

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ISLAMIC SAUDI ACADEMY,

Employer,

and

ISLAMIC SAUDI ACADEMY EMPLOYEE
PROFESSIONAL ASSOCIATION (ISAEPA),

Petitioner.

Case 05-RC-080474

**EMPLOYER'S OPPOSITION TO
PETITIONER'S REQUEST FOR REVIEW**

Maureen E. Mahoney
Abid. R. Qureshi
Paul T. Crane
John A. Mathews
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004-1304
Tel: (202) 637-2200
Fax: (202) 637-2201

Joseph B. Farrell
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
Tel: (213) 485-1234
Fax: (213) 891-8763

*Counsel for Employer,
Islamic Saudi Academy*

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INTRODUCTION

Pursuant to Section 102.67 of the National Labor Relations Board’s Rules and Regulations, the Islamic Saudi Academy (the “Academy”) files this Opposition to Petitioner’s Request for Review of the Decision and Direction of Election issued by the Regional Director on June 14, 2012. Petitioner seeks review on two issues. The first issue is whether the Regional Director erred in concluding that the Academy was a religious school under the Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), thereby precluding the Board from exercising jurisdiction over the Academy’s teachers. This issue has both a factual and legal component. According to Petitioner, the Regional Director made faulty factual findings and, due in part to those findings, reached an erroneous legal conclusion. The second issue is whether the Regional Director erred when he declined to address whether Department Heads are supervisors under Section 2(11) of the National Labor Relations Act (“NLRA”).

The Board should deny Petitioner’s request because it fails to satisfy any of the criteria set forth in Section 102.67(c). The Regional Director’s factual findings are free from error, and his legal conclusion that the Academy is a religious school under *Catholic Bishop* was consistent with every prior Board precedent applying that decision—including *Jewish Day School of Greater Washington, Inc.*, 283 N.L.R.B. 757 (1987), and *Nazareth Regional High School*, 283 N.L.R.B. 763 (1987). Finally, the Regional Director plainly did not err by declining to address whether Department Heads are supervisors under the NLRA because it was no longer necessary to resolve that issue given his holding on the *Catholic Bishop* question. For all these reasons, Petitioner’s Request for Review should be denied.

ARGUMENT

I. THE REGIONAL DIRECTOR DID NOT ERR, FACTUALLY OR LEGALLY, WHEN CONCLUDING THAT THE ACADEMY IS A RELIGIOUS SCHOOL UNDER *CATHOLIC BISHOP*

After being presented with overwhelming evidence about the school's religious mission and how that mission permeates every aspect of life at the Academy, see D&DE 4-13, 24-26; Employer's Request for Review 2-9, the Regional Director reached the only conclusion supported by the record: "the school's purpose and function in substantial part is to propagate Islam." D&DE 26.¹ The Regional Director accordingly held that the Academy "is a religious school within the meaning of *Catholic Bishop* and [that] the Board will not assert jurisdiction over the teachers." D&DE 3. In so doing, the Regional Director emphasized the following six factors: (1) the Academy's charter, bylaws, mission statement, operations manual, website, and other public documents all state that the Academy is a religious school "established to teach Islam to its students"; (2) "religious instruction and attendance at [daily] prayer services are mandatory for students"; (3) "there is some integration of Islamic principles in other [non-religious] subjects"; (4) "the school maintains a halal cafeteria"; (5) "the teachers, regardless of their religious affiliation, must maintain the Islamic values taught at the school"; and (6) "the school has a dress code [for students and employees] which the school's policies state is based on Islam." D&DE 24-26.

In its request for review, Petitioner contends that the Regional Director committed factual and legal errors when holding that the Academy is a religious school under *Catholic Bishop* and

¹ In this brief, "D&DE" refers to the Decision and Direction of Election issued by the Regional Director on June 14, 2012. "Tr." refers to the transcript of the hearing conducted on May 17, 18, and 21, 2012. "Exh. E-[#]" refers to Employer's Exhibits received during the hearing. And "Pet. Br." refers to Petitioner's Request for Review. Because Petitioner's Request for Review does not contain page numbers, the page numbers referenced in this brief are based on page 1 being the first page after the cover sheet (the page that begins "Rule Concerning Request For Review").

related Board precedents. For the reasons discussed below, Petitioner fails to establish any error in the Regional Director’s decision.

A. NONE OF THE REGIONAL DIRECTOR’S FACTUAL FINDINGS WAS ERRONEOUS, LET ALONE CLEARLY SO

Petitioner first contends that the Regional Director relied on “incorrect facts” when concluding that the Academy is a religious school. *See* Pet. Br. 17. In particular, Petitioner purports to challenge each of the six findings noted above. Under Section 102.67(c)(2) of the Board’s Rules and Regulations, the Board will grant review in such circumstances only when “the regional director’s decision on a substantial factual issue is *clearly erroneous* on the record and such error prejudicially affects the rights of a party.” 29 C.F.R. § 102.67(c)(2) (emphasis added). As the Board is well aware, this is a stringent standard that affords the Regional Director considerable deference regarding factual findings. Petitioner does not come close to satisfying this rigorous requirement. Indeed, Petitioner fails to identify a single factual error—clear or otherwise.

