

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

SAINT XAVIER UNIVERSITY,)	
)	
Employer,)	
)	
And)	Case No. 13-RC-22025
)	
ST. XAVIER UNIVERSITY ADJUNCT)	
FACULTY ORGANIZATION, IEA-NEA,)	
)	
Petitioner.)	

**SAINT XAVIER UNIVERSITY’S RESPONSE TO PETITIONER’S BRIEF AND TO
THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS’ AND THE AMERICAN FEDERATION OF TEACHERS’ *AMICI
CURIAE* BRIEF IN SUPPORT OF THE REGIONAL DIRECTOR’S DECISION**

Saint Xavier University (the University) requested review of the Regional Director’s Decision and Direction of Election in this case, asking that the Board reverse the Regional Director’s Decision because the substantial religious character test used in that decision to determine whether the University is “sufficiently religious” is unconstitutional. Instead, as the University argued in its Request for Review, the Board should adopt the D.C. Circuit’s three-pronged test and decline jurisdiction over the University and its adjunct faculty.

In response, Petitioner and the American Federation of Labor and Congress of Industrial Organizations and one of its affiliates, the American Federation of Teachers (collectively referred to herein as the AFL-CIO), filed briefs in support of the Regional Director’s Decision and Direction of Election urging that not only should the Board uphold the Regional Director’s application of the unconstitutional substantial religious character test in determining whether an institution is exempt from the National Labor Relations Act (NLRA or the Act), but that it should go a step further and examine not only the religious character of the University but that of

its teachers as well. In its arguments, the Petitioner and the AFL-CIO ignore controlling precedent holding that teachers at church-operated schools are exempt from the jurisdiction of the Act and from the type of intrusive inquiry proposed here.

I. THE PETITIONER'S AND THE AFL-CIO'S FOCUS ON THE RELIGIOUS FUNCTION OF THE ADJUNCT FACULTY AT THE UNIVERSITY IS MISPLACED.

The employees at issue in this case are adjunct faculty at a university that was founded by and continues to be affiliated with and sponsored by the Sisters of Mercy, a Roman Catholic religious order. As such, they are teachers at a church-operated school and exempt from jurisdiction of the Board under *Catholic Bishop. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).¹

In opposing the University's Request for Review, the Petitioner's and the AFL-CIO's briefs generally make the same misguided argument. Both argue that the Board's substantial religious character test is constitutional under the United States Supreme Court's ruling in *Catholic Bishop*, and that by striking down that test and creating a bright-line three-part test, the D.C. Circuit fundamentally misinterpreted the holding in *Catholic Bishop*. This argument conflates the two issues present in *Catholic Bishop*:

- (a) Whether teachers in schools operated by a church...are within the jurisdiction granted by the [NLRA]; and (b) if the act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses....

¹ It is the position of the University that under the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and the D.C. Circuit's decisions in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009) and *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), that church-operated schools, as a whole, are exempt from jurisdiction under the Act and that the Board may not perform further inquiry beyond the three-prong approach set forth in *Carroll College* and *Great Falls*. These arguments are set forth in the University's Request for Review. The purpose of this brief is to address Petitioner's and the AFL-CIO's arguments raised for the first time in response to the University's Request for Review that the D.C. Circuit's three-part test fundamentally misinterprets the U.S. Supreme Court's holding in *Catholic Bishop* and that the correct Board test should actually focus on the role of the unit employees in effectuating the employer's purpose, rather than solely on the employer. As such, this brief focuses on the adjuncts' status as teachers.

NLRB v. Hanna Boys Center, 940 F.2d 1295, 1300 (9th Cir. 1991), quoting *Catholic Bishop*, 440 U.S. at 491. In *Catholic Bishop*, the Court never addressed the second issue (whether exercising jurisdiction violates the First Amendment by causing excessive entanglement), because it concluded that the Act simply does not apply to teachers at church-operated schools.²

As noted below, however, Petitioner and the AFL-CIO ignore the first step in the two-part analysis set out by the Court and subsequent federal Circuit Courts. They conflate the first and second step into one test, and as a result, advocate that the Board use a test that trolls through and examines the nature of the University’s religious mission and the function of its teachers in carrying out its religious mission, an inquiry wholly inappropriate in light of *Catholic Bishop*.

A. The Supreme Court’s Holding in *Catholic Bishop*.

Petitioner claims that under *Catholic Bishop*, the “key question is whether the teachers themselves perform a religious function.” Pet. Br. p. 15. Petitioner argues that there are two inquiries under *Catholic Bishop*, namely whether the institution is religious or secular, and whether the employees’ function is religious and secular (although notably, Petitioner cites the Board’s decision in *The Salvation Army*, 345 NLRB 550 (2005), a case that did not involve teachers, and not *Catholic Bishop*). Pet. Br. P. 16. The AFL-CIO phrases the issue slightly differently, claiming that “the proper focus in determining whether a unit of employees is excluded from the Board’s jurisdiction 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.’” AFL-CIO Br. p. 5.

