsibility whatsoever to impart directly or indirectly *any* part or parcel of the Catholic faith. The facts of this case could not possibly be further from the type of entanglement that the Supreme Court deemed to be present in a *parochial school* and which gave rise to Establishment clause concerns.

Because the Employer misinterprets the U.S. Supreme Court's holding in *Catholic Bishop*—and hence also misinterprets this Board's correct application of that doctrine—its entire case, both before the Regional Director and as argued to this Board, is misdirected. Indeed, the summary of evidence that consumes the first 25 pages of the Employer's Brief is simply not pertinent to address what historically has been, and should remain, the focal point of this Board's inquiry, namely: (1) the articulated purpose and function of the institution in question and (2) any requirements imposed upon the employees to participate in the religious faith that the institution associates with, or to inculcate its students with that faith.

Here, the answer to both of these inquiries required no "trolling": the Employer's Articles of Incorporation expressly forbid reliance upon "religion" as a basis for admission of any students into the University, or as a basis for promotion of any faculty member. The fact that its employees are never required to come into contact with the Catholic faith or Catholic tenets as a condition to becoming or remaining employed is likewise found in its Articles of Incorporation and Bylaws and is repeated in its statements of academic freedom. Er. Ex. 7, Er. Ex. 31 p. 2, R.

463-65; *see also* Regional Director's Decision p. 4. Simply put: adherence to examining the core issues (the articulated purpose and function of the institution in question, and any requirements imposed upon employees to participate in the religious faith or to inculcate students with that faith) creates the "bright line" test that the Employer seeks, but does so in a manner that does not improperly intrude on employees' right to organize.

Indeed, the fact that the NLRB's jurisdiction would *not* create Establishment clause entanglement issues is clearly evidence by the fact that the University's full time faculty were organized under an NLRB election 20 years ago, and the University has continued to recognize and bargain with that union without experiencing any "entanglement" issues through to the current date. *See* P.Ex. 9, R. 478-81. Since the Employer already acknowledges and respects the right of its employees to organize, applying a test that focuses on the institution's purpose and the adjunct instructor's role within the institution clearly poses *no* "entanglement" issues in this matter, as the Regional Director properly found.

Summary of Relevant Facts

Despite the length of the Hearing and Record in this matter, the crucial questions of fact regarding (1) the (wholly secular) employment expectations imposed upon the employees who seek to be organized and (2) the purely secular purpose of the institution ("to educate") were quickly established through uncontroverted testimony. These salient, undisputed facts are summarized below.

1. St. Xavier University's Hiring/Evaluation/Promotion of Its Faculty Is Based on Non-Sectarian Principles and Qualifications.

St. Xavier University ("SXU") uses traditional job postings in the secular job market to fill openings for all of its jobs, *e.g.* both professor positions and generic campus jobs. PX 6, 8; R.

321-22, 452-53, 507-08, 514, 520-21. Interviews for full-time faculty are conducted via the department chair and members of the department (R. 491) followed by a meeting with the Provost, and a meeting with the Dean of the division where the hire is to occur. R. 224, 284-85, 492. No meeting with either the President or the Board of Trustees is required. R. 492. Adjuncts are typically interviewed and hired directly by full-time professors (R. 508-09) or department chairs. R. 514, 521.

No inquiry is made at *any* time of prospective faculty regarding their religious beliefs. R. 264, 329, 330, 492. The only requirement that SXU imposes as criterion for hiring adjunct faculty is that they be "qualified in the field they wish to teach." R. 345. Thus, the entire hiring process – from the point of advertising through the hiring decision – involves *only* persons who have absolutely no obligation to any religion or religious institution at all; the process never involves any inquiry regarding the prospective instructor's faith, let alone any "requirement" that the prospective faculty member participate in a particular faith at all. R. 508-09, 515, 521.

Consistent with its published mission statement, *i.e.,* mission is "*to educate*," when SXU sends out offers of employment to prospective faculty members, the letter of offer makes *no* mention of any religious goal or mission, but instead states that it is the instructor's responsibility to "provide reasonable opportunity for consultation with students pertinent to the course; to communicate with the department chairperson, school dean, or other designated academic personnel on course design and implementation; and to report to appropriate administrative offices on such matters as class lists and grade reports." The letter of offer concludes by extending a welcome to incoming instructors who will "help[] others fulfill their educational goals." PX 6.

The same principle of academic freedom holds true with respect to the course of a

faculty's member's term of employment at SXU: there is absolutely *no* requirement to teach Catholicism in the classroom. R. 223. Faculty members are never advised at any time that they are in any way required to "instill a specific religious faith in the students" that they teach. R. 492- 93, 509, 515, 521, 525. Faculty has absolutely unfettered control over what texts they wish to use in the classroom – there is no requirement that the texts be approved by the Church. R. 223-24, 330-31, 515, 522. Faculty members are not prohibited from teaching ideas and concepts that are contrary to those of the Catholic church. R. 330.[1] The Employer's witnesses conceded that the Catholic faith is only mentioned during classroom time if the course requires it to be touched upon, *e.g.* in a class on world religion. R. 323, 509, 521. This type of discussion would occur in any world religion class at any public or private high school, college or university in the United States, irrespective of religious affiliation or lack thereof.