1. Petitioner begins with the puzzling assertion that the “Regional Director’s reliance on documents which were selected by the employer is misguided.” Pet. Br. 17. According to Petitioner, the Regional Director erred by relying on documentary evidence—such as the Academy’s Charter, Bylaws, Employee Handbook, Parent/Student Handbook, and Operations Manual—when finding that the school proclaimed and pursued a religious mission. In Petitioner’s view, these materials “should not be given much weight, since it is how the school actually runs its day-to-day activities, not the documentation which the employer may choose to provide, that dictates whether the school is substantially religious.” Pet. Br. 17-18.

Notably, Petitioner does not dispute that each of these core governing documents expressly states that the Academy serves a religious mission and that the school is dedicated to

providing an Islamic curriculum and learning environment conducive to building Muslim character. Nor could Petitioner legitimately claim otherwise. *See* D&DE 24-25 (summarizing content of various documents). Rather, Petitioner claims that these documents are of limited significance because they only prove how the Academy *professes to be operated*, not necessarily how the school is *actually operated*. That peculiar assertion is belied by the sheer tonnage of contrary evidence—both documentary and testimonial—in the record.²

Several witnesses, for example, testified that the mission statements (and other materials) contained in the documents received by the hearing officer were consistent with their own experiences of how the school actually operated. *See, e.g.*, Tr. 103:8-24 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that the Academy follows and implements the “purpose” of the school set forth in the Charter—i.e., “foster[ing] Islamic understanding and religious education”); Tr. 139:7-141:6 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that the Operations Manual is “in effect” at the Academy and that it sets forth the “guiding principles and the day-to-day operations under which the school is run”); Tr. 153:15-154:9 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that the requirements and expectations set forth in the Employee Handbook are actually implemented); Tr. 410:4-411:4 (testimony of Faridah Turkistani, Girls School Principal) (explaining that the

² To the extent Petitioner contends that *only* “testimonial evidence” is relevant to the *Catholic Bishop* inquiry, or that “testimonial evidence” is somehow deserving of more weight than documentary evidence, that assertion is surely wrong. Pet. Br. 18 There is no basis in *Catholic Bishop*, the Federal Rules of Evidence, or the Board’s rules and regulations for such an approach. Indeed, the Board (among others) has consistently relied on documents similar to those at issue here when conducting the *Catholic Bishop* analysis. To take just one example, in *Jewish Day School*, the Board relied on the school’s bylaws, articles of incorporation, and a “recruitment manual for parents of prospective students” when concluding that *Catholic Bishop* precluded it from exercising jurisdiction over a Jewish school. *See Jewish Day Sch. of Greater Wash., Inc.*, 283 N.L.R.B. 757, 757-58 (1987). And the D.C. Circuit has repeatedly emphasized that such public documents are particularly relevant since a “school’s public representations as to its religious educational environment” is “a more useful way for determining the school’s religious bona fides.” *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 573 (D.C. Cir. 2009) (citing *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002)).

Academy’s “mission,” “vision,” and “goals,” as described in the Parent/Student Handbook, was “consistent with [her] experience as principal of the girls’ school”); Tr. 522:14-523:9 (testimony of Ziad Alzakari, Boys School Principal) (same). Accordingly, the record confirms there is no gap between how the school is designed to function (as an Islamic school) and how it actually operates (as an Islamic school).³

As Petitioner’s own brief makes plain, moreover, what Petitioner really objects to is not the use of documentary evidence generally, but rather the fact that these documents are directly contrary to its own litigating interests. Elsewhere in its brief, Petitioner has no qualms citing to documentary evidence when it thinks such evidence supports its position. For example, Petitioner cites approvingly to Employer’s Exhibit 15, which is an informational brochure the Academy provides prospective students and parents. *See* Pet. Br. 12. Ironically, this document further supports the Regional Director’s finding that the Academy pursues a religious mission—not Petitioner’s contrary position. As Petitioner quotes in its brief, the informational brochure states that “[t]he mission of the Islamic Saudi Academy is primarily to enable our students to excel academically, *while maintaining the values of Islam* and proficiency with Arabic language” and that the “Academy seeks to provide students with a balanced and thorough education in English and Arabic *with an atmosphere conducive to building Muslim character.*” *See* Pet. Br. 12 (quoting Exh. E-15, The Islamic Saudi Academy, *A Prominent Educational Institution* (Informational Brochure)) (emphases added). In short, try as it might, Petitioner cannot escape

³ This, of course, should not be surprising. Petitioner is effectively asking the Board to believe that the mission statements and other materials contained in *all* of the Academy’s governing documents—including its Charter, its Bylaws, its Operations Manual, its Employee Handbook, and its Parent/Student Handbook—are uniformly inaccurate. To simply state that incredible claim is to refute it.

the simple reality that the Academy is dedicated to providing its students with a curriculum and educational environment grounded in Islamic values.

