

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

**BRIEF OF EMPLOYER
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION1

BACKGROUND2

I. FACTUAL SUMMARY2

II. PROCEDURAL HISTORY8

ARGUMENT10

I. THE ACADEMY IS A RELIGIOUS SCHOOL UNDER *CATHOLIC BISHOP*
AND, THEREFORE, THE BOARD PLAINLY LACKS JURISDICTION OVER
THE PETITIONED-FOR TEACHER EMPLOYEES10

A. The Academy Is A Religious School Under The Board’s Decisions In
Jewish Day School and *Nazareth Regional High School*11

B. The Academy Is A Religious School Under The D.C. Circuit’s Decisions
in *Carroll College* and *Great Falls*.....16

C. Petitioner’s Arguments That The *Islamic Saudi Academy* Is Not A
Religious School Strain Credibility21

II. THE RATIONALE UNDERLYING *CATHOLIC BISHOP* EXTENDS TO NON-
TEACHERS AND, THEREFORE, THE BOARD LACKS JURISDICTION
OVER THE PETITIONED-FOR NON-TEACHER EMPLOYEES26

CONCLUSION.....32

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Carroll College, Inc.</i> , 345 N.L.R.B. 254 (2005)	14, 15
<i>Carroll College, Inc. v. NLRB</i> , 558 F.3d 568 (D.C. Cir. 2009)	15, 16, 17, 21, 24
<i>Ecclesiastical Maintenance Services, Inc.</i> , 325 N.L.R.B. 629 (1998)	27, 28
<i>Hanna Boys Center</i> , 284 N.L.R.B. 1080 (1987)	27
<i>Jewish Day School of Greater Washington, Inc.</i> , 283 N.L.R.B. 757 (1987)	11, 12, 13, 18, 22, 23, 26
<i>Livingstone College</i> , 286 N.L.R.B. 1308 (1987)	15, 16
<i>Nazareth Regional High School</i> , 283 N.L.R.B. 763 (1987)	11, 13, 23, 24
<i>NLRB v. Bishop Ford Central Catholic High School</i> , 623 F.2d 818 (2d Cir. 1980)	18, 22
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979)	<i>passim</i>
<i>Riverside Church in the City of New York</i> , 309 N.L.R.B. 806 (1992)	10, 27, 31
<i>St. Edmund's Roman Catholic Church</i> , 337 N.L.R.B. 1260 (2002)	10, 27, 28, 31
<i>University of Great Falls</i> , 331 N.L.R.B. 1663 (2000)	14
<i>University of Great Falls v. NLRB</i> , 278 F.3d 1335 (D.C. Cir. 2002)	16, 18, 24, 31

INTRODUCTION

The Islamic Saudi Academy (the “Academy”) files this brief pursuant to Section 102.67(g) of the National Labor Relations Board’s Rules and Regulations. On August 17, 2012, the Board granted review of the following issue: “whether the Board has jurisdiction over the petitioned-for teacher and non-teacher employees.” That inquiry essentially consists of two separate questions.

The first question is whether the Academy is a religious school under the Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). As its name suggests, and as the facts discussed below confirm, the answer to that question is obvious: the *Islamic Saudi Academy* is a religious school dedicated to the mission of providing an educational environment and curriculum that is consistent with Islamic values and conducive to building Muslim character. Because the Academy is a religious school, the Court’s decision in *Catholic Bishop* plainly precludes the Board from exercising jurisdiction over the petitioned-for teacher employees. *See Catholic Bishop*, 440 U.S. at 507.

The second question is whether the First Amendment protections underlying the Court’s decision in *Catholic Bishop* apply in the context of non-teacher employees. As will be discussed in more detail below, the rationale of *Catholic Bishop* extends beyond teachers and precludes the Board from exercising jurisdiction over all Academy employees. In short, the Board’s exercise of jurisdiction over non-teacher employees would present the exact same risk of unconstitutional infringement—namely, excessive governmental entanglement in the affairs of a religious institution—that the Supreme Court sought to avoid with teachers in *Catholic Bishop*.

The Board accordingly should hold that it lacks jurisdiction over the petitioned-for teachers and non-teacher employees and dismiss the petition.

BACKGROUND

I. FACTUAL SUMMARY

The Academy is a not-for-profit private school located in Fairfax County, Virginia that operates under the auspices of the Kingdom of Saudi Arabia and its Embassy to the United States. The Academy was established in 1984 by a Royal Decree from The Custodian of the Two Holy Mosques, King Fahd bin Abdulaziz Al-Saud, to provide Saudi Arabian children living in the United States with an education grounded in “Islamic Religion, Studies and Practices; Arabic Language; and General Education.” *See* Exh. E-10, Islamic Saudi Academy Charter (“Charter”) at 1 (Apr. 13, 1989).¹ The Academy is a “legal instrumentality of the government of Saudi Arabia” established “under the laws of Saudi Arabia,” and operates under the direct supervision of the Ambassador for the Kingdom of Saudi Arabia to the United States. *See id.* at 1-2 (“The Ambassador for the Kingdom of Saudi Arabia to the United States [is] Chairman of the Board [of Trustees].”); Exh. E-11, Islamic Saudi Academy Bylaws (“Bylaws”) at 1, 10 (June 27, 1992).

Since its founding, the Academy has been dedicated to providing its students with an educational environment and curriculum that is consistent with Islamic values and conducive to building Muslim character. The Academy’s Charter, for example, proclaims that the “Academy is established pursuant to the Kingdom’s Islamic responsibilities as custodian of Islam’s two most holy mosques in Makkah and Medinah, and its unswerving commitment and policy to further Islamic understanding and the religious education and development of its young people.”