Nor are part time faculty members required to participate in or acknowledge any Catholic or religious events or meetings outside of the classroom or off campus. R. 263, 510, 522. The University imposes absolutely no requirements that adjunct faculty participate in any way with the various activities offered through the Center for Religion and Public Discourse.[2] Thus, the Employer's lengthy testimony regarding the Center for Religion and Public Discourse, and its lengthy discussion of this Center in its Brief, have absolutely no relevance to the adjunct faculty who, as employees, do not encounter these experiences. Indeed, adjunct faculty members are not even required to review the faculty resource handbook which includes the University's mission statement. R. 332. Because they are not required to follow the University's mission statement,

[1] The Employer insinuates in its Brief on p. 43 that faculty cannot contradict or undermine the teachings of the Catholic Church; however, the Record evidence establishes that this is not so. Faculty members have absolutely unfettered discretion regarding what they teach – including doctrines that directly contradict the Catholic faith.

[2] Ms. Sanders spent the first day of the Hearing in this matter testifying about the Center, R. 262-63 Indeed, of the vast number of documents introduced by the Employer through Sanders – as an attempt to demonstrate that SXU is a religious institution – each of the adjuncts (and full-time) faculty who testified stated that they had never seen the materials introduced into evidence, other than perhaps the posters advertising campus lecture series. R. 511, 522-23.

no faculty member has ever had his or her employment terminated over the alleged failure to follow the University's mission statement. R. 353.[3]

Faculty are evaluated according to traditional secular standards (R. 324-25, 517, 524); a faculty member's religious activity or lack of religious activity is utterly irrelevant to the evaluation process of adjuncts and/or full time faculty members. R. 326, 325. In sum, as one adjunct testified, there is simply no difference between teaching classes at SXU or at the State College where he has also taught for many years. R. 526. Indeed, as this same witness testified, while he was aware that SXU is a "Catholic" university, from his perspective, the only thing "Catholic" about SXU is the "St." that the University puts before the word "Xavier." R. 526.

Because Professors are totally free to choose whatever curriculum they please, to teach whatever materials that are pertinent to classroom studies irrespective of content – including content that is antithetical to the Catholic faith – and are not evaluated whatsoever on the basis of participation in religious events on or off campus, there is no possibility that a professor could be evaluated, disciplined, or discharged based upon a "religious" matter.

Finally, all employment decisions regarding adjunct faculty are made by Department chairs and department members – none of whom are required to have *any* formal or informal relationship with Catholicism or the Catholic Church as a prerequisite to hiring, retention, tenure or promotion. PX10, 6th page. Therefore, *all* the University's dealings with the putative bargaining unit members with respect to being hired, retained, or terminated, are conducted through individuals who have absolutely *no* connection to the Catholic Church, Catholic faith, Catholic beliefs, or the Sisters of Mercy.

2. SXU's Secular Purpose: To Educate

[3] The Petitioner thus takes issue with the Employer's representation (Brief p. 26) that "all faculty members…must be responsive to the University's mission, which is to provide a Catholic ethos or culture to students and staff who are not Catholic." The Employer's Record citations to this "fact" simply do not support this proposition.

The Employer's secular employment expectations are reflected in all of the legal documents submitted into evidence that include a statement of SXU's purpose. SXU's Articles of Incorporation – which constitute the primary rules governing the management of the corporation – describe a purely secular educational environment in which there is no mention of religion or Catholicism having any role. The Articles set forth the following corporate purpose:

> The object for which it is formed is: to provide and furnish opportunities for all branches of higher education; to establish, maintain and conduct one or more colleges and provide in all, collegiate studies; to establish, maintain and conduct a university in which may be taught all branches of higher learning and which may compromise and embrace separate departments for literature, pedagogy, commerce, music, the various branches of science, the cultivation of the fine arts, and all other branches of professional or technical education which may be included within the purposes and objects of a college or university; to provide and maintain courses of instruction in any and all of said college and university departments; to prescribe the courses of study and employ professors, instructors and teachers; to maintain and control the discipline in each of said several colleges and university departments; to fix the rates of tuition and the qualification for admission to the said colleges and university and to each of the institutions subordinate thereto; to receive, hold, invest and dispose all moneys and property or the income thereof which may be vested in or entrusted to the care of said corporation, whether by gift, grant, bequest, devise or otherwise, for educational purposes; to act as trustee for persons desiring to give or provide money or property or income thereof for any one or more of the colleges or for any educational purpose; and generally to pursue or promote all of any of the objects above named, and to do all and every one of the things necessary or pertaining to the accomplishments of said objects or any of them.

ER Ex. 7, 5th page.

The stated "object" of the corporation does not even include the study of religion or religious studies among the types of courses or departments or fields of discipline; instead, the clear "object" of the corporation is to provide a general liberal arts education, and/or a "professional or technical" education. Consistent with this statement of "object" in its Articles of Incorporation, the University has five Schools including a College of Arts and Sciences, a school of management, School of Nursing, School of Education, and School of Continuing or

Professional Studies. R. 98. There is simply nothing in the "object" of the University's Corporation that suggests that teaching or proselytizing the Catholic faith or that participation in or acknowledgement of the Catholic faith has any role in the University's purpose.

SXU provides the Federal Government with the same representation regarding its purpose. In its 2009 IRS 990 submission, St. Xavier describes its "mission or most significant activities" as follows:

> Saint Xavier University (SXU) educates men and women to search for the truth, think critically, communicate effectively, and serve wisely and compassionately in support of human dignity and the common good.

PX. 10 p. 5.

Based upon this articulated purpose, St. Xavier claims 501(c)(3) status as an educational, rather than religious institution. *Id.* at 16.