2. Petitioner’s next challenge is ostensibly to the Regional Director’s finding that “religious instruction and attendance at prayer services are mandatory for the students.” D&DE 25. Petitioner, however, does not object to the accuracy of this finding. Indeed, Petitioner acknowledges that all students must take an Islamic Studies course each year; that all students are required to attend a daily prayer session in the afternoon;⁴ and that the school’s morning meeting commences with a reading from the Holy Quran. *See* Pet. Br. 18-20. Petitioner instead objects to the weight these facts were given by the Regional Director when reaching his legal conclusion that the Academy is a religious school. Petitioner’s objection is more appropriately viewed as a legal challenge rather than a factual one—and accordingly will be addressed in more detail later in this Opposition (along with Petitioner’s other legal objections). In any event, Petitioner fails to establish that the weight assigned to these facts by the Regional Director was “clearly erroneous.”

3. Petitioner also contends that the Regional Director erred when finding that “there is some integration of Islamic principles” in classes beyond Islamic Studies. *See* Pet. Br. 20. Although Petitioner claims “[t]here was no testimony or any other evidence supporting his conclusion that teachers who teach subjects other than Arabic and Islamic Studies have any Islamic influence in their classes,” Petitioner does not meaningfully dispute most of the examples cited by the Regional Director as support for this finding. Pet. Br. 20. Petitioner acknowledges,

⁴ Petitioner makes a point of noting that adults generally are not required to attend the daily afternoon prayer (except for those charged with overseeing the prayer sessions). Pet. Br. 19-20. This, however, is of little relevance for determining whether the Academy is a religious school under *Catholic Bishop*. What is relevant is that “all *students* must attend the afternoon prayer.” D&DE 25 (emphasis added).

for instance, that students may not draw the human body in art class. *See* Pet. Br. 21-22. Petitioner instead asserts that this prohibition is unrelated to Islam. *See* Pet. Br. 22. That is simply not true. Boys School Principal Ziad Alzakari unequivocally testified that students are not permitted to draw the human body “because it’s prohibited by Islam.” Tr. 549:19-22. Petitioner also does not challenge several other examples of integration cited by the Regional Director, including the fact that “[i]n math and science, students are taught contributions made by Muslim scholars,” D&DE 9, and that in Arabic classes students read, among other things, the Holy Quran and stories about the Prophet Muhammad (S.A.S.), D&DE 25.

Petitioner instead focuses almost exclusively on the Regional Director’s finding that, in certain science classes, teachers are required to note potential religious objections to particular practices or theories, such as stem cell research, in vitro fertilization, and evolution. *See* D&DE 9-10, 25. Petitioner contends that, on this point, “the record testimony is completely opposite—teachers teach subjects which are completely contrary to the tenets of Islam.” Pet. Br. 20-21. Not so. Petitioner fails to appreciate the distinction between teaching students about the *existence* of a particular practice or theory (while noting the religious objections to that subject) and instructing students that Islam supports such a practice. For example, Petitioner proclaims that students learn about evolution, even if (Petitioner alleges) that theory is inconsistent with Islam. Pet. Br. 21. But students are not taught that they must believe evolution is correct; rather, the evidence in the record is that students are told that “it is ultimately up to them whether they treat evolution as fact or if they disregard it.” Tr. 609:14-17 (testimony of Dr. Sheena Friend, science teacher).

There is, moreover, no evidence in the record that teaching and learning certain academic subjects contradicts principles of the Islamic faith. In fact, such an assertion is expressly

contradicted by the testimony of the very witnesses on whom Petitioner now relies. *See, e.g.*, Tr. 617:14-618:3 (testimony of Dr. Sheena Friend, science teacher) (acknowledging that she was not claiming that teaching particular academic subjects violated Islamic principles); Tr. 632:21-633:20 (testimony of David Kovalik, psychology teacher) (noting that, as an Academy employee, he was required to conduct himself in a manner consistent with principles of the Islamic faith). For all these reasons, Petitioner fails to show any error in the Regional Director’s finding, and certainly nothing rising to the level of “clear error.”

