

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SAINT XAVIER UNIVERSITY,)
)
)
 Employer,)
)
)
 And) Case No. 13-RC-092296
)
 SERVICE EMPLOYEES INTERNATIONAL)
 UNION, LOCAL 1,)
)
)
 Petitioner.)
)

SAINT XAVIER UNIVERSITY'S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

FRANCZEK RADELET P.C.
Amy Moor Gaylord
Joshua D. Meeuwse
300 South Wacker Drive
Suite 3400
Chicago, Illinois 60606-6785
(312) 986-0300

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
SUMMARY OF RELEVANT FACTS	2
I. STIPULATED RECORD	2
II. THE UNIVERSITY'S HISTORY AND RELATIONSHIP WITH THE SISTERS OF MERCY	2
A. The University's Origin.	2
B. The Sisters of Mercy's Conference <i>for</i> Mercy Higher Education.	3
C. As the Sisters of Mercy's Corporate Arm, the CMHE Maintains Reserved Powers over the University.	5
III. THE UNIVERSITY'S LEADERSHIP AND CATHOLIC PHILOSOPHY	6
A. The University's Leadership.	6
B. The University's Mission Statement.	8
C. <i>Ex Corde Ecclesiae</i>	8
D. The University's Philosophy.	11
IV. THE UNIVERSITY'S CATHOLIC IDENTITY AND APPLICATION OF <i>EX CORDE</i> <i>ECCLESIAE</i>	13
A. Various Expressions of the University's Catholic Identity.	13
B. The Office for University Mission and Heritage's Role in Shaping University Identity and Culture.	19
C. The Sisters of Mercy's Continued Involvement with the University.	22
D. Religious Courses at the University.	25
E. The University's Students and Faculty.	26
LEGAL ARGUMENT	27
I. THE BOARD'S SUBSTANTIAL RELIGIOUS CHARACTER TEST IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS AND SHOULD BE ABANDONED	27
A. The Board's Substantial Religious Character Test Is Inconsistent with Constitutional Requirements	27
B. The Board Should Adopt the Bright-Line Three-Part Test Used by the D.C. Circuit.	36
C. The Board Does Not Have Jurisdiction Under the D.C. Circuit's Three-Part Test.	37
CONCLUSION	40

TABLE OF AUTHORITIES

Cases

Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007)..... 29

Biscuit and Cracker Workers Local Union No. 405, 109 NLRB 985 (1954)..... 39

Butterworth Mortuary, 270 NLRB 1014 (1984)..... 39

Cantwell v. State of Connecticut, 310 U.S. 296 (1940)..... 30

Carroll Coll., Inc. v. NLRB, 558 F.3d 568 (D.C. Cir. 2009) 31, 33

Carroll College, Inc., 345 NLRB 254 (2005)..... 38

Catholic Social Services, 344 NLRB No. 167 (2010) 37, 38

Colorado Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008) 32, 34

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)..... 29

Ecclesiastical Maintenance Serv., 325 NLRB 629 (1998)..... 31

Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980) 30

Hernandez v. Commissioner of Internal Revenue Service, 490 U.S. 680 (1989)..... 29

McGinnis v. U.S. Postal Service, 512 F. Supp. 517 (N.D. Cal. 1980)..... 40

Mitchell v. Helms, 530 U.S. 793 (2000) 28

New York v. Cathedral Academy, 434 U.S. 125 (1977) 30, 35

New York v. Cathedral Academy, 434, U.S. 125 (1977) 35

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)..... 39

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)..... passim

Ranco, Inc., 109 NLRB 998, 1009 (1954)..... 39

Rules & Regulations, §102.67(c)(4) 1

Salvation Army, 345 NLRB 550 (2005) 37, 38

Thomas v. Review Bd. Ind. Employment Sec. Div., 450 U.S. 707(1981)) 35, 40

Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002)..... passim

Univ. of Great Falls, 278 F.3d at 1345 42

Univ. of Great Falls, 331 NLRB 1663 (2000)..... 31, 38

Universidad Central de Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1986) 32

Welsh v. United States, 398 U.S. 333 (1972)..... 40

Statutes

NLRB Rules & Regulations, §102.67(c)(4) 1

**SAINT XAVIER UNIVERSITY'S REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

PRELIMINARY STATEMENT

Saint Xavier University ("the University"), requests review of Region 13's Decision and Direction of Election in *Saint Xavier University and Service Employees International Union, Local 1*, Case Number 13-RC-092296, pursuant to Section 102.67(b)&(c) of the National Labor Relations Board's (the "Board") Rules and Regulations. As noted herein, there are compelling reasons for reconsideration of an important Board rule. *See* Rules & Regulations, §102.67(c)(4).