Exh. E-10, Charter at 1; *see also id.* at 4 (“In carrying out [its] responsibilities, the Board [of

¹ In this brief, “Exh. E-[#]” refers to Employer’s Exhibits, “Exh. P-[#]” refers to Petitioner’s Exhibits, and “Exh. B-[#]” refers to Board Exhibits. “Tr.” refers to the transcript of the hearing conducted on May 17, 18, and 21, 2012. “D&DE” refers to the Decision and Direction of Election issued by the Regional Director on June 14, 2012. And “Pet. RFR” refers to Petitioner’s Request for Review that was filed with Board on June 27, 2012.

Trustees] shall be guided by Islamic and Saudi Arabian heritage and traditions where appropriate.”).

That mission remains the same nearly 30 years later. The Parent/Student Handbook describes the Academy’s mission as follows: “The mission of the Islamic Saudi Academy is to enable our students to excel academically while maintaining the values of Islam and proficiency with the Arabic language.” Exh. E-4, Islamic Saudi Academy Parent/Student Handbook at 1 (2011-2012); *see* Exh. E-2, Islamic Saudi Academy Employee Handbook at 6 (same). That same handbook explains that one of the school’s primary “goals” is to provide students with a “balanced and thorough education” in “an atmosphere conducive to building Muslim character and personality.” Exh. E-4, Parent/Student Handbook at 1; Exh. E-3, The Islamic Saudi Academy, *Beginning the Third Decade* at 24 (“The Academy’s main goal is to form an Islamic character that strives, through understanding of its religion, to be the best example of good conduct.”); Exh. E-34, Operations Manual at E-010 (Student Code of Conduct) (“The Islamic Saudi Academy shall provide a safe and healthful environment conducive to building Muslim character and personality.”). Similarly, the Academy’s public website states that it seeks to “[c]reate opportunities for [its] students to embrace, internalize, and practice the moral values established in the Holy Qur’an and the exemplary life of our Prophet Muhammad (S.A.S).” *See* Exh. E-16, Islamic Saudi Academy, *Vision*; *see also* Exh. E-2, Employee Handbook at 6 (same); Exh. E-15, The Islamic Saudi Academy, *A Prominent Educational Institution* (Informational Brochure) at 2 (same).²

² The Academy’s public website also explains that the “central goal” of the Academy “is the formation of Muslim character.” In particular, the Academy seeks to instill the following characteristics in its students: “A Muslim pursues spiritual goals through all his/her world endeavors. Muslim behavior embodies and reflects Islamic morals and values. Pursuit of knowledge is among a Muslim’s highest responsibilities and a spirit of inquiry is its prerequisite.

All employees—teachers and non-teachers—are expected to support and abide by the school’s religious mission. Indeed, as detailed in the Employees Handbook, 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.” Exh. E-2, Employees Handbook at 30; *see* Tr. 154:20-24 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that all employees are expected to “live within the school[’s] Muslim culture and Muslim practices and beliefs”); D&DE at 18.

The school’s religious mission permeates every aspect of life at the Academy.³ Below are just a few examples of how the Academy, its students (who are all Muslim), its faculty, and its staff fulfill the school’s mission of fostering an Islamic educational environment.

- After the first grade, male and female students attend separate schools. *See* Exh. E-4, Parent/Student Handbook at 12; Tr. 56:5-7; D&DE at 4. “The separation of students exists in other ways outside the classroom.” D&DE at 4-5. For example, “[b]oys and girls do not eat lunch in the cafeteria at the same time.” D&DE at 5. In addition, “[w]hen riding the school’s buses, the two groups sit on opposite sides of the bus.” D&DE at 5. This separation of the sexes is based on the Islamic principle that unnecessary mixing of young men and young women should be avoided. Tr. 56:8-12.
- All students must participate in the Islamic Studies Program. Tr. 71:23-75:4; D&DE at 7. The Islamic Studies Program is considered the “cornerstone” of the Academy’s curriculum, for it “is the main objective for which the Academy was established[:] to teach students Islamic faith, Arabic language, and keep them in close contact with their Islamic heritage and culture and to maintain Muslim ethics and values.” Exh. E-30, Islamic Studies Department at 1; D&DE at 7. Students in kindergarten and first grade participate in

Faith and reason work hand-in-hand to lead a Muslim toward higher knowledge and progress, sound individual life choices, and service to society.” *See, e.g.*, Exh. E-18, Islamic Saudi Academy, *Boys High School*; *see also* Exh. E-34, Operations Manual at Introduction (same).

³ Dr. Ronald Schultz, Acting Director General of the Academy, described Islam’s role in the school as follows: “[It] permeates the school, the way we deal with each other in the hallways, the way teachers deal with students in classrooms, the way we deal with parents, the way we publicize ourselves in front of the world through our webpages, through our publications. Islam and its culture, and its customs and its beliefs permeates everything that the school does.” Tr. 142:12-18.

Islamic Studies for 30 minutes each day. Students in grades 2 through 6 have an Islamic Studies course for 45 minutes each day. And students in grades 7 through 12 have Islamic Studies for 3 hours and 45 minutes per week. Tr. 432:12-18; *see also* Tr. 452:3-458:16, 544:1-15. In order to graduate, a student must complete 4 credits of Islamic Studies, as compared to only 3 credits for Math, Science, and Social Studies. *See* Exh. E-2, Employee Handbook at 7-8.