4. Petitioner next claims that “the Regional Director’s reliance on inconsistent testimony regarding whether the cafeteria is halal is misguided.” Pet. Br. 22. It is not clear what Petitioner means by “inconsistent testimony.” Each witness who spoke about the school cafeteria testified that the cafeteria served only halal food, consistent with Islamic dietary restrictions. *See, e.g.*, Tr. 81:19-82:21 (testimony of Dr. Ronald Schultz, Acting Director General); Tr. 472:8-21 (testimony of Faridah Turkistani, Girls School Principal) (“[E]verything served at the cafeteria has to be halal.”). Perhaps Petitioner is referring to the fact that the cafeteria often serves pizza from Domino’s Pizza. But, again, each witness asked about Domino’s Pizza consistently testified that the pizza was halal. *See, e.g.*, Tr. 186:4-6 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that “[o]ur imam has said it’s okay to serve”); Tr. 472:8-21 (testimony of Faridah Turkistani, Girls School Principal) (explaining that Domino’s tells the Academy that the pizza delivered is halal); *see also* D&DE 12 (citing Dr. Schultz’s testimony). Rather than rely on evidence in the record, Petitioner asks the “Board [to] use its common sense to determine whether Dominoes [sic] pizza is halal” and “note[s] that a quick web search will provide the answer is ‘no.’” Pet. Br. 31. But Petitioner’s musings about web searches do not

change consistent testimony into “inconsistent testimony.” And, perhaps more importantly, it surely cannot render the Regional Director’s factual findings clearly erroneous.⁵

5. Petitioner next contends that the “Regional Director’s conclusion that teachers are required to maintain ‘Islamic values’ is misguided.” Pet. Br. 22. According to Petitioner, teachers at the Academy “cannot be expected to ‘maintain the [school’s] Islamic values’” because many teachers “are not Muslim” and therefore do “not know what ‘Islamic values’ are.” Pet. Br. 22-23. Petitioner’s argument is truly remarkable—and patently wrong. For starters, there is nothing in the record to suggest that only Muslim teachers are able to ascertain what constitutes “Islamic values.” Indeed, Petitioner’s repeated assertions elsewhere in its brief that certain parts of the Academy’s curriculum “are completely contrary to the tenets of Islam,” *see* Pet. Br. 20, undermine the notion that only Muslims can know what constitutes Muslim values.

In any event, all the evidence in the record supports the Regional Director’s finding. The Employee Handbook, for example, expressly provides that the “Academy reserves the right to terminate for cause an employee who engages in behavior while at school or away from school which is inappropriate or inconsistent with the Academy’s moral standards.” *See* Exh. E-2, Employees Handbook at 30. The Academy’s Acting Director General similarly testified that employees are expected to “live within the school[’s] Muslim culture and Muslim practices and beliefs.” Tr. 154:20-24. And, finally, one of Petitioner’s witnesses testified that his employment contract contains a provision which requires him to agree “to act in a way that is not contradictory to Islamic values.” Tr. 633:16-17 (testimony of David Kovalik, psychology

⁵ Petitioner also asserts that the Academy “does not restrict the type of food that the students bring to the school.” Pet. Br. 22. That is not a ground for undermining the Regional Director’s decision, however, because the Regional Director expressly recognized that precise point. *See* D&DE 12 (“If students bring their own lunch, there are no restrictions on what they bring.”). This fact also has no bearing on whether the *school’s cafeteria* serves only halal food, which is what the Regional Director found.

teacher). In short, the Regional Director did not err—under any standard of review—by refusing to adopt Petitioner’s narrow-minded view that only those persons who practice a faith are able to ascertain what values are associated with that religion.

6. Petitioner finally claims that the “Regional Director’s reliance on a ‘dress code’ at [the Academy] is clearly erroneous” because “there is nothing religious about the [school’s] dress code” and the “dress code at the school is not religiously motivated.” Pet. Br. 23. Petitioner is again mistaken, as that assertion simply cannot stand up against the great weight of contrary evidence in the record.

The Parent/Student Handbook describes in detail the dress code for students, including a general admonition that “clothing should remain moderate and respectful” at all times. Specifically, girls must always dress “conservatively”—for example, during gym class or sporting events, “[s]horts, cut-off pants, sleeveless shirts, etc. will not be permitted, even during practices.” Similarly, boys must keep their hair “short,” may not have “unusual hair styles or uneven hair cut[s],” and may not “wear jewelry” (with “[p]iercings and necklaces” being “forbidden”). *See* Exh. E-4, Parent/Student Handbook at 3-5. As the Regional Director correctly observed, “the school’s policies state [the student dress code] is based on Islam.” D&DE 26; *see, e.g.*, Exh. E-8, ISA Girls’ School Uniform Policy for Grades 7-12 for 2011-2012 (providing that on days when “the uniform is not required, [the student] agree[s] to wear clothes that are conservative and in keeping with the Islamic traditions at [the Academy]”). And Boys School Principal Ziad Alzakari similarly testified that “Islam underlies the dress code for the boys’ school.” *See* Tr. 551:21-552:10, 572:3-574:23 (testimony of Ziad Alzakari, Boys School Principal).