The Regional Director concluded that the Board has jurisdiction over the University, a Catholic university, under the Board's substantial religious character test. However, the Board's substantial religious character test is unconstitutional under the First Amendment to the United States Constitution, and therefore the Board should adopt the bright-line, three-part test used by the United States Court of Appeals for the District of Columbia Circuit ("the D.C. Circuit"). Under this three-part test, the Board does not have jurisdiction over the University, and the University requests that the Board grant its request for review and decline jurisdiction over the University.

This is not the first time the University is contesting the Board's jurisdiction. In Case Number 13-RC-22025, which is still pending, the University asked the Board to decline jurisdiction because, among other reasons, the Board's substantial religious character test is unconstitutional. The Board granted the University's request for review in that case but has not yet issued a decision. The University hereby incorporates the arguments which it raised in its request for review in Case Number 13-RC-22025.

SUMMARY OF RELEVANT FACTS

I. STIPULATED RECORD

The record in this case is a stipulated record. Nov. 15, 2012 Tr. 6.¹ The parties stipulated to the admission of the complete record in Case No. 13-RC-22025 (including the transcript and all of the exhibits) into the record of this case. Nov. 15, 2012 Tr. 6. The parties also stipulated to the scope of the proposed unit and the job duties of the employees in the proposed unit. Nov. 15, 2012 Tr. 6. Finally, the parties stipulated that the only issue before the Regional Director is whether the Board has jurisdiction over the University. Nov. 15, 2012 Tr. 6.

II. THE UNIVERSITY'S HISTORY AND RELATIONSHIP WITH THE SISTERS OF MERCY

A. The University's Origin.

The University is the oldest Catholic university in Chicago and was established by the Sisters of Mercy in 1846. *See* ER Ex. 14; ER Ex. 17 pp. 1-2. The Sisters of Mercy are a Catholic religious order founded by Mother Mary Catherine McAuley in Dublin, Ireland in 1831. ER Ex. 14; ER Ex. 17 pp. 1-2. As an apostolic order, the Sisters of Mercy are responsible directly to the Holy See of the Catholic Church, *i.e.*, the Pope. *See* Tr. 23-24.

In 1846, Mother Frances Xavier Warde and five other Sisters traveled to Chicago to start the Chicago foundation of the Sisters of Mercy. *See* ER Ex. 14; ER Ex. 17, p. 3. Three weeks later, the Sisters of Mercy opened Saint Francis Xavier Academy for Females at Michigan Avenue and Madison Street in downtown Chicago; the Academy was officially chartered under Illinois state law on February 27, 1847, and was named after Mother Frances Xavier Warde's patron saint, Saint Francis Xavier. ER Ex. 7; ER Ex. 14; ER Ex. 17, p. 1; ER Ex. 18.

¹ References to the transcript of the proceedings are designated as "Nov. 15, 2012 Tr. ___." References to the transcript from Case No. 13-RC-22025 are designated as "Tr. ___." Board's exhibits, Petitioner's exhibits, and the Employer's exhibits from Case No. 13-RC-22025 are designated as "BD Ex. ___," "PET Ex. ___," and "ER Ex. ___," respectively.

Eventually, the Saint Francis Xavier Academy for Females grew to the point that the Sisters of Mercy divided it into two organizations that remain vibrant today: Saint Xavier College, which later became Saint Xavier University,² and Saint Xavier Academy, which is now Mother McAuley Liberal Arts High School. *See* ER Ex. 14; ER Ex. 18.

B. The Sisters of Mercy's Conference *for* Mercy Higher Education.

This rapid growth was not unique to the Chicago Sisters of Mercy. The Sisters of Mercy started foundations in other cities throughout the United States and eventually these organizations collectively became the Institute of the Sisters of Mercy of the Americas.³ *See* ER Ex. 14; ER Ex. 5. The Sisters of Mercy founded schools and universities throughout the United States. *See* ER Ex. 14; ER Ex. 18, p. 4. The Catholic Church recognizes these colleges and universities as official ministries of the Catholic Church through the sponsorship of the Sisters of Mercy. *See* Tr. 49-51. Currently, the Sisters of Mercy have sixteen universities and colleges in the United States, which are referred to as the "Mercy colleges," or "Mercy institutions." Tr. 50, 52; ER Ex. 5, pp. 4, 5, 7.

The Sisters of Mercy sponsor the Mercy institutions through the Conference *for* Mercy Higher Education, Inc. (CMHE), which is the corporate arm of the Sisters. *See* Tr. 50; ER Ex. 5, pp. 2, 5, 7. The sponsor council of the CMHE consists of five members, who are all Sisters of Mercy. *See* ER Ex. 5, p. 3. The CMHE Board of Trustees consists of Sisters of Mercy and lay persons, and has liaisons with each of the Mercy institutions. Tr. 51.

The mission of the CMHE is very clear. Its purpose is to sponsor the ministry of higher education while preserving Catholic values and the mission of the Sisters of Mercy: "The

² Saint Xavier College became coeducational in 1969, and changed its name to Saint Xavier University in 1992. ER Ex. 18.