² The proposed bargaining units in *Catholic Bishop* were comprised of groups of teachers at church-operated schools. Nothing in the Supreme Court’s decision in *Catholic Bishop* indicates that the Court intended to limit this holding to teachers, however. Rather, the Court held that the Board does not have jurisdiction over religious educational *institutions* because exercising jurisdiction would result in excessive entanglement, in violation of the First Amendment. *Catholic Bishop*, 440 U.S. at 504, 507.

Both claims are incorrect. The Supreme Court did not prescribe a jurisdictional test in *Catholic Bishop*, and it certainly did not hold that the appropriate test is to examine whether teachers perform a religious function at the school. *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009) (“The [Supreme] Court saw ‘no escape’ from these ‘serious First Amendment questions’ if the Board was permitted to exercise jurisdiction over church-operated schools. But the Court offered no test for determining whether a school is beyond Board jurisdiction.”); *see also Catholic Bishop*, 440 U.S. at 506-507. Petitioner’s and the AFL-CIO’s claims to the contrary are simply erroneous.

The issue the Court addressed in *Catholic Bishop* was a more fundamental issue: whether Congress intended the NLRA to apply to teachers in church-operated schools. *Catholic Bishop*, 440 U.S. at 491. To answer this question, the Court focused on Congress’ intent when it passed the Act. *Id.* at 504. The Court concluded that in passing the Act, Congress sought only to protect the rights of employees in private industry, and gave no consideration to church-operated schools:

In enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively. The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the collective activities of employers which had been authorized by the National Industrial Recovery Act. But congressional attention focused on employment in private industry and on industrial recovery.

Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools. It is not without significance, however, that the Senate Committee on Education and Labor chose a college professor’s dispute with the college as an example of employer-employee relations not covered by the Act.

Id. at 504-505 (citations omitted) (emphasis added).

Based on this legislative history, the Court concluded that Congress did not intend to bring teachers at church-operated schools within the jurisdiction of the Act. *Id.* at 507. But the Court provided no guidance on how to define a church-operated school, or the appropriate test for the Board to use. *See id.* In fact, the Court concluded that Congress had given “no consideration to church-operated schools,” when it passed the NLRA. *Id.* at 504.

The Court’s holding in *Catholic Bishop* was later applied to post-secondary educational institutions, not just to primary and secondary schools. This is confirmed by then-Judge Breyer’s opinion in *Universidad Central de Bayamon*, and the Board’s decision in *St. Joseph’s College*. In both cases, Judge Breyer and the Board recognized that the ruling in *Catholic Bishop* extended beyond the specific facts of that case, to a wider range of church-affiliated schools and their employees. *See Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 401 (1st Cir. 1986) (Breyer, J., denying enforcement in an equally divided *en banc* court) (extending *Catholic Bishop* to a university because the Supreme Court’s holding did not distinguish between colleges and primary or secondary schools); *St. Joseph’s College*, 282 NLRB 65, 68 (1986) (same).

In concluding that teachers in church-operated schools are not within the jurisdiction of the Act, the Court avoided the question of whether the exercise of the Act over teachers in church-operated schools violates the guarantees of the Religion Clauses. *Catholic Bishop*, 440 U.S. at 491. The Board and courts have faced that inquiry in later cases involving non-teachers.

B. The Primary Cases Relied Upon by Petitioner and the AFL-CIO Do Not Involve Teachers.

The Supreme Court in *Catholic Bishop* recognized that teachers in church-operated schools played a “critical and unique role...in fulfilling the mission of a church-operated school.” *Catholic Bishop*, 440 U.S. at 501. The Court therefore found that lay teachers of both religious and secular subjects, regardless of their personal faith and religious activities, were exempt from the jurisdiction of the Act. Indeed, the bargaining units at issue in *Catholic Bishop* included physical education teachers as well as teachers of various secular subjects such as math and English. *Id.* at 493 n.5).

In support of its argument that the Board should examine the religious function of the University’s teachers, the Petitioner and the AFL-CIO rely heavily on the Ninth Circuit’s decision in *Hanna Boys Center*, a case wholly inapposite to the case at hand. *Hanna Boys Center* involved child-care workers, recreation assistants, cooks, cooks’ helpers, and maintenance workers at a residential school for boys operated by the Roman Catholic Church. The school argued that *Catholic Bishop* must be broadly construed to apply not only to teachers but to all employees of religiously affiliated schools. In the alternative, the school argued that the child-care workers were “teachers” and thus exempt from the Board’s jurisdiction under *Catholic Bishop*.