The record evidence also confirms that the dress code for employees is religiously motivated. The Employee Handbook, for example, prescribes that “all employees are expected to dress modestly” in “keeping with Islamic customs and professional traditions.” Exh. E-2, Employees Handbook at 31; *see also* Exh. E-34, Operations Manual at O-005 (stating that employees’ “[a]ttire should be in keeping with Islamic customs and professional traditions”). And witnesses similarly testified that the employee dress code was based on Islamic principles. *See, e.g.*, Tr. 152:6-153:2 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that “employees are asked to dress modestly in respect to the Muslim culture”).

Petitioner ignores this evidence and instead seems to suggest that a dress code is religious in nature only if requires “religious garb.” Pet. Br. 23. Petitioner offers no legal citation for such a proposition, likely because no such authority exists. In any event, given the amount of evidence supporting the Regional Director’s decision, Petitioner plainly cannot show that the Regional Director erred in finding that the school’s dress code policies are “based on Islam.” D&DE 26.

* * *

For the foregoing reasons, Petitioner has failed to demonstrate that the Regional Director’s decision on any factual issue was “clearly erroneous.” 29 C.F.R. 102.67(c)(2). Indeed, Petitioner has failed to establish that the Regional Director committed *any* factual error when concluding that the Academy is a religious school under *Catholic Bishop*. The Board should accordingly decline Petitioner’s request for review on this issue.

B. THE REGIONAL DIRECTOR CORRECTLY HELD THAT THE ACADEMY IS A RELIGIOUS SCHOOL UNDER THE BOARD'S DECISIONS IN *JEWISH DAY SCHOOL* AND *NAZARETH REGIONAL HIGH SCHOOL*

Petitioner also argues that the Regional Director's conclusion that the Academy is a religious school under *Catholic Bishop* departs from prior Board precedent. *See* Pet. Br. 23-37. That claim is meritless.

As the Regional Director correctly observed, the two prior Board decisions most pertinent here are *Jewish Day School of Greater Washington, Inc.*, 283 N.L.R.B. 757 (1987), and *Nazareth Regional High School*, 283 N.L.R.B. 763 (1987). *See* D&DE 23-24. Both decisions support the Regional Director's decisions. In *Jewish Day School*, the Board considered whether *Catholic Bishop* precluded it from exercising jurisdiction over a unit of teachers at a private, Jewish school. After analyzing *Catholic Bishop*, the Board opined that the Court's decision was "grounded in its analysis of the purpose of the school, the role of the teacher in effectuating that purpose, and the potential effects of the Board's exercise of jurisdiction." *Jewish Day Sch.*, 283 N.L.R.B. at 760. The Board further explained that *Catholic Bishop* was primarily concerned with "schools whose purpose and function in substantial part are to propagate a religious faith." *Id.* at 761. Because the Board found that the Jewish Day School's "purpose and function in substantial part is the propagation of a religious faith," the Board concluded that an "assertion of jurisdiction here would create the same significant risk of constitutional infringement that the Supreme Court foresaw in *Catholic Bishop*" and dismissed the petition. *Id.* at 761-62.

The Regional Director correctly held that, based on *Jewish Day School*, the Academy is a religious school under *Catholic Bishop*. Indeed, the facts about the school in *Jewish Day School* are almost indistinguishable from the facts in this case. The only difference is the religion being followed. For example, the Jewish Day School's founding documents established that one of "its

central aims [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.” *See* 283 N.L.R.B. at 761 (internal quotation marks omitted). The same is true here (the Academy’s Charter). Consistent with its mission, the Jewish Day School offered a Judaic studies program that included mandatory religious instruction for all grades (kindergarten through grade 12). *See id.* at 758. The same is true here (mandatory participation in Islamic Studies Program). The Jewish Day School also offered classes in Hebrew language. *Id.* The same is true here (Arabic). The Jewish Day School operated and maintained a synagogue. The same is true here (the Academy operates and maintains a mosque). The Jewish Day School conducted “prayer services in Hebrew each morning” that students were required to attend. *Id.* The same is true here (daily prayer sessions and morning recitations of the Holy Quran). The Jewish Day School also required students and staff to “observe Jewish dietary restrictions.” *Id.* at 759. The same is true here (the cafeteria serves only food consistent with Islamic dietary restrictions and non-Muslim teachers do not eat in front of students during Ramadan). Students at the Jewish Day School also studied “various Jewish holidays and festivals” and learned “to perform the rituals and practices appropriate to the holiday.” *Id.* The same is true here (Eid Alfitr and Eid Aladha). The Jewish Day School also sought to “enforce rules of modesty in dress” and boys were “required to wear a cap.” The same is true here (dress code consistent with Islamic values).

Based on the facts in *Jewish Day School*, the Board concluded that there was “abundant evidence” that the Jewish Day School’s purpose and function in substantial part was the propagation of a religious faith. *Id.* at 761. The evidence is equally abundant here that the Islamic Saudi Academy’s purpose and function in substantial part is the propagation of Islam.