- The Academy also provides a general studies curriculum involving other academic subjects (such as math, social studies, and art) and it participates in the International Baccalaureate (IB) Diploma Program for grades 11 and 12. In those courses, the Academy integrates principles of the Islamic faith where appropriate and provides education through a Muslim lens. *See* Tr. 549:19-20 (testimony of Ziad Alzakari, Boys School Principal) (“[W]e do see our curriculum through Islamic lenses.”); D&DE at 25 (finding that there is “integration of Islamic principles in other subjects”). For example, Social Studies features a review of the life of the Prophet Muhammad (S.A.S.), and the Companions of the Prophet who succeeded him as Caliphs. Tr. 545:18-22, Tr. 698:7-10, 21-23. There is also an Arabic Social Studies class offered from third grade through high school. Tr. 545:23-547:3; 287:25-288:9. Math involves a review of Muslim contributions to Algebra and Geometry, Tr. 550:25-551:2, while Art classes are mindful of Islamic prohibitions against drawing the human form. Tr. 549:20-22; D&DE at 9. And in Arabic class, students read, among other things, the Quran and stories about the Prophet Muhammad (S.A.S.). *See* Exh. E-44, Eighth Grade Arabic Language Textbook; Tr. 458:23-459:5, 524:22-528:11, 547:5-549:13; D&DE at 8.⁴
- The school day starts with a “morning meeting” for all students (though the boys’ meeting and girls’ meeting take place in separate locations). Each morning, this school wide assembly begins with a recitation of verses from the Holy Quran. Tr. 176:22-178:2, 298:19-299:14, 411:7-413:4, 418:9-419:14, 530:3-531:18; D&DE at 10-11. For grades 2 through 6, the morning meeting concludes with a prayer. Tr. 414:8-416:12.⁵

⁴ One of petitioner’s witnesses, Ms. Rahima Abdullah, testified that the Arabic classes did not include readings from the Quran. *See* Tr. 315:18-316:6. In light of Employer’s Exhibit 44 (an Arabic textbook used at the Academy that contains verses of the Quran) and the testimony of Girls’ School Principal Faridah Turkistani (Tr. 458:23-459:5, 463:16-465:21, 468:3-470:14) and Boys’ School Principal Ziad Alzakari (Tr. 524:22-528:11, 547:5-549:13), it is evident that Ms. Abdullah was mistaken.

⁵ There was some debate during the hearing about whether students are “required” to attend this morning meeting, which begins at 7:45 a.m. While there may be no disciplinary action taken against a student for missing a meeting, the clear and settled expectation is that all students will attend the morning assemblies. *See* Tr. 180:8-15 (testimony of Dr. Ronald Schultz, Acting Director General); Tr. 416:14-18, 492:20-23 (testimony of Faridah Turkistani, Girls School Principal); Tr. 554:6-10, 565:14-25 (testimony of Ziad Alzakari, Boys School Principal); Exh. E-4, Parent/Student Handbook at 2 (“School starts at the main campus at 7:45 a.m. . . .”).

- The school maintains and operates its own private mosque, Tr. 56:18-24, 535:11-536:2, which the school describes as “the heart of the Academy,” *see* Exh. E-3, *Beginning the Third Decade* at 63. During the school day, a call for prayer—the “*adahn*”—is announced over the speaker system and students convene at the mosque (boys), gymnasium (girls, grades 7 through 12), or auditorium (girls, grades 2 through 6) to offer the afternoon prayer. Tr. 156:5-9, 422:10-423:7, 536:7-22; D&DE at 11. Offering five daily prayers, at set times, is a tenet of the Islamic faith. Tr. 230:14-231:1. All students are required to attend these daily prayer sessions. *See* Exh. E-4, *Parent/Student Handbook* at 12 (“All students are expected to attend prayer if possible. Students are not permitted to stay in classrooms during prayer time.”); Tr. 300:23-301:5, 426:20-427:7, 531:19-534:17; D&DE at 25 (“[A]ll students must attend the afternoon prayer.”). Students who do not attend prayer without a “special excuse” are disciplined. *See* Tr. 156:10-157:5 (testimony of Dr. Ronald Schultz, Acting Director General); Tr. 616:16-617:6 (testimony of Dr. Sheena Friend, science teacher) (explaining that a student who does not attend prayer will typically receive detention and stating that in April 2012 several girls received three days’ detention for not attending afternoon prayer); D&DE at 11.
- The food served at the Academy’s cafeteria is consistent with Islamic dietary restrictions: only halal food is served. Tr. 81:19-82:21; D&DE at 12.⁶ During Ramadan—the Muslim month of fasting—students of requisite age generally abstain from eating and drinking during daylight hours. Tr. 231:11-13. Non-Muslim staff are discouraged from eating in front of students who are fasting. Tr. 155:7-12, 321:20-22. The Academy provides a private area for non-Muslim staff who wish to eat during the daylight hours of Ramadan.
- The Academy has a dress code for students and staff that is consistent with Islamic customs and traditions. *See* D&DE at 12-13. With respect to students, the *Parent/Student Handbook* describes in detail the dress code, including a

⁶ In its Request for Review, Petitioner claimed that there was “inconsistent testimony” about whether the school’s cafeteria is halal. Pet. RFR 22. It is not clear what Petitioner meant 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 asked 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. RFR 31. But Petitioner’s musings about web searches do not change consistent testimony into “inconsistent testimony.”

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”). Exh. E-4, Parent/Student Handbook at 3-5; *see* Exh. E-8, ISA Girls’ School Uniform Policy for Grades 7-12 for 2011-2012 (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 ISA”); Tr. 551:21-552:10, 572:3-574:23 (testimony of Ziad Alzakari, Boys School Principal) (discussing dress code and explaining that Islam underlies the dress code for the boys’ school).

As for employees, the Employees Handbook prescribes that “all employees are expected to dress modestly” in “keeping with Islamic customs and professional traditions.” For example, “[s]leeves should come at least to the elbow and skirts/dresses covering the knees.” Exh. E-2, Employees Handbook at 31; Tr. 152:6-153:2; 552:11-553:17; *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”); 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”).

- The Academy celebrates the main Muslim holidays and closes in observance of those days. *See* Exh E-13, School Calendar (noting that the Academy closes in observance of Eid Alfitr and in observance of Eid Aladha); Exh. E-2, Employees Handbook at 40 (same); Exh. E-34, Operations Manual at O-004 (same); Tr. 144:11-16, 170:11-171:14, 420:7-14; *see also* Exh. E-1, Basic Law of Governance art. 2 (“The State public holidays are Eid Al Fitr (the Feast of Ramadan) and Eid Al Adha (the Feast of the Sacrifice).”). In addition, the official school calendar—which is distributed to employees, parents, and students—refers to both the Gregorian calendar and the Islamic calendar. *See* Exh. E-13, School Calendar; Tr. 171:15-172:5; D&DE at 12.
- The Academy, including its hallways, classrooms, and common areas, is decorated with verses from the Holy Quran and Islamic art, including pictures of Makkah and other holy mosques. *See* Exh. E-56 (photographs of the Academy); Tr. 710:22-736:18 (testimony of Dolores Rader, Social Studies Department Head) (explaining photographs); Tr. 554:22-558:8 (testimony of Ziad Alzakari, Boys School Principal).