The Ninth Circuit concluded that the Supreme Court intended to limit its holding in *Catholic Bishop* to teachers based on the unique role of a teacher in furthering the school’s religious mission. The court found that the child-care workers “function as someone akin to a ‘dormitory monitor,’” and not as teachers. Once it determined that the employees were not teachers, the Ninth Circuit had to address the second issue that the Supreme Court avoided in *Catholic Bishop*: whether exercising jurisdiction would result in excessive entanglement.

In analyzing the issue, the Ninth Circuit applied the three-pronged test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), to determine whether exercising jurisdiction would foster excessive state entanglement with religion, and in applying the *Lemon* test, the Ninth Circuit analyzed the function of the employees. Specifically, the court found that application of the NLRA to the school’s *non-teaching* staff did not cause excessive entanglement because the school’s “religious character and mission was furthered by others than the employees” in the proposed bargaining unit. *Hanna Boys Center*, 940 F. 2d at 1304.

Although *Hanna Boys Center*, as well as *The Salvation Army*, 345 NLRB 550 (2005), another case relied upon by Petitioner, did not involve teachers, Petitioner and the AFL-CIO would have the Board examine the religious function of the University’s teachers, an inquiry flatly rejected by the Supreme Court in *Catholic Bishop*, by the Ninth Circuit in *Hanna Boys Center*, and by the D.C. Circuit in *Carroll College and Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). See Pet. Br. pp. 16, 19; AFL-CIO Br. pp. 4-8. *Hanna Boys Center* does not permit such an inquest in this case, however, because the employees at issue in this case **are teachers**.³

³ As noted above, it is the position of the University that all employees at religious educational institutions are exempt under *Catholic Bishop*. Asking whether a particular employee or group of employees performs a “religious function” is precisely the sort of intrusive and entangling inquiry that the Supreme Court disapproved in *Catholic Bishop*. See also *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 402 (1st Cir. 1986) (en banc) (opinion of Breyer, J.) (“we cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board ‘entanglement’ as they are administered”). Shifting emphasis to each individual employee’s job functions is likewise incompatible with the NLRA’s focus on entire “bargaining units.” Moreover, the First Amendment entanglement inquiry typically and appropriately examines the relationship between the government and a religious institution rather than the government and a particular employee. The Board need not address in this case the issue of whether *Catholic Bishop* applies to employees other than teachers, however, because the employees in the proposed bargaining unit in this case are teachers and thus exempt under *Catholic Bishop*.

II. THE D.C. CIRCUIT CORRECTLY FOLLOWED ESTABLISHED PRECEDENT IN DECLARING THE BOARD'S TEST UNCONSTITUTIONAL.

In its decisions in *Carroll College* and *Great Falls*, the D.C. Circuit sought to clarify an issue left open by the Supreme Court in *Catholic Bishop* – how should the Board and the courts determine whether an educational institution is religious and, therefore, exempt from the Board's jurisdiction? Specifically, the D.C. Circuit articulated a three-part bright line test that avoided the entanglement created by the Board's substantial religious character test.

The Petitioner and the AFL-CIO claim that the D.C. Circuit misinterpreted the holding in *Catholic Bishop*, and therefore the Board should not follow the D.C. Circuit's three-part test for determining whether the Board has jurisdiction over a particular educational institution. They argue that the D.C. Circuit's test contradicts *Catholic Bishop* because the D.C. Circuit's three-part test focuses solely on the nature of the institution, and not on whether the function of the employees is religious or secular.

Petitioner and the AFL-CIO misinterpret the two decisions. As noted above, in *Catholic Bishop*, the Supreme Court addressed whether Congress intended the Act to apply to teachers in church-operated schools. It did not explain how to define church-operated schools, and it did not set forth a test for determining whether a school fell within the jurisdiction of the Act. It did, however, briefly describe several ways in which the Board's jurisdiction would entangle a church-operated school. *Catholic Bishop*, 440 U.S. at 502. In particular, it recognized that “[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Id.*

Because the Supreme Court did not set forth a jurisdictional test, the Board created its own test. In doing so, it came up with the “substantial religious character test,” a test designed to determine if a school is religious enough to be considered a religious institution, and whether specific school practices and policies (as applied to students, faculty, the board of trustees, and the curriculum) are secular or religious. *See University of Great Falls v. NLRB*, 278 F.3d 1335, 1339 (D.C. Cir. 2002).