The Regional Director's conclusion is also supported by the Board's decision in *Nazareth Regional High School*, 283 N.L.R.B. 763 (1987), an opinion issued the same day as *Jewish Day School*. In *Nazareth Regional High School*, the Board held that a Catholic school's "purpose and function in substantial part [was] to propagate a religious faith" and, therefore, dismissed the complaint for lack of jurisdiction. *Id.* at 765 (quotation omitted). The Board based its decision on the following factors, all of which are also present in this case (substituting Islamic tenets for Catholic tenets, of course): the school "defines itself in its faculty handbook by its 'attempt to transmit the teachings of Jesus Christ and His Church'"; "[t]eachers of both religion and nonreligion courses are expected to impart the values of the Catholic Church to the students"; "religion classes are mandatory at all grade levels"; "there is a crucifix in each classroom"; "meat is not served on Fridays during Lent"; "mass is celebrated daily"; and "a prayer is read over the public address system each morning." *Id.* at 764-65. In *Nazareth Regional High School*, moreover, approximately only 75% of the student body was Catholic. *Id.* at 763. In this case, by contrast, every student that attends the Academy is Muslim. *See* Tr. 87:19-20. Indeed, the Academy has not had a non-Muslim student for at least the last 10 years. *See* Tr. 294:8-12.⁶

Grasping at proverbial straws, Petitioner offers a scattershot of arguments for why the Academy is not a religious school under *Catholic Bishop* and *Jewish Day School*. (Petitioner does not even attempt to distinguish this case from *Nazareth Regional High School*.) None withstand scrutiny.

⁶ The comparison to *Nazareth Regional High School* echoes a public statement about the Academy and its character that was previously made by one of Petitioner's witnesses, a teacher who has spent more than ten years at the school: the Islamic Saudi Academy is "essentially a parochial school that specializes in Islamic education, no different from a typical religious school in the United States that specializes in Catholic education, for example." Tr. 637:16-21 (testimony of David Kovalik, psychology teacher).

Petitioner first argues that *Catholic Bishop* only applies to “church-operated” schools and, although the Academy operates and maintains its own mosque, it is not “mosque-operated” and therefore not a religious school under *Catholic Bishop*. See Pet. Br. 1, 24, 33, 45. That position, however, is directly contrary to Board and federal court precedent. In *Jewish Day School*, the Board made clear that the Supreme Court’s use of the term “church-operated school” was simply a “shorthand description of schools whose purpose and function in substantial part are to propagate a religious faith.” *Jewish Day Sch.*, 283 N.L.R.B. at 761; see *NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 823 (2d Cir. 1980) (holding that the Supreme Court’s use of the term “church-operated” in *Catholic Bishop* was merely “a convenient method of characterizing schools with a religious mission”). While “affiliation with a religious organization may be one factor to consider in determining [a school’s] purpose,” a requirement that an Islamic school be “mosque-operated” would contravene *Jewish Day School*. *Jewish Day Sch.*, 283 N.L.R.B. at 761.

Petitioner’s approach would also treat Islamic schools differently simply because of the religion they follow. As Dr. Muqtedar Khan, an expert in Islam, explained at the hearing, “there are no mosques running Islamic schools” in the United States. Tr. 237:8. Rather, unlike their Christian counterparts, Islamic schools traditionally maintain their own mosque, as the Academy does here. Tr. 237:7-13.⁷ Thus, adopting Petitioner’s requirement would effectively mean that

⁷ Dr. Khan’s testimony was in response to a question about whether it was possible to analogize Islamic schools to Catholic schools in the United States. He responded: “No, you cannot talk about it in that context. For example, there are no mosques running Islamic schools. In fact, interesting that in the Christian faith you have Christian churches running schools. But in the Islamic context, it is the other way around. Like the school [in this case], it has a mosque. No mosque has the school, but [the] school has a mosque in it.” Tr. 237:7-13.

no Islamic school in the United States would qualify as a religious school for purposes of *Catholic Bishop*. That surely cannot be the law.⁸

Petitioner next argues that the Academy is not a religious school because the Acting Director General, some of the other administrators, and some teachers are not Muslim. *See, e.g.*, Pet. Br. 1, 3, 11, 24, 25, 45. However, Petitioner offers no legal support for the proposition that a school may only be considered a religious school under *Catholic Bishop* and *Jewish Day School* if all its employees practice the religion that underlies the school's mission. Indeed, such a rule would contravene the Board's decision in *Nazareth Regional High School*. In that case, there were non-Catholic teachers working at a Catholic school. *See* 283 N.L.R.B. at 763. The Board nonetheless held that the school at issue was a "religious school" for purposes of *Catholic Bishop*. *Id.* at 765; *cf. id.* at 763 (holding that the school was a religious school even though approximately only 75 percent of the student body was Catholic). Accordingly, the Regional Director's decision to reject this argument was *consistent* with prior Board precedent, not a departure from it.⁹