Students and employees are uniformly expected to adhere to the above requirements, which are designed to achieve the Academy’s goal of providing an environment “conducive to building Muslim character.” Exh. E-34, Operations Manual at E-010; Exh. E-4, Parent/Student

Handbook at 1. If a student fails to abide by these “Islamic religious tenets,” he or she will be asked to leave the school: “The Academy reserves the right to dismiss any student who knowingly and purposefully engages in behavior while at school, or at any time away from school, that is adjudged to be inappropriate or inconsistent with Islamic moral or ethical standards and its ideals of honor, integrity or accountability.” Exh. E-34, Operations Manual at E-010. And, as noted above, the same goes for *all* employees: failure to adhere to the school’s religious principles and practices will result in termination for cause. *See* Exh. E-2, Employees Handbook at 30.

II. PROCEDURAL HISTORY

On May 8, 2012, the Islamic Saudi Academy Employees Professional Association (“ISAEPA” or “Petitioner”) filed a petition with the National Labor Relations Board (the “Board”) seeking to represent certain Academy employees. A hearing was held before a Board Hearing Officer on May 17, 18, and 21. During that hearing, ISAEPA amended the petitioned-for unit to “all full-time and regular part-time employees employed by the Employer, but excluding all bus driver managers; maintenance managers; vehicle maintenance foreman; temporary health employees; English as a second language temporary teachers, also known as ESL temporary teachers; physical education temporary teachers; also known as PE temporary teachers; controllers; elementary coordinators; West Campus coordinators; assistant principals; vice principals; principals; directors of education; personnel managers; business managers; finance officers; transportation managers; directors general; acting directors general; executive assistants; managerial employees; guards; and supervisors as defined in the Act.” Tr. 14:4-18.

The Academy asserted that the petition should be dismissed. As relevant here, the Academy argued that the Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), precludes the Board from exercising jurisdiction over the petitioned-for unit

because the Academy is a *bona fide* religious school dedicated to the mission of providing an Islamic curriculum and educational environment.⁷

On June 14, 2012, the Regional Director issued his Decision and Direction of Election. After being presented with overwhelming evidence about the school's religious mission and how that mission permeates every aspect of life at the Academy, 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. The Regional Director accordingly held that the Academy "is a religious school within the meaning of *Catholic Bishop*." 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. Having found that the Academy was a religious school under *Catholic Bishop*, the Regional Director held that the Board lacked jurisdiction over the Academy's teachers and "dismiss[ed] the portion of the petition concerning the teachers." D&DE at 26.

Although the Regional Director concluded the Board lacked jurisdiction over the school's teachers, he found the Board could exercise jurisdiction over the Academy's non-teaching

⁷ The Academy also argued that the Board lacked jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). Because the Board did not grant review of that issue, this brief does not address that contention. The Academy continues to maintain, however, that the FSIA bars the Board from exercising jurisdiction in this matter.

employees.⁸ D&DE at 26-28. In so doing, the Regional Director distinguished two prior Board decisions—*Riverside Church in the City of New York*, 309 N.L.R.B. 806 (1992), and *St. Edmund’s Roman Catholic Church*, 337 N.L.R.B. 1260 (2002)—in which the Board had declined to exercise jurisdiction over church employees who performed secular tasks that furthered the institution’s religious mission. The Regional Director held that those decisions were “inapposite” because the Academy is not a church and because the non-teaching employees at issue here “have no role in the inculcation of religion” and do not “perform secular tasks without which the [Academy] would be unable to accomplish its religious mission.” D&DE at 27 (internal quotation marks omitted). The Regional Director therefore ordered an election in a unit of non-teaching employees at the school.⁹

The Academy and the ISAEPA filed requests for review with the Board. On August 17, 2012, the Board granted the Employer’s and the Petitioner’s Requests for Review with respect to the following issue: “whether the Board has jurisdiction over the petitioned-for teacher and non-teacher employees.”

ARGUMENT

I. THE ACADEMY IS A RELIGIOUS SCHOOL UNDER *CATHOLIC BISHOP AND*, THEREFORE, THE BOARD PLAINLY LACKS JURISDICTION OVER THE PETITIONED-FOR TEACHER EMPLOYEES

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the United States Supreme Court held that the Board lacks jurisdiction over lay teachers at religious schools. The Court explained that a contrary interpretation of the National Labor Relations Act would “create[] an

⁸ The ISAEPA “stated that it would proceed to an election in any unit” the Regional Director found appropriate. D&DE at 27.

⁹ The Regional Director also concluded that the Board conditionally had jurisdiction over the Academy’s guidance counselors. D&DE at 28. Because “the record [did] not indicate the extent of the guidance counselors’ duties in propagating the Islamic faith at the school,” the Regional Director found that the counselors would be permitted to vote subject to challenge. *Id.*

impermissible risk of excessive governmental entanglement in the affairs of” religious educational institutions. *Id.* at 501. The Court observed that the Board’s exercise of jurisdiction over religious schools would inevitably “implicate sensitive issues that open the door to conflicts between” the Board and school administrators about the sincerity of professed religious beliefs and the relationship of those beliefs to the school’s mission. *Id.* at 502-03. Such conflicts would run a serious risk of “imping[ing] on rights guaranteed by the Religion Clauses.” *Id.* at 502.