SXU provides a non-discrimination statement to the IRS:

> SXU publishes their racially nondiscriminatory policy on their website at www.sxu.edu. The University seeks students of diverse talents, experiences, knowledge, interests, and cultures who are willing to learn, and to seek excellence in themselves and others. One of the core values of the University is diversity. Diversity builds a community that fosters a climate that is open and welcoming to diverse people, ideas, and perspectives; that promotes a constructive discourse on the nature of diversity; and that engages faculty, staff, and students in activities that promote the university's core values. *SXU admits qualified students without regard to race, religion,* age, sex, color, national or ethnic origin. The University does not discriminate against handicapped persons who are otherwise qualified to participate in the intellectual and social life of the University.

PX 10 p. 58, which is an addendum to Schedule E, p. 33.

In fact, irrespective of what role the Sisters of Mercy have as members of the Board of Directors, it is clear from the documents that XSU put into evidence that the secular purpose of the school can *never* change. Since at least 1912, the University's Articles of Incorporation has provided that:

> No religious test or particular religious provision *shall ever* be held as a requisite to said colleges or university or to any institution subordinate thereto.

ER Ex. 7 p. 50.

The Articles of Incorporation as amended on or about 1973 forbid discrimination based upon religious "profession" and were also expanded to ensure that the same academic freedom standards that applied to its students would also apply to the faculty. To wit, they provide:

> *No* religious, racial, color or ethnic test or particular religious profession shall *ever* be held as a requisite for admission to said colleges or university or to *any* department belonging thereto or which shall be under the supervision or control of this Corporation, *or for election to any professorship*, or any place of honor or emolument in said Corporation, or any of its departments or institutions of learning.

ER Ex. 7 p.5 (emphasis added).

Thus, SXU has elected to permanently prohibit "religious profession" from ever being considered for purpose of admission to the University, or for being considered for professorship. It has chosen to establish purely secular academic hiring standards and qualifications.

3. The University's form of Governance

Finally, while Petitioner contends that it is unnecessary to examine the institution's governance to determine whether the NLRB has jurisdiction over a college or university that claims religious exemption, Petitioner notes that the Record evidence regarding this issue confirms that the institution should not be exempt from the NLRB's jurisdiction. To wit: the University's Articles of Incorporation provide that the Corporation is managed by its "Board of Trustees." Er. 7 (5th page). As SXU's witness, Ms. Sanders, acknowledged on direct examination, the Board is an "independent board of trustees even though it has some Sisters of Mercy on it." R. 50 (emphasis supplied).

Currently, 5 of the 24 members of the Board of Trustees are members of the Sisters of

Mercy. R. 48, 101, 207. The University undertakes no investigation to ascertain what, if any faith or religion, any of the remaining 21 members of the Board participate in or acknowledge or actively practice. R. 213, 442-43. Although some, discrete powers (*e.g.* selling campus property that is valued in excess of $10 million dollars) are reserved to the Conference for Mercy Higher Education and hence require approval by the Conference before the action is formally approved, Sanders testified that she could not think of a single instance in which a decision made by the independent Board of Directors was *ever* rejected. R. 203-04. These facts demonstrate that the Trustees are truly "independent" from control by any religious organization or entity – as Sanders testified.

When questioned about the relationship between the "Sisters of Mercy" and the Board of Trustees – vis-à-vis her role as liaison between the two entities – the President testified that she consulted with the Sisters of Mercy regarding (1) preparing a development plan to fulfill its financial obligations to Sisters of Mercy (*e.g.* the University's promissory note), and (2) fundraising (R. 436-37) – *i.e.* purely secular issues.

Neither the President of SXU, nor *any* of the individuals holding any position of authority under the President in SXU's chain of management (*see* PX 1) has to be Catholic or participate in the Catholic faith in order to become employed or remain employed at SXU. R. 213, 217-18, 466. No documents exist that the board of directors, administration, faculty or staff are required to sign that reflect or affirm commitment to the Catholic faith. R. 340-41.

Finally, the President's "cabinet," which is the senior leadership team of the University on all issues *other than* faculty governance, is composed of persons who hold high positions of authority at SXU, *e.g.* the Provost and various Vice Presidents of Recruiting, Business, Student Affairs, etc. *See* PX 1, PX4. Thus, Sanders, who is currently Secretary of the Corporation and

who is an in-coming Vice President, is the only member of the President's cabinet who is also a Sister of Mercy. R. 99, 101, 194.

LEGAL ARGUMENT

The Employer urges the Board to overturn its longstanding precedent and adopt instead the D.C. Circuit's test for determining when the Establishment Clause requires the Board to refrain from asserting jurisdiction over a dispute under the National Labor Relations Act. The Board should not adopt the D.C. Circuit's test, which is unconstitutionally vague and overbroad, and utterly fails to consider that the school's right to be free of excessive entanglement under the Establishment Clause is not the only Constitutional right at stake—the First Amendment freedom of teachers to associate by unionizing is also directly implicated.

The D.C. Circuit's test misreads *Catholic Bishop* as precluding NLRB jurisdiction of over all teachers in religiously affiliated institutions of higher education. As is demonstrated below, the test that the Board has used to determine exercise of its jurisdiction is completely consistent with *Catholic Bishop.* The NLRB's approach to the problem of possible entanglement under the Establishment Clause is wholly consistent with the decisions of the U.S. Supreme Court, other federal circuit courts and state Supreme Courts. Moreover, contrary to the Employer's contention, the Board's recent decisions are fully consistent with the Board's own precedent. The Board's focus on the purpose of the institution and the type of work performed by its employees faithfully carries out the *Catholic Bishop* inquiry while avoiding the entanglement problems perceived by the D.C. Circuit. Applying the Board's test to the facts here, the Board should find that the Regional Director's exercise of jurisdiction was justified, for the adjunct faculty in question perform a purely secular teaching function directed at a purely secular purpose—higher education.