As the D.C. Circuit repeatedly recognized, the problem with the Board’s jurisdictional test is that it is simply too intrusive—it requires the Board to parse or “troll” through the school’s religious beliefs, assessing the nature of the beliefs, determining the religious mission, and deciding if the school is “religious enough.” *Carroll Coll. Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009); *University of Great Falls*, 278 F.3d at 1343. Essentially, this test allows a federal administrative agency the ability to define what is or is not “religious.” Consequently, the D.C. Circuit struck down the test and established a three-part test that does not involve any intrusive trolling. In doing so, the D.C. Circuit based its decision in part on *Catholic Bishop’s* recognition that entanglement can occur by an overly intrusive process, but it also based its decision on a plethora of other (mostly more recent) Supreme Court cases supporting the same conclusion. *See University of Great Falls*, 278 F.3d at 1341-1342 (citing *Catholic Bishop*, 440 U.S. at 502, *Mitchell v. Helms*, 530 U.S. 793 (2000); *Employment Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presiding Bishop v. Amos*, 483 U.S. 327 (1987)).

Petitioner and the AFL-CIO mistakenly argue that the D.C. Circuit’s rulings contradict *Catholic Bishop*, but that is simply incorrect. The D.C. Circuit’s holdings in *Carroll College and Great Falls* provide a constitutional, three-pronged test for determining when, under *Catholic*

Bishop, an educational institution is religiously affiliated without trolling through the religious mission and beliefs of the school or university. If the school or university is church-operated and the employees are teachers or professors, the inquiry ends under *Catholic Bishop*.

In other words, *Catholic Bishop* examined the scope of the NLRA and whether it included teachers at church-operated schools. *University of Great Falls* and *Carroll College* examined whether the method used by the Board to identify church-operated schools violated the First Amendment. In holding that it did, the D.C. Circuit relied on the firmly established principles that the government cannot delve into matters of religious doctrine or motive, or sit in the place of the Roman Catholic Church to decide how it thinks a Catholic university should act. *Hanna Boys Center* examined the appropriate test if the employer does not fall under the jurisdictional exception set forth in *Catholic Bishop* and clarified by the D.C. Circuit.

In its brief, the AFL-CIO claimed that it is “imperative that the Board correct the D.C. Circuit’s misunderstanding by clearly explaining, once again, that Catholic Bishop does not ‘exclude church-operated schools, as entire units, from coverage of the NLRA.’” AFL-CIO Br. p. 8. This argument puts the servant above the master. It is the D.C. Circuit and other federal courts, not administrative agencies (like the Board), that are the final arbiters of constitutional issues. See *University of Great Falls*, 278 F.3d at 1341 (recognizing that *Chevron* deference is not appropriate when addressing questions of constitutional concerns and Supreme Court precedent; federal courts are the experts in analyzing such issues, not the Board). The University is not aware of any cases that criticize, let alone disagree with the D.C. Circuit’s holdings in *University of Great Falls* and *Carroll College* that the Board’s test is unconstitutional. Similarly, the University is unaware of any cases concluding that the D.C. Circuit’s test is inconsistent with the Supreme Court’s ruling in *Catholic Bishop*. Because Petitioner and the AFL-CIO have not

cited any federal opinions questioning the D.C Circuit's decisions, this Board must defer to the D.C. Circuit's expertise in this area of the law and adopt a test that does not troll through the University's beliefs.

Lastly, throughout their briefs Petitioner and the AFL-CIO cited Board cases in which the Board examined the employees' function in propagating religious values in order to determine whether the Board had jurisdiction. These cases are not relevant, however, because they miss the point. The University agrees that under the Board's substantial religious character test, one of the issues the Board considers is the employees' function in propagating religious values. *See e.g., Livingstone College*, 286 NLRB 1308, 1309-1310 (1987); *Jewish Day School*, 283 NLRB 757, 761-762 (1987).

The issue in this case, however, is not whether the Board examines these factors. The issue is that under *Catholic Bishop, Carroll College*, and *Great Falls*, the Board violates the First Amendment by doing so – by trolling through the University's religious mission, weighing whether its mission is central to its primary purpose, and examining and assessing whether it is “religious enough,” the Board excessively entangles itself in the University's religious mission and theology.

III. CONCLUSION.

The D.C. Circuit's three-part test is consistent with the holding in *Catholic Bishop*. The D.C. Circuit correctly held that the Board's current test for determining whether a school is “church-operated” is unconstitutional because it is intrusive and trolls through the University's beliefs. The D.C. Circuit's three-part test avoids such trolling, and therefore passes constitutional muster. Consequently, the Board should adopt the D.C. Circuit's three-part test. Moreover, the Board should refrain from adopting the approach proposed by the Petitioner and the AFL-CIO which would have the Board examine the religious function of the adjunct faculty,

regardless of their status as teachers at a church-operated school and, thus, exempt from the Act under *Catholic Bishop*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she caused a copy of the foregoing **SAINT XAVIER UNIVERSITY'S RESPONSE TO PETITIONER'S BRIEF AND TO THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS' AND THE AMERICAN FEDERATION OF TEACHERS' *AMICI CURIAE* BRIEF IN SUPPORT OF THE REGIONAL DIRECTOR'S DECISION** to be served upon the following, via electronic filing and via electronic mail, on this 28th day of October, 2011:

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