Since the Court’s decision, the Board and D.C. Circuit have taken differing approaches on how *Catholic Bishop* should be interpreted and applied. Regardless of the approach adopted here, however, the conclusion must be the same: the Islamic Saudi Academy is a *bona fide* religious school and, therefore, an exercise of jurisdiction by the Board in this matter would present “a significant risk that the First Amendment will be infringed.” *Catholic Bishop*, 440 U.S. at 502.

A. The Academy Is A Religious School Under The Board’s Decisions In *Jewish Day School* and *Nazareth Regional High School*

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 conclusion that the Academy is a religious school under *Catholic Bishop*. 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. 294:8-12.¹⁰

This case is also clearly distinguishable from three prior Board decisions cited favorably by Petitioner in its Request for Review. *See* Pet. RFR 33-37. The Regional Director correctly rejected Petitioner’s attempt to compare this case to the Board’s decision in *University of Great Falls*, 331 N.L.R.B. 1663 (2000). 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.” *Id.* “In this case,” by contrast, “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. RFR 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]

¹⁰ 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).

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 Academy is not a religious school under the Board’s decision in *Livingstone College*, 286 N.L.R.B. 1308 (1987). *See* Pet. RFR 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; Exh. E-10, Charter at 1; Exh. E-4, Parent/Student Handbook at 1; Exh. E-2, Employee Handbook at 6.

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”). Indeed, as one teacher at the Academy explained, he was required to sign a contract in which he promised to “act in a way that [was] not contradictory to Islamic values.” *See* Tr. 632:21-633:20 (testimony of David

Kovalik, psychology teacher).¹¹ This stands in stark contrast to the faculty members at issue in *Livingstone College*. See *Livingstone Coll.*, 286 N.L.R.B. at 1309-10 (finding that “faculty members are not required to conform to [AME Church] doctrine” and “there is no evidence that the [employer] could require dismissal of faculty for engaging in conduct not in harmony with the teachings of the [AME] Church, or for advocating ideas contrary to Church beliefs”).

In sum, the Regional Director reached the only conclusion that is consistent with prior Board 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.

B. The Academy Is A Religious School Under The D.C. Circuit’s Decisions in *Carroll College* and *Great Falls*

Two cases from the D.C. Circuit confirm that the Academy is a religious school under *Catholic Bishop*. 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. In so doing, the court applied a three-prong test for determining whether a school may invoke the protection of *Catholic Bishop*. According to the D.C. Circuit, a

¹¹ In his or her employment contract, each Academy employee agrees, among other things, “to comply with all Academy rules, regulations, policies and procedures as outlined in the Academy’s Employee Handbook and Operations Manual.” See Exh. E-33, Islamic Saudi Academy Employment Agreement, 2011-2012 Academic Year. The Employee Handbook, in turn, makes clear that all employees “are expected to”: “[a]ppreciate the purpose of the Academy to provide instruction in Islamic Studies, in the Arabic Language, and in a demanding and challenging general education program”; “[r]ecognize and support the Muslim commitment and dedication to the special sanctity and traditional structure of the family by personal deportment and behavior that demonstrates appreciation for that fundamental and valued estate of Islam”; and “[u]nderstand and support the stated goal that pursuit of knowledge is among a Muslim’s highest responsibilities.” Exh. E-2, Employee Handbook at 30. For its part, the Operations Manual emphasizes that all employees must follow “rules and regulations based on,” among other things, “the teachings of Islam” so the Academy can provide an environment conducive to building Muslim character and personality. Exh. E-34, Operations Manual at O-005; see also *id.* at E-010.

“school is exempt from NLRB jurisdiction 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 Coll.*, 558 F.3d at 572 (internal quotation marks and citations omitted). This “bright-line rule,” the court explained, “ensure[s] that schools claiming a *Catholic Bishop* exemption are *bona fide* religious institutions, while avoiding Board inquiry into the substance and contours of their religious beliefs and missions.” *Id.* (internal quotation marks and citation omitted). The Academy satisfies all three of these factors.

1. As for the first prong, there should be no dispute that the Academy “holds itself out to students, faculty and the community as providing a religious educational environment.” Indeed, the Academy’s Parent/Student Handbook, Employee Handbook, and public website all make clear that the school seeks to provide an educational environment that “maintain[s] the values of Islam” and is “conducive to building Muslim character and personality.” *See* Exh. E-4, Parent/Student Handbook at 1; Exh. E-2, Employee Handbook at 6; Exh. E-16, Islamic Saudi Academy website. The Academy’s Charter further underscores the Islamic mission of the school. *See* Exh. E-10, Charter at 1 (“The exclusive purpose of the Academy is to provide instruction in Islamic Religion, Studies and Practices; Arabic Language; and General Education . . .”).

2. The second prong is also easily satisfied. The Charter expressly provides that the “Academy shall be organized and operate as not-for-profit.” Exh. E-10, Charter at 1. Although the Academy is not organized as a so-called 501(c)(3) organization (because it is a foreign instrumentality), its Charter provides that it may not “carry on any other activities [that are] not

permitted to be carried on by an organization which is exempt from the United States income tax under Section 501(c)(3) of the United States Internal Revenue Code.” *Id.* at 7. The parties also stipulated that the Academy is “a non-profit private educational institution.” Tr. 9:8-25; *see also* Tr. 111:14-112:14 (testimony of Dr. Ronald Schultz, Acting Director General) (explaining that the Academy is organized and run as a non-profit); Tr. 797:19-798:17 (testimony of Dr. Samy Musa, Finance Manager) (stating that the Academy has never made a profit and that all funds are used to operate the school).