Petitioner also contends that the Academy is not a religious school because it teaches "primarily American subjects"—including traditional academic courses like math, science, and history—and religious instruction accounts for only a portion of the curriculum. *See, e.g.*, Pet. Br. 3-5, 6-8, 25-27, 45. But of course the mere fact that a school offers a well-rounded

⁸ Petitioner makes the related argument that there is no requirement that members of the Academy's Board of Trustees be Muslim and, therefore, the school should not be considered religious under *Catholic Bishop* and *Jewish Day School*. *See* Pet. Br. 3, 27. While Petitioner is correct that there is no specific requirement that members of the Academy's governing board be Muslim, the fact is that all voting members of the Board are Muslim. Moreover, and more to the point, the Academy's Charter and Bylaws require that all actions by the Board be consistent with the school's Islamic mission. *See* D&DE 24.

⁹ To the extent Petitioner's argument is premised on the notion that only a Muslim employee can carry out an Islamic school's mission, that claim is sorely misguided.

curriculum and seeks to place its students in colleges around the world does not strip it of its status as a religious school. Nor should it. Such a rule would not only contravene Board and Supreme Court precedent but also undermine the reasoning underlying *Catholic Bishop*.

As an initial matter, the schools at issue in *Catholic Bishop* offered “essentially the same college-preparatory curriculum as public secondary schools,” in addition to their religious instruction. See *Catholic Bishop*, 440 U.S. at 492-94. Similarly, the religious schools in *Jewish Day School* and *Nazareth Regional High School* offered general studies classes in addition to religion courses. See *Jewish Day Sch.*, 283 N.L.R.B. at 758; *Nazareth Reg’l High Sch.*, 283 N.L.R.B. at 763. Indeed, like the present case, students in the *Nazareth Regional High School* case were only required to take one religion course in each of their four school years. *Nazareth Reg’l High Sch.*, 283 N.L.R.B. at 763. If a contrary rule were followed, *Catholic Bishop* would apply only to seminaries and divinity schools.¹⁰

In addition to lacking any basis in Board or court precedent, such a rule runs contrary to the basic protections of the First Amendment. As the D.C. Circuit eloquently explained, if a school “is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty. To limit the *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom . . . is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment

¹⁰ Petitioner’s rule would also be inconsistent with federal court precedent. In two separate decisions—*Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), and *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002)—the D.C. Circuit held that *Catholic Bishop* precluded the Board from exercising jurisdiction over a religious educational institution. The higher education institutions at issue in those cases offered scores of courses that did not remotely touch on religion. See *Carroll Coll., Inc.*, 558 F.3d at 570; *Great Falls*, 278 F.3d at 1343-45.

Clause—not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.” *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002) (citation omitted).

Put simply, Petitioner seems to equate a religious school with a school that teaches nothing but religion. For the reasons discussed, such an approach would be flatly contrary to *Catholic Bishop* and every Board precedent applying the Court’s decision. Accordingly, the Regional Director plainly did not err when rejecting Petitioner’s novel argument.

After failing to distinguish this case from *Jewish Day School*—and not even attempting to distinguish this case from *Nazareth Regional High School*—Petitioner concludes by arguing that this case is more akin to three prior Board decisions where the Board exercised jurisdiction over a school: *University of Great Falls*, *Carroll College*, and *Livingstone College*. Petitioner’s reliance on each can be dispatched in short order.

Petitioner first claims, as it did before the Regional Director, that the Board’s decision in *University of Great Falls*, 331 N.L.R.B. 1663 (2000), supports its claim that the Academy is not a religious school. See Pet. Br. 34-35. The Regional Director held otherwise, correctly explaining that *Great Falls* is “distinguishable.” D&DE 26. “In that case,” the Regional Director observed, “there were no required religion classes or religious services, no evidence of integration of the religious curriculum with the secular subjects, no dietary restrictions, and virtually no evidence of any religious practice at the school. In this case, as I have found above, the [Academy] engages in all of those activities, making it much more similar to *Jewish Day*.” D&DE 26. Moreover, the D.C. Circuit later vacated the Board’s decision in *Great Falls*, finding that the university in that case was indeed a religious school. For this reason, as well as those set forth in his decision, the Regional Director properly rejected Petitioner’s reliance on *Great Falls*.