I. THE D.C. CIRCUIT'S PROBLEMATIC AND OVERBROAD READING OF *CATHOLIC BISHOP* SHOULD NOT BE ADOPTED BY THIS BOARD

The Board should reject the Employer's invitation to abandon its precedent by adopting instead the bright-line, three-part test used by the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit test relies on an overbroad reading of *Catholic Bishop* that fails to provide a suitable solution to the Constitutional challenges created when the Constitutional rights of workers to freely associate and form a union are pitted against a religiously-affiliated institution's asserted Constitutional right to be free from excessive entanglement under the Establishment Clause. By focusing *exclusively* on the nature of the institution itself (the type of employer) instead of considering the purpose of the institution in providing a service and the function of the class of employees in question (the type of employee), the D.C. Circuit test narrows the Board's jurisdiction much more severely than *Catholic Bishop* requires, denying the Board jurisdiction over all employees at a religiously-affiliated institution.

The three-part test developed by the D. C. Circuit by its nature is aimed at determining when a school is exempt from NLRB jurisdiction. Under the D.C. Circuit test, a school is exempted:

> if it (1) holds itself out to students, faculty and the 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.

Carroll College, 558 F.3d at 572 (quotation marks and citations omitted).

This test rests on a fundamental misreading of *Catholic Bishop*, interpreting *Catholic Bishop* as "hold[ing] that the NLRB lacks jurisdiction over *church-related schools*." *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009) (emphasis added).

In reversing the Board's decision in *University of Great Falls*, the D.C. Circuit gave no deference to the Board's application of the *Catholic Bishop* doctrine, stating that the deference normally accorded an agency's interpretation of statute under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc*. was unnecessary because the court was interpreting precedent, not a statute. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002). It rejected the Board's "substantially religious" test on the grounds that "'trolling'" through a school's mission to determine whether it is substantially religious in character involves unconstitutional entanglement. *Id.* However, having boxed itself into a corner by identifying the *kind* of school, rather than the function of a teacher within the school, as the exclusive and proper locus of inquiry, the D.C. Circuit then was forced to develop a test which in practice devolves into one question: whether the school "holds itself out . . . as providing a religious educational environment." *See Great Falls,* 278 F.3d at 1344.

The D.C. Circuit attempted to replace the "substantially religious" test with a test that is itself overly broad —the third prong purports to exempt a school that "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*." How does one determine whether an entity's membership is determined "with reference to religion"? By using language both vague and broad in purporting to apply an exception to a generally applicable law whose purpose is remedial—to protect the rights of workers to organize— this test threatens to preclude the NLRB's jurisdiction in cases that *Catholic Bishop*, even if read liberally, never purported to reach.[4]

[4] It is possible that the third prong of the D.C. Circuit test uses many words where few would do, and could be construed to simply apply to any entity that is "religiously affiliated". Thus, in *Great Falls*, the court stated:

Having misconstrued *Catholic Bishop* to require focusing the analysis on the nature of the school in question rather than the nature and function of the employee, the D.C. Circuit was then forced to derive a "test for determining whether *a school* is beyond Board jurisdiction" that would not require "trolling through the beliefs of schools, making determinations about their religious mission, and that mission's centrality to the 'primary purpose' of the school." *Id*. at 571-72 (citations omitted).[5] However, such trolling is not a concern where the inquiry is instead focused upon (1) the formally articulated purpose and function of the institution (*i.e.* "to educate" vs. "to promote a religious faith", and (2) whether any requirements are imposed upon the employees to participate in the religious faith that the institution associates with, or to inculcate its students with that faith. Indeed, this has historically been the crux of the Board's inquiry, and there is no reason for the Board to depart from this focus.

> Finally, as we observed above, the third element, at least in its simplest form, is directly analogous to *Catholic Bishop*. The school, college, or university must be "religiously affiliated." *Catholic Bishop*, 440 U.S. at 495.

Great Falls at 1344-1345. However, even if the vague language of the third prong is reformed to mean simply that the institution in question must be religiously affiliated, the test is overly broad.

[5] As its primary example of the unconstitutional "trolling" that occurs under the NLRB's current test, the Employer quotes one question by the Petitioner's counsel in the 535 page Record, in which counsel questioned a witness regarding her testimony that 15 of SXU's Board Members are "practicing" Catholics. Notably, the *Employer* decided to place into evidence the relative religiosity of its Board members not Petitioner. Thus, the follow-up question by Petitioner's counsel was wholly proper. In any event, the Employer's decision to highlight this inquiry as an example of "trolling" permitted in this matter it is grossly disingenuous because (1) the Administrative Law Judge ultimately did *not* permit Petitioner to pursue this line of inquiry (TR p. 216), and (2) Petitioner's counsel voluntarily withdrew the question in any event. (TR. 425). Ironically, despite the fact that Petitioner withdrew the question – having recognized that the inquiry and response was immaterial to the issues to be resolved by the NLRB, the Employer chose to include in its Brief to the Board the hearsay testimony that *it* solicited from its witness that at least 15 members of the Board are "practicing Catholics" and are "committed" to the Church. (ER Brief p. 6 and fn 6). Respectfully, the Sisters of Mercy cannot have their cake and eat it too, with respect to their selective presentation of "trolling" facts.