3. The third prong is satisfied for several reasons. As an initial matter, the Academy should not be required to show an affiliation with a particular “religious organization”—if that term means a specific place of worship or official arm of a religious denomination. As previously discussed, the main purpose of the D.C. Circuit’s three-pronged test is to ensure that only *bona fide* religious institutions invoke *Catholic Bishop*. Indeed, the court in *Great Falls* expressly left open the possibility that the “affiliation” requirement may not be necessary to demonstrate a school’s legitimate religious character. *See Great Falls*, 278 F.3d at 1347 n.2 (“We need not and do not decide whether other indicia of religious character might replace ‘affiliation’ in other cases.”). The Board itself has reached a similar conclusion, finding that “a school’s affiliation with a religious organization” is merely “one factor to consider” when determining whether *Catholic Bishop* applies. *See Jewish Day Sch.*, 283 N.L.R.B. at 760; *see also NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 823 (2d Cir. 1980) (holding that the Supreme Court in *Catholic Bishop* “intended no particular limitation in using the term ‘church-operated’ to describe religious schools” but rather employed it “as a convenient method of characterizing schools with a religious mission”).

Accordingly, it should suffice that the Academy is legitimately (and publicly) “affiliated” with Islam, a “recognized religion.” Requiring the Academy to establish any further connection with a particular entity would risk having *Catholic Bishop* apply differently to Islamic schools merely because of the nature of that religion. Indeed, unlike Catholicism or many Protestant faiths, Islam does not have a hierarchical structure that lends itself to the sort of organization or affiliation that typically is found with Christian schools. *See* Tr. 235:9-237:22 (testimony of Dr. Muqtedar Khan).

A mandatory requirement that schools (Islamic or otherwise) be affiliated with a particular organization would also lead to bizarre results—results at odds with the protections guaranteed by the First Amendment. For example, the Academy maintains and operates its own mosque, at which its students conduct prayers. Members of the local community may visit and pray at the mosque as guests with the Academy’s permission. *See* Tr. 538:12-16. The Academy could have instead associated itself with a local mosque and have its students travel there for the daily prayers. That, of course, would have been logistically difficult and significantly-more costly.¹² It surely cannot be the case, however, that a decision to maintain a mosque on school premises rather than affiliate with one off-campus can be dispositive for purposes of *Catholic Bishop*. Accordingly, the relevant inquiry should simply be whether the Academy is affiliated with a particular religion—i.e., whether it is a *bona fide* religious institution. For the reasons already discussed, the Academy is a *bona fide* religious school and, therefore, exempt from the Board’s jurisdiction.

¹² It also would have been contrary to how Islamic schools traditionally operate. As Dr. Khan explained, when asked whether it was possible to analogize Islamic schools to Catholic schools in the United States: “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.

Even if the Academy is required to show an affiliation with a particular organization, that element is nonetheless satisfied because the Kingdom of Saudi Arabia—with which the Academy is plainly affiliated—is a “recognized religious organization” for purposes of *Carroll College* and *Great Falls*. As the Academy’s Charter explains, the school “is established pursuant to the *Kingdom’s Islamic responsibilities as custodian of Islam’s two most holy mosques in Makkah and Medinah*, and its unswerving commitment and policy to further Islamic understanding and the religious education and development of its young people.” Exh. E-10, Charter at 1 (emphasis added). Indeed, the King of Saudi Arabia’s official title is “The Custodian of the Two Holy Mosques.” See Tr. 240:18-21 (testimony of Dr. Muqtedar Khan) (observing that this title “underscores the fact that Saudi Arabia is both a religious community as well as a political community”); *id.* at 241:6-7 (explaining that “Saudi Arabia as a state exists to fulfill the Islamic purpose”); Tr. 760:3-5 (testimony of Dr. David Long) (describing Saudi Arabia as an “Islamic political system”).

In 1992, King Fahd bin Abdulaziz Al-Saud issued a Royal Decree embodying the Basic Law of Governance. The first Article of that Decree provided: “The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God’s Book, the Holy Qur’an, and the Sunna (Traditions) of the Prophet (PBUH).” Exh. E-1, Basic Law of Governance art. 1; see Tr. 241:12-18 (testimony of Dr. Muqtedar Khan) (describing the Holy Quran as the “constitution” of Saudi Arabia). The Decree also establishes that the “Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna [traditions] of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State” and that “Governance in the Kingdom of Saudi Arabia is based on justice, shura (consultation) and equality according to Islamic Sharia.” Exh. E-1, Basic Law of

Governance arts. 7, 8.¹³ Article 23 provides that the “State shall protect the Islamic Creed, apply the Sharia, encourage good and discourage evil, and undertake its duty regarding the Propagation of Islam (Da’wa).” *Id.* art. 23. Article 34 provides that it is the “duty of every citizen to defend the Islamic Creed.” *Id.* art. 34. And Article 9 establishes that the “family is the nucleus of Saudi Society. Members of the family shall be raised in the Islamic Creed, which demands allegiance and obedience to God, to His Prophet and to the rulers, respect for and obedience to the laws, and love for and pride in the homeland and its glorious history.” *Id.* art. 9.

In light of the Basic Law of Governance, as well as the special responsibilities of the King of Saudi Arabia as The Custodian of the Two Holy Mosques, the Kingdom of Saudi Arabia should be considered a “recognized religious organization” for the purposes of *Carroll College* and *Great Falls*. Because the Academy is affiliated with the Kingdom—indeed, it was established pursuant to the Kingdom’s “Islamic responsibilities”—the third prong of the D.C. Circuit’s test is met here.¹⁴

C. Petitioner’s Arguments That The *Islamic Saudi Academy* Is Not A Religious School Strain Credibility

Grasping at proverbial straws, Petitioner offers a scattershot of arguments for why the Academy is not a religious school under *Catholic Bishop*. None have merit.

¹³ See also Exh. E-1, Basic Law of Governance art. 48 (“The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur’an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur’an and the Sunna.”).

¹⁴ The Academy also contends that the Kingdom of Saudi Arabia is “an entity, membership of which is determined, at least in part, with reference to religion.” *Carroll Coll.*, 558 F.3d at 572 (quotation marks and citation omitted). Accordingly, the third prong of *Carroll College* and *Great Falls* is satisfied on that basis as well. See, e.g., Exh. E-1, Basic Law of Governance arts. 9, 34 (requiring that members of the family be “raised in the Islamic Creed” and that Saudi citizens “defend the Islamic Creed”); Tr. 239:19-25 (testimony of Dr. Muqtedar Khan) (observing that all citizens of Saudi Arabia are Muslim); Tr. 763:16-17 (testimony of Dr. David Long) (“All citizens of Saudi Arabia are Muslims, and they want to keep it that way.”).