Petitioner next claims that the Regional Director's decision is contrary to the Board's opinion in *Carroll College, Inc.*, 345 N.L.R.B. 254 (2005). See Pet. Br. 35-37. That opinion, however, has little relevance here because it did not address whether the college was a religious school under *Catholic Bishop*. Rather, the only issue addressed by that decision was whether the employer was "exempt from application of the [National Labor Relations Act] by virtue of the Religious Freedom Restoration Act (RFRA)." *Carroll Coll., Inc.*, 345 N.L.R.B. at 254. And, as the Board made clear in *Carroll College*, "[i]f a party brings a RFRA claim before the Board, [it] will analyze it independently of any *Catholic Bishop* exemption claim." *Id.* at 257. Although the Board's opinion only addresses RFRA, the D.C. Circuit eventually ruled on whether the college was a religious school under *Catholic Bishop* and held that it was. See *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

Petitioner finally claims that the Regional Director's decision is contrary to *Livingstone College*, 286 N.L.R.B. 1308 (1987). See Pet. Br. 33-34. That decision, however, is easily distinguishable. The Board's opinion in that case rested primarily on two facts, neither of which are present here. First, the Board found that the college at issue in that case did "not have a religious mission." *Livingstone Coll.*, 286 N.L.R.B. at 1309. In contrast, and as found by the Regional Director, the Academy indisputably pursues a religious mission. See D&DE 24-26. Second, the Board found that the college had no "requirement that the faculty propagate or conform to a particular religious faith." *Livingstone Coll.*, 286 N.L.R.B. at 1309-10. In contrast, and as found by the Regional Director, the Academy requires its employees, "regardless of their [own] religious affiliation," to "maintain the Islamic values taught at the school." See D&DE 26; Exh. E-2, Employee Handbook at 30 (stating that the "Academy reserves the right to terminate for cause an employee who engages in behavior while at school or away from school" that is

inconsistent with the school's Islamic values); Tr. 154:20-24 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that employees are expected to "live within the school[']s Muslim culture and Muslim practices and beliefs").

In sum, Petitioner fails to demonstrate that the Regional Director departed from any prior Board decision. Indeed, the Regional Director reached the only conclusion that is consistent with the Board's precedent, in particular its opinions in *Jewish Day School* and *Nazareth Regional High School*: the Academy "is a religious school within the meaning of *Catholic Bishop*." D&DE 3, 26.

II. THE REGIONAL DIRECTOR DID NOT ERR BY DECLINING TO ADDRESS AN ISSUE THAT NO LONGER REQUIRED RESOLUTION

Petitioner's second ground for review is "[w]hether the Regional Director erred when he did not reach the issue regarding whether Department Heads at the [Academy] are supervisors under the meaning of §2(11) of the National Labor Relations Act (NLRA)." Pet. Br. 2. It is undisputed that all Department Heads at the Academy are teachers. See D&DE 3 n.2. Accordingly, after concluding that *Catholic Bishop* precluded the Board from exercising jurisdiction over teachers at the Academy, the Regional Director explained it was "not necessary for [him] to decide whether department heads are supervisors." *Id.* As should be obvious, this is because the Board could not exercise jurisdiction over the Department Heads even if they were not deemed supervisors.

Petitioner nonetheless contends that the Regional Director's "decision [was] clearly erroneous" because he "did not even discuss the issue of whether the department heads at [the Academy] are supervisors under the Act." Pet. Br. 38. Petitioner cites no Board precedent, rule, or regulation in support of this anomalous claim, and the Academy is aware of none. Indeed, it would be a bizarre rule (to say the least), if a Regional Director were found to have erred simply

because he declined to address an issue that no longer needed to be resolved. Because Petitioner fails to show any basis for granting review under Section 102.67(c), the Board should deny review on this issue as well.

CONCLUSION

For the foregoing reasons, the Board should deny Petitioner’s request for review. With respect to the application of *Catholic Bishop*, Petitioner fails to show that any of the Regional Director’s factual findings were erroneous, let alone clearly so. It also fails to demonstrate that the Regional Director departed from a single Board decision. Indeed, all prior Board precedent point towards the conclusion reached by the Regional Director. With respect to whether Department Heads are supervisors, Petitioner fails to establish that the Regional Director erred in declining to address an issue that no longer required resolution.

Dated: July 5, 2012

Respectfully submitted,

LATHAM & WATKINS LLP

/s/ Maureen E. Mahoney

By

Maureen E. Mahoney
Joseph B. Farrell
Abid. R. Qureshi
Paul T. Crane
John A. Mathews

*Counsel for Employer,
Islamic Saudi Academy*

CERTIFICATE OF SERVICE

I certify that a copy of this Employer's Opposition to Petitioner's Request for Review was electronically filed with the NLRB on July 5, 2012, and sent to the following persons on that same day:

Kevin M. Plessner (by electronic mail)
LAW OFFICE OF KEVIN M. PLESSNER
228 Homewood Road
Linthicum, MD 21090
plessnerlaw@gmail.com

Wayne R. Gold (by facsimile)
Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street, 6th Floor
Baltimore, MD 21201-2700
Fax No: (410) 962-2198

Daniel M. Heltzer (by electronic mail)
Field Attorney
National Labor Relations Board, Region 5
daniel.heltzer@nlrb.gov

/s/ Paul T. Crane

Paul T. Crane