II. THE BOARD'S TEST IS CONSISTENT WITH SUPREME COURT PRECEDENT AND LOWER COURT DECISIONS INTERPRETING *CATHOLIC BISHOP*

A. *Catholic Bishop* Does Not Foreclose NLRB Jurisdiction Over all Religiously Affiliated Universities

A close reading of *Catholic Bishop* reveals that, in determining whether the NLRB can assert jurisdiction over a labor dispute involving teachers at a college with a religious affiliation, the key question is whether the teachers themselves perform a religious function. The narrow question addressed in *Catholic Bishop* was "[w]hether teachers in [parochial] schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act." 440 U.S. at 491. *Catholic Bishop* involved teachers in "parochial schools" who were found to be "under religious control and discipline." *Id*. at 500. Under such circumstances, the Court found that "the separation of the religious from the purely secular aspects of pre-college education" would be impossible. *Ibid*. (citations omitted).

Thus, *Catholic Bishop* held that the Board does not have jurisdiction over *teachers* at parochial schools, who were held to be, as a class, under religious control and discipline. This holding did *not* "exclude church-operated schools, as entire units, from the coverage of the NLRA." *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1301-02 (9th Cir. 1991). Indeed, it does not extend to all teachers employed by an institution with a religious affiliation---instead, the holding that there was no NLRB jurisdiction was limited to teachers who are under an "obligation . . . to imbue and indoctrinate the student body with the tenets of a religious faith." *NLRB v. Bishop Ford Cent. Catholic High School*, 623 F.2d 818, 822 (2d Cir. 1980).

The rationale behind the decision is simple: "It is the commitment of the faculty to religious values no matter what subject in the curriculum is taught and the obligation to

propagate those values which provides the risk of entanglement." *Ibid*. *Accord Denver Post of the Nat'l Soc. of the Volunteers of America v. NLRB*, 732 F.2d 769, 772 (10th Cir. 1984). A direct corollary to this analysis is that, where the faculty tasked with teaching a given subject in the curriculum is not committed to religious values—where such faculty has no obligation to propagate those religious values—there is no risk of entanglement.

Catholic Bishop suggests then that two issues are of direct relevance to the inquiry into whether a unit of employees at a church-operated institution must be excluded from the Board's jurisdiction in order to avoid excessive entanglement: whether the institution has a secular or religious purpose, and whether the function performed by the employees at issue is religious or secular in nature. *See, e.g The Salvation Army*, 345 NLRB 550, 550 (2005) (inquiry under *Catholic Bishop* is *not* whether the employer "is a religious institution" but whether the "function" performed by the employees at issue is "one of religious education.")

Indeed, such a reading of *Catholic Bishop* is consistent with the approach of the Ninth Circuit in *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295 (9th Cir. 1991). In *Hanna Boys Ctr.,* the Ninth Circuit looked to the "pervasively secular nature" of the employees in holding that the NLRB could constitutionally assert jurisdiction over nonteaching employees at a religious school. *Id.* at 1306. It explicitly rejected the contention that "the effect of *Catholic Bishop* is to exclude church-operated schools, as entire units, from the coverage of the NLRA," since the facts of Catholic Bishop were confined to Board jurisdiction over *teachers*. *Id.* at 1301 (emphasis added). In so holding, the court construed *Catholic Bishop* to permit NLRB jurisdiction to depend on the type of work performed by the employees seeking to unionize. *Id.* at 1301-02. The Ninth Circuit acknowledged that *Catholic Bishop* included broad language that could be read, as the D.C. Circuit appears to read it, to suggest that entire schools were exempt.

Id. However, the court stated that "we think it clear from the rest of the Court's opinion that the ruling of Catholic Bishop is not nearly so broad as *Hanna* contends." *Id.*

Instead, it would be far more consistent with effectuating the Constitutional rights of these educators, as well as the remedial policies and purposes of the NLRA, to recognize that the facts of *Catholic Bishop* were confined to *parochial* schools in which teachers could be more readily presumed to play a "unique role" in accomplishing the religious goals of the school. In contrast, in a university setting in which academic freedom is guaranteed to the teaching faculty, who teach a range of specialized subjects, such a "unique role" in accomplishing religious goals is not to be lightly presumed. *College of Notre Dame and Int'l Union of Operating Engineers*, 245 NLRB 386 (NLRB 1979).

B. The Board's Test for Determining Exercise of Its Jurisdiction is Consistent with *Catholic Bishop*

The Employer criticizes the Board for departing from officially reported Board precedent in recent cases by instead relying directly on *Catholic Bishop*. Brief at 1. Specifically, the Employer contends that the Board did so in deciding the recent case of *Catholic Social Services, Diocese of Belleville v. Teamsters Local No. 50*, 355 NLRB No. 167 (2010). *See Brief* at 35 ("The Board appeared to abandon the substantial religious character test completely in [*Catholic Social Services*]"). It is unclear how the Board can be criticized for following and applying binding precedent from the United States Supreme Court. Moreover, contrary to the Employer's contention, the Board's recent applications of its test have been consistent with its historic approach. Even putting this point aside, however, a review of NLRB decisions reveals that the Board's jurisdiction analysis has been consistent with *Catholic Bishop* and wholly consistent with a wealth of other cases in federal and state courts.