1. 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. RFR 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. Thus, adopting Petitioner’s requirement would effectively mean that no Islamic school in the United States would qualify as a religious school for purposes of *Catholic Bishop*. That surely cannot be the law.

2. 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. RFR 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).¹⁵

3. 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. RFR 3-5, 6-8, 25-27, 45. But of course the mere fact that a school offers a well-rounded 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*

¹⁵ 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. RFR 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.

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.¹⁶

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 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.

4. Finally, Petitioner contends that the Regional Director erred when he found that “there is some integration of Islamic principles” in classes beyond Islamic Studies. *See* Pet. RFR 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

¹⁶ Petitioner’s rule would also be inconsistent with federal court precedent. In *Carroll College, Inc.* and *Great Falls*, the D.C. Circuit held that *Catholic Bishop* precluded the Board from exercising jurisdiction over religious educational institutions even though they 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.

cited by the Regional Director as support for this finding. Pet. RFR 20. Petitioner acknowledges, for instance, that students may not draw the human body in art class. See Pet. RFR 21-22. Petitioner instead asserts that this prohibition is unrelated to Islam. See Pet. RFR 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. RFR 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. RFR 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 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).

* * *

Under any plausible interpretation of *Catholic Bishop*, the Islamic Saudi Academy is a *bona fide* religious school. Because it is beyond dispute that the Board may not exercise jurisdiction over teachers at a religious school, *see Catholic Bishop*, 440 U.S. at 507, the Regional Director’s decision that the Board lacks jurisdiction over the petitioned-for teacher employees in this case must be affirmed.

II. THE RATIONALE UNDERLYING *CATHOLIC BISHOP* EXTENDS TO NON-TEACHERS AND, THEREFORE, THE BOARD LACKS JURISDICTION OVER THE PETITIONED-FOR NON-TEACHER EMPLOYEES

Because *Catholic Bishop* and *Jewish Day School* only involved efforts to organize teachers, *see Catholic Bishop*, 440 U.S. at 491; *Jewish Day Sch.*, 283 N.L.R.B. at 757, the Board in *Jewish Day School* expressly reserved the question of “whether the Board’s exercise of jurisdiction with respect to other employee classifications in [religious schools] would raise serious constitutional questions.” *Jewish Day Sch.*, 283 N.L.R.B. at 761 n.48. For the reasons discussed below, the Board should resolve that question by holding that the First Amendment protections underlying *Catholic Bishop* extend with equal vigor to non-teaching employees.

Although the Board has yet to answer the question left open by *Jewish Day School*, it has decided a series of cases in the analogous context of secular employees that work for a church or other place of worship. In that line of cases, the Board has held that it will *not* exercise jurisdiction over employees performing seemingly-secular tasks, such as custodial or maintenance work, for a church employer. See, e.g., *St. Edmund's Roman Catholic Church*, 337 N.L.R.B. at 1261 (declining to exercise jurisdiction over a unit of custodial employees that were “directly employ[ed]” by a Roman Catholic Church that also operated a school); *Riverside Church*, 309 N.L.R.B. at 807 (declining to exercise jurisdiction over a unit of service and maintenance employees that were employed by a church and performed “secular tasks without which the Employer would be unable to accomplish its religious mission”).

The Board's decision in *St. Edmund's Roman Catholic Church* is particularly instructive here. That case involved a group of custodial employees who performed “routine maintenance work” for a “Roman Catholic Church and school located in Brooklyn, New York.” 337 N.L.R.B. at 1260; see *id.* (noting that the “Church, the elementary school, and the high school [were] a single employer”). The Regional Director in that case found “that jurisdiction over the Employer was not prohibited by [*Catholic Bishop*] and its progeny.” *Id.* In reaching that conclusion, the Regional Director relied on the Board's earlier decisions in *Ecclesiastical Maint. Servs., Inc.*, 325 N.L.R.B. 629, 630-31 (1998) (exercising jurisdiction over unit of employees at a religiously-affiliated company that performed cleaning and maintenance services), and *Hanna Boys Ctr.*, 284 N.L.R.B. 1080, 1082-83 (1987) (exercising jurisdiction over unit of child-care workers employed by a religiously-affiliated, charitable institution that operated a home for troubled boys). The Board reversed the Regional Director's decision and held that it lacked jurisdiction over the custodial employees. See *St. Edmund's Roman Catholic Church*, 337

N.L.R.B. at 1260. In particular, the Board distinguished its prior decisions in *Ecclesiastical Maintenance Services* and *Hanna Boys Center* on the ground that “neither concerned an employer which was itself a religious institution” pursuing a “religious mission[.]” *Id.* at 1260-61.

Despite the Board’s decisions in *St. Edmund’s Roman Catholic Church* and *Riverside Church*, the Regional Director in this case concluded that the Board could exercise jurisdiction over non-teaching employees at the Academy for two primary reasons. First, the Regional Director observed that the Academy was not a church and, therefore, this case was distinguishable from prior Board decisions like *St. Edmund’s Roman Catholic Church*. See D&DE at 27. For purposes of applying *Catholic Bishop*, however, it is wrong to draw a bright line between religious schools and places of worship. Indeed, “the *raison d’etre*” of both types of institutions “is the propagation of a religious faith.” *Catholic Bishop*, 440 U.S. at 503 (citation omitted). And, as the Board indicated in *Ecclesiastical Maintenance Services*, a more proper dividing line is between institutions that provide “worship services or religious education,” on the one hand, and entities that do not perform such functions, on the other. See 325 N.L.R.B. at 630-31 (observing that *Riverside Church* was distinguishable because the employer in *Ecclesiastical Maintenance Services* did “not provide worship services or religious education” but rather performed “routine commercial cleaning and maintenance services”).

There is also a serious question of whether such a line could even be legitimately drawn in this case. This is because the Academy maintains and operates its own mosque. Students conduct prayers at the mosque, and members of the local community may visit and pray at the mosque as guests. See Tr. 56:18-24, 535:11-536:2, 538:12-16. In this respect, the Academy is quite similar to the places of worship at issue in *St. Edmund’s Roman Catholic Church* and

Riverside Church. See also Tr. 237:7-13 (testimony of Dr. Muqtedar Khan) (explaining that, unlike Christian churches in the United States, “there are no mosques running Islamic schools” and that, “in the Islamic context, it is the other way around”—Islamic schools operate their own mosques).

Finally, as the Supreme Court recognized in *Catholic Bishop*, the risks of improper government entanglement are present regardless of whether the institution is a place of worship or a religious school. See 440 U.S. at 502-04. By drawing a bright line between religious schools and places of worship, the Regional Director exalted form over substance.

The second reason offered by the Regional Director for concluding that the Board could exercise jurisdiction over non-teachers is that those employees “have no role in the inculcation of religion” at the Academy. See D&DE at 26-27. As an initial matter, that finding is not accurate. The Academy’s 15 bus drivers, for example, are responsible for maintaining the separation of the sexes on the bus. See D&DE at 5 (“When riding the school’s buses, [boys and girls] sit on opposite sides of the bus. The school’s bus drivers are responsible for maintaining this separation.”); Tr. 77:4-13. This separation is based on the Academy’s religious tenets. See Tr. 56:5-12. Similarly, the Academy’s cafeteria workers are responsible for ensuring that the school only serves halal food, consistent with Muslim principles. See Tr. 81:19-82:21. More generally, *all Academy employees* are required to abide by the school’s religious mission and Islamic “moral standards”—including a dress code grounded in Islamic principles. See Exh. E-2, Employees Handbook at 30; see 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”); Exh. E-34, Operations Manual at O-005 (explaining that all employees are expected to appreciate that the purpose of the Academy is to provide

instruction in Islamic Studies, recognize and support the Muslim commitment and dedication to the values of Islam, and understand and support the Muslim pursuit of knowledge). In this respect, *all employees* play a role in fostering and furthering the Academy’s mission of providing an Islamic educational environment that is conducive to building Muslim character.

The Regional Director’s decision fails, moreover, to recognize that the same risks of entanglement that animated the Supreme Court’s decision in *Catholic Bishop* also exist whenever the Board exercises jurisdiction over *any* employee of a religious school. When resolving unfair labor practice charges, for example, resolution of such charges involving non-teachers—as with teachers—will “necessarily involve inquiry into the good faith of the position asserted by the [administrators] and its relationship to the school’s religious mission.” *Catholic Bishop*, 440 U.S. at 502. For example, if a bus driver at the Academy decided to no longer administer the school policy of students being separated on the bus by gender, this would implicate the same religious issues as if a teacher decided to hold an impromptu class that mixed the sexes. Similarly, if a cafeteria worker decided to serve non-halal food one day, contrary to school policy, any potential dispute with the administration would mirror a conflict between the administration and a teacher that served non-halal food in her class. And if a maintenance worker failed to comply with the dress code, the questions raised in a potential unfair labor practices charge would be no different than if it was a seventh-grade science teacher.

What is a student—or, perhaps more importantly, a parent—to make of a school where Islamic tenets are followed inside the classroom but not outside of it? How can a religious school seeking to provide an environment “conducive to building Muslim character,” Exh. E-4, Parent/Student Handbook at 1, do so when only some of its employees may be required to follow and implement the tenets that foster such an environment? In short, there is no sound reason to

view teachers and non-teachers differently when it comes to the First Amendment concerns that underlie *Catholic Bishop*—specifically, impermissible governmental entanglement with the religious beliefs propagated by a religious school.

Finally, the notion that the Board may conclusively determine which employees further the religious mission of the school—and which employees do not—contravenes the Supreme Court’s admonition in *Catholic Bishop* that “[i]t is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” 440 U.S. at 502. In order to determine whether a non-teaching employee “plays a role” in furthering the school’s religious mission, the Board will inevitably have to engage in the types of infringing questions and processes against which the Court cautioned. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (observing that questions to a school official “about the nature of the University’s religious beliefs and how the University’s religious mission was implemented” and the general “dissection of life and beliefs at the University” was “the *exact* kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid”).

In sum, the Board should conclude that it lacks jurisdiction over non-teaching employees at a religious school—just like it concluded that it lacked jurisdiction over the custodial employees in *St. Edmund’s Roman Catholic Church*, 337 N.L.R.B. at 1261, and the maintenance workers in *Riverside Church*, 309 N.L.R.B. at 807. As in each of those cases, the employer here pursues a religious mission that includes the propagation of a religious faith. And as in each of those cases, the non-teaching employees here perform tasks “without which the Employer would be unable to accomplish its religious mission.” *Id.*

* * *

For all these reasons, the Board should hold that it lacks jurisdiction over *all* employees of a religious school. A contrary conclusion would thrust the government into the thicket of religious beliefs, implicating the precise First Amendment concerns that animated the Supreme Court's decision in *Catholic Bishop*. Because *Catholic Bishop* precludes the Board from exercising jurisdiction over any possible unit, the petition filed by ISAEPA must be dismissed.

CONCLUSION

For the foregoing reasons, the Board should hold that (1) the Academy is a religious school under *Catholic Bishop*, (2) the First Amendment protections underlying *Catholic Bishop* extend with equal vigor to non-teachers, and (3) the Board therefore lacks jurisdiction over the petitioned-for teacher and non-teacher employees. Accordingly, the Academy respectfully requests that the Board dismiss the ISAEPA's petition for lack of jurisdiction.

Dated: August 31, 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 Request for Review was electronically filed with the NLRB on August 31, 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