In the recent case of *Catholic Social Services*, the Board denied review of the Regional

Director's assertion of jurisdiction over the Employer, a not-for-profit Illinois corporation doing business as Catholic Social Services of Southern Illinois, which operated a non-profit, licensed, childcare facility ("the Center"). *Catholic Social Services,* 344 NLRB at 1. The Employer contended that, because it is a religious organization, the Regional Director should not have asserted jurisdiction over the Employer under *Catholic Bishop*. *Id.* The Board disagreed, extending jurisdiction over the employer and reasoning that "a religious institution may, for reasons central to its tents, hold itself out as providing and actually provide critical, but *wholly secular* social services. That is the case here." *Id. fn* 2.

The Board exercised jurisdiction in light of *function* of the employees in question: the Regional Director had determined that these employees (residential treatment specialists and aides) did not teach or inculcate religious values when tutoring or teaching the children in residence, for "[n]o specific religious-based courses [were] taught to the children" and "no religious services or programs [were] held at the Center." *Id.* at 2. The Board declined to "assume that church sponsorship implies that religious doctrine will inform how that broad range of social services are provided,"— such an assumption "would sweep away decades of Board precedent post-*Catholic Bishop*, precedent that has been repeatedly affirmed in the courts of appeals. *Id.* citing *Hanna Boys Center*, 284 NLRB 1080, 1083 (1987), enfd. 940 F.2d 1295 (9th Cir.1991), cert. denied 504 U.S. 985 (1992),; *Salvation Army of Massachusetts Dorchester Day Care Center*, 271 NLRB 195 1984), enfd. 763 F.2d 1 (1st Cir. 1985); St. *Louis Christian Home*, 251 NLRB 1477 (1980), enfd. 663 F.2d 60 (8th Cir. 1981).

Indeed, this assumption— that church sponsorship necessarily implies that a teacher at a religiously-affiliated college is involved in the inculcation of religious doctrine or teaching of religious programs—is built in to the D.C. Circuit's test, and would sweep away decades of

Board precedent. Rejecting such an assumption, this Board has long established its own rigorous test, consistent with the holding in *Catholic Bishop*, for determining when it should decline jurisdiction due to Establishment clause issues. Applying *Catholic Bishop*, the Board has noted that the United States Supreme Court focused its analysis on the "purpose of the school [and] the role of the teacher in effectuating that purpose," concluding that it would deny jurisdiction only over those "educational institutions whose purpose and function in substantial part is the propagation of a religious faith." *See, e.g. Jewish Day School of Greater Washington, Inc. v. American Federation of Teachers Local 3648, AFL-CIO*, 283 NLRB 757 (1987). Compare *St. Joseph's College*, 282 NLRB 65, 68 (1986) (declining jurisdiction in light of "the College's requirement that faculty members conform to Catholic doctrine and agree on hire 'to promote the objectives and goals . . . of the Sisters of Mercy of Maine' and "[t]he pervasiveness of the Order's influence on the teaching of the College, even as to subjects commonly viewed as secular") *with Livingston College*, 286 NLRB 1308, 1309-10 (1987) (asserting jurisdiction over a unit of teaching faculty where "the absence of a requirement that the faculty propagate or conform to a particular religious faith significantly diminishe[d] any risk of impermissible constitutional infringement posed by asserting jurisdiction" and according greater weight to "the fact that faculty members are not required to conform to AME [church] doctrine or promote the ideals and objectives of the AME Church" than to whether the College itself "ha[d] a religious mission.")

As the Regional Director observed in his Decision, the Board has historically considered a multitude of factors in its inquiry into whether assertion of jurisdiction presents a significant risk that the First Amendment will be infringed. Decision at 9. "The Board has not relied solely on the employer's affiliation with a religious organization, but rather has evaluated 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 *University of Great Falls,* 331 NLRB 1663, 1664-65 (2000). As part of this multi-factor inquiry, over the past two decades when confronted with *Catholic Bishop* challenges, the Board has consistently assessed the actual *functioning* of the institution and the role of unit employees.

Where the purpose of the employer's operations and the function of unit employees in effectuating that purpose are sectarian, the Board withholds jurisdiction, but where the function is clearly secular, it has asserted jurisdiction. *Compare Jewish Day School of Greater Washington, Inc. v. American Federation of Teachers Local 3648, AFL-CIO*, 283 NLRB 757 (1987) (declining to assert jurisdiction where school's articles of incorporation stated a central aim was to teach religious subjects "in accordance with the principles of the Jewish faith with the purpose of giving each student a thorough Jewish education," and religious instruction was mandatory at all grade levels, comprising forty percent of a child's school day) with *Harborcreek School for Boys v. Amalgamated Food Employees Union Local , UFCW, AFL-CIO*, 249 NLRB 1226 (1980)(school owned by the Catholic Bishop of the Diocese of Erie which was governed by board of directors empowered by the diocese and whose mission was to "perform works of mercy" was subject to NLRB jurisdiction since the actual purpose of the school "is not the promulgation of the Roman Catholic faith but the provision of social services on a nondenominational basis," "none of the employees was required to have any particular religious background or training," and there was "no showing that any employee is directly or indirectly involved in the teaching of a religious philosophy.")

This consistent approach of the Board to determining its jurisdiction is wholly consistent with a wealth of cases directly considering the Establishment Clause implications of applying

labor relations statutes to religiously affiliated institutions. In the 1980s, lower federal courts clarified the narrow scope of the Supreme Court's *Catholic Bishop* decision as they applied the National Labor Relations Act to a broad spectrum of religiously affiliated social services organizations. *See St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193 (7th Cir. 1983) and *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436 (9th Cir. 1983)(applying NLRA to hospitals); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3d Cir. 1982) (nursing homes); *Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB*, 752 F.2d 345 (8th Cir. 1985); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (homes for neglected and troubled children); *see also Denver Post of the Nat'l Soc'y of the Volunteers of Am. v. NLRB*, 732 F.2d 769 (10th Cir. 1984) (addressing church-operated programs for troubled children as well as programs providing shelter for women and children and a program for victims of crime); and *NLRB v. Salvation Army of Mass. Dorchester Day Care Ctr.*, 763 F.2d 1 (1st Cir. 1985) (day care centers). These decisions collectively demonstrate that entanglement problems under the Establishment Clause are unlikely to occur in a context where a religiously-motivated program functions like a secular charitable enterprise and does not implicitly involve the dissemination of religious doctrine.

From the mid-1980s and into the 1990s, three state Supreme Courts and one federal circuit court addressed the Constitutional question presented but not directly addressed by *Catholic Bishop*, upholding against First Amendment challenges the application of state labor laws to lay teachers at church-operated schools. *See Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161 (2d Cir. 1985); *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709 (N.J. 1997); *N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960 (N.Y. 1997); *Hill-*

Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992). Each case involved the collective bargaining of lay teachers at religious institutions pursuant to state labor provisions. These courts have uniformly found that mandatory collective bargaining is Constitutional, even in quintessentially religious enterprises such as *parochial* schools. *Culvert*, 753 F.2d at 1166-71; *St. Teresa*, 696 A.2d at 585-602; *Christ the King*, 682 N.E.2d at 963-66; *Hill-Murray*, 487 N.W.2d at 862-64. All four courts held that the constitutional concerns articulated in *Catholic Bishop* do not preclude application of the state labor laws. The rationale: even where a substantial religious mission permeates church-operated schools and teachers are key players in this religious mission, the process of collective bargaining, when limited to secular matters and the remedial powers of the state, need not result in excessive entanglement of state with religion. *See St. Teresa*, 696 A.2d at 718; *Hill-Murray*, 487 N.W.2d at 864; *Culvert*, 753 F.2d at 1166-67; and *Christ the King*, 682 N.E.2d at 965.

In summary, the NLRB application of a test that evaluates the purpose of the employer's operations and the role of unit employees in effectuating that purpose is consistent with *Catholic Bishop*, consistent with its own precedent, and consistent with (although it does not go as far as) the rationale behind a plethora of other court's decisions construing the requirements imposed by the Establishment Clause.

C. Applying the Board's Test to the Instant Facts, the Regional Director Properly Asserted Jurisdiction to Order an Election for the SXU Adjuncts

Application of the NLRB's test under *Catholic Bishop* compels the conclusion that Board jurisdiction over SXU is fully proper, for the secular purpose of St. Xavier and the secular nature of the work performed by the employees in question is beyond dispute.

It is undisputed that SXU provides a *wholly* secular education for secular students taught by secular instructors who are selected and evaluated by secular department chairs or faculty

who use secular criteria, and that the instructors have complete freedom to choose any secular texts they wish and teach using wholly secular curriculum, including texts and instruction that are directly contrary to the Catholic faith. The Regional Director found that the "University has no requirement for faculty, including adjuncts, to espouse or emphasize Catholicism in their teachings or imbue students with the tenets of the Catholic faith." Decision at 6.

Indeed, St. Xavier's academic freedom policy and the independence of its faculty from hiring and firing decisions based on failure to conform to religious doctrine guard against the "entanglement issues". The Regional Director determined that the University does not investigate the religious beliefs of its students, faculty, or trustees. Decision at 6. He noted that the Articles of Incorporation (as last amended on or about 1973) in fact forbid discrimination based upon religious "profession" and were also expanded to ensure that the same academic freedom standards that applied to its students would also apply to the faculty. To wit, they provide:

> *No* religious, racial, color or ethnic test or particular religious profession shall *ever* be held as a requisite for admission to said colleges or university or to *any* department belonging thereto or which shall be under the supervision or control of this Corporation, *or for election to any professorship*, or any place of honor or emolument in said Corporation, or any of its departments or institutions of learning.

ER Ex. 7 p.5 (Emphasis added), cited by Decision at 6.

Because Professors are totally free to choose whatever curriculum they please, to teach whatever materials that are pertinent to classroom studies irrespective of content – including content that is antithetical to the Catholic faith – and are not evaluated whatsoever on the basis of participation in religious events on or off campus, there is no possibility that a professor could be evaluated, disciplined, or discharged based upon a "religious" matter.

It is worth noting that adducing the simple facts outlined above did not require "trolling" into the personal religious beliefs of the Board of Directors or of any individuals, nor did it require any inquiry or judgment as to the validity of the role of the Sisters of Mercy in the University, past or present. Instead, as the Employer acknowledges (Brief p. 31) the Petitioner's investigation was solely limited to questions regarding XSU's publicly acknowledged commitment to academic freedom. The information that the Petitioner gleaned (and the Regional Director relied upon in his Decision) regarding the University's commitment to academic freedom came from legal documents on file with the Secretary of State and/or the University's own self-descriptive public statements.

In this case, it is clear from the articles of incorporation, contracts, and other legal documents that the adjunct faculty in question are under no obligation or expectation to inculcate *any* religious values, hence none of Employer's concerns about entanglement under the Establishment Clause are applicable.[6]

The Employer here attempts to claim that the Board has no jurisdiction over the SXU dispute because of "officially reported Board precedent" from which the Regional Director

[6] Once again, Petitioner notes it is the Employer who keeps referring to testimony regarding how religious it is, describing religious symbols on campus, Medallion ceremonies, and activities performed under the auspices of the Office for University Mission and Heritage (Brief pp. 18-21). Notably, none of the activities performed by the Office for University Mission and Heritage (nor the voluminous documents cited in the Employer's Brief fn 14, including materials taken from the personal library of Sister Saunders to be presented at the Hearing) – have any bearing on this Board's assessment of the Employer's request for review: it is undisputed, as the Employer ultimately concedes, that no students or faculty are ever required to have any connection to this "Office." R 227-264. Likewise, the fact that SXU "hosts" various events at the University that deal with the Catholic faith (Brief pp. 13-18) is likewise irrelevant since it is undisputed that faculty and students are not required to attend any of these activities, as the Employer so concedes. (Brief p. 17, citing R 515). By the same token, the references to the dictates of *ex corde* in the Employer's Brief at pp. 12 to 13 are of questionable relevance, in comparison with the institution's statement of purpose in its Articles of Incorporation, because the Employer's witness testified that nothing requires SXU to follow it (R. 307).

purportedly departed without justification, *Trustee of St. Joseph's Coll.*, 282 NLRB 65 (1986). Employer contends that St. Joseph's College is binding precedent because the facts in *St. Joseph's College* "are virtually identical to the facts in the instant case." Petition for Review at 39. But wishing doesn't make it so.

A comparison of the factual findings of the Regional Director in *St. Joseph* with those of the regional director in SXU reveals some very important differences. In *St. Joseph's*, facts in evidence revealed that the list of criteria in selecting the College's President required that the president be a practicing Catholic, have a valid marriage, be pro Church, religion, and the Mission of St. Joseph's College, and to accept and support the objectives of the "sponsoring body." 282 NLRB at 66. In its faculty handbook, the faculty was prohibited from knowingly attempting to "inculcate ideas contrary to the official position of the Pope with the Bishops in matters of Faith and Morals." With respect to governance, at *St. Joseph's* all seven of the College's Board of Trustees had to be Sisters of Mercy, and in the instant case only four of the **24** Board members are Sisters of Mercy. Likewise the percentage of funding that SXU recieves from the Sisters of Mercy ($5 million) is de minimis when compared to the amount of money that SXU receives from other sources including Bank loans ($51-52 million) whereas at *St. Joseph's* the College "could not survive without the financial support of the Order." In *St. Joseph's* the employer also produced testimony that the Mother General "assigned" 18 nuns to teaching positions in the College. *Id.* at 66. There is no similar requisite here.

In finding, on an explicitly *case-by-case basis*, that jurisdiction should not be exercised, the Regional Director in *St. Joseph's* noted the following facts:

> The Bishop of Portland also possesses a significant degree of control over the College. . . in his ability to remove faculty members if their conduct is not in harmony with Catholic beliefs or to determine what books are to be used in the classroom. The pervasiveness of the Order's influence on the teaching of the

> College, even as to subjects commonly viewed as secular, is also apparent in certain requirements imposed on the faculty. New faculty members are required to sign a letter of employment in which they agree that it is part of their duties "to *promote* the objectives and goals" of the Order (emphasis added). In addition, all faculty members are prohibited [under the employee handbook] from knowingly inculcating ideas which are contrary to the position of the Catholic Church on matters of faith and morals

Id. at 68. These facts have no cognate in the instant case.

Finally, the Employer insists – without providing any rationale – that the fact that the Bishop of Portland had an "influential role" at *St. Jospeph's* but the Bishop here has no similar role – should not be given any weight. But this is clearly a highly pertinent difference between the institutions; indeed, as the Employer acknowledges, in *St. Joseph's*, the Bishop had the authority to choose which books the College could use and was entitled to seek discharge of faculty members who contradict the teachings of the Catholic Church. Here, by contrast, it is undisputed that the *faculty* have the absolute right to choose their own books (even those that are antithetical to the Catholic faith) and to develop their own curriculum. Indeed, not even the Board of Directors, the President or the Provost have any right in this critical domain of self-governance and ultimate sign of academic freedom that is vested in SXU's faculty; moreover, religion and religious belief can play *no* role in the evaluation of any faculty member at SXU.

Thus, contrary to the inference created by SXU (Brief p. 43) that its faculty are somehow constrained with respect to what they can and cannot teach, the Record evidence firmly establishes that at SXU the teachers' discretion is absolutely unfettered. This difference between SXU and *St. Joseph's* is, in itself, outcome determinative. *See also Manhattan College v. Manhattan College Adjunct Faculty Union, New York State United Teachers, AFT/NEA/AFL-CIO* 2-RC-23543(Jan. 10, 2011) (asserting jurisdiction over Catholic college despite requirement that "in the hiring of faculty and staff the College will 'discuss the mission statement, the

College's Catholic identity, and its Lasallian tradition,'" and that employees must sign a letter of appointment and contract that expresses their "agreement to respect the College's Catholic identity and Lasallian tradition.")

CONCLUSION

Based upon the Record evidence developed in this matter, the Petitioner respectfully submits that this is not a "close call;" XSU is *clearly* covered by this Board's jurisdiction under its well established test that is fully in accord with *Catholic Bishop* as well as the Board's own past precedents.

WHEREFORE Petitioner respectfully requests that this Board AFFIRM the Regional Director's Decision in this matter.

Respectfully submitted,

Petitioner, SXU Adjunct Faculty Organization, IEA-NEA

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that she caused a copy of the foregoing **Brief in Support of Regional Director's Decision** to be served upon the following via electronic filing and e-mail this 14th day of September, 2011:

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