³ Although this is their official title, the Sisters will be referred to throughout the brief by their colloquial name, *i.e.*, the Sisters of Mercy.

mission of the [CMHE] is the preservation and development of the core Catholic identity and mission of Mercy higher education in accord with the spirit, mission, and heritage of the Sisters of Mercy.” ER Ex. 5, p. 2. The CMHE monitors each of the sixteen colleges and universities to ensure that they are faithful to their Catholic values and Mercy mission. *See* ER Ex. 9. The CMHE’s description of its institutions shows the nature of its dedication, and the dedication of its universities, to implementing its Catholic and Mercy mission:

SERVICE LEARNING

...To be a truly Mercy experience, service learning has to be grounded in Catholic Social Theory and the fundamental principles of Catholic Social Thought as it has developed over the last century. Therefore, strong preparation before the experience and deep, theological reflection after it are essential components of service learning on a Mercy campus. Moreover, such experiences need to be tied to the Mission and Direction Statement of the Sisters of Mercy to give it an authentic Mercy character.

* * *

STATEMENT ON CATHOLIC IDENTITY AND MERCY CHARISM FOR CMHE COLLEGES AND UNIVERSITIES

The Institute of the Sisters of Mercy of the Americas recognizes that higher education is integral to the mission of the Church and is an effective expression of our Mercy mission. The ministry expresses our commitment to the pursuit of truth and knowledge and to the furtherance of the social, political, economic, and spiritual well being of the human community. We encourage collaboration among Mercy institutions, regional communities and sisters in ministry.

OUR CATHOLIC IDENTITY AND MERCY CHARISM

A Mercy institution of higher education stands within the lineage of the Catholic intellectual tradition in its pursuit of truth and integration of knowledge for the common good. It participates in the Church’s mission under the sponsorship of the Institute of the Sisters of Mercy of the Americas through the ministry of education, giving tangible evidence to its mission through ongoing teaching, scholarship and service. It demonstrates the values of mercy, justice and compassion as communicated through the traditions of the Sisters of Mercy. These common characteristics are uniquely given expression within each campus community.

Graduates of Mercy institutions are informed and shaped intellectually, socially and spiritually through a faith-inspired education. The academic study of the liberal arts and sciences and mastery of the professional disciplines enable Mercy graduates to be responsible leaders in their communities and professions. They

appreciate and are informed by a Christian commitment to mercy and justice in the world....

ER Ex. 5, pp. 5, 7.

C. As the Sisters of Mercy's Corporate Arm, the CMHE Maintains Reserved Powers over the University.

As its sponsors, the Sisters of Mercy have a close relationship with the University, through the CMHE. *See* Tr. 49, 53-56, 67; ER Ex. 7; ER Ex. 8. The University is a 501(c)(3) nonprofit corporation, incorporated in the state of Illinois. Tr. 25; ER Ex. 7. Under the University's Bylaws, the CMHE is the only member of the corporation. ER Ex. 8, Art. III, § 1.

As the corporate body, CMHE links the University to the Catholic Church. Tr. 49-50. To be a sponsored ministry of the Catholic Church, there must be a public juridic person, or sponsoring entity. Tr. 50. The CMHE serves as the public juridic person for the University, making the University an officially recognized ministry of the Catholic Church. Tr. 49-50.

As the sole corporate member of the University, the CMHE is vested with reserved powers, and is responsible for ensuring that the University remains true to its mission and purpose. Tr. 54; ER Ex. 8, Art. III, § 3. Specifically, the CMHE has "the responsibility to ensure that the Corporation continues its educational and religious mission and purposes, especially its Catholic-Mercy character, in accord with the University's Articles of Incorporation." ER Ex. 8, Art. III, § 3. The CMHE has the sole power to: amend the University's Articles of Incorporation; approve certain amendments of the University's Bylaws; approve changes to the University's mission statement or philosophy; approve nominees to the University's Board of Trustees; approve the finalists for the position of University President; sell, lease or dispose of University land and buildings worth over ten million dollars; and merge, consolidate or dissolve the University. *Id.* at § 3.2 & Art. XV. The University also may not

borrow or refinance a loan for more than ten million dollars, without approval of the CMHE.

*Id.*⁴

Furthermore, because of its close relationship with the Sisters of Mercy, the University President and Board of Trustees consult regularly with the Sisters of Mercy and CMHE about issues and decisions affecting the University. *See* Tr. 435-436. The Sisters of Mercy voice their opinions both “in terms of the Mercy tradition and in terms of the general nature ... of any item that [is discussed]” during these consultations. Tr. 435.

III. THE UNIVERSITY’S LEADERSHIP AND CATHOLIC PHILOSOPHY

A. The University’s Leadership.

The University’s day-to-day affairs are governed by its Board of Trustees, in conjunction with the University’s President, who is also on the Board of Trustees. *See* Tr. 195, 197-198; ER Ex. 8, Art. IV, § 4.1 & Art. V; PET Ex. 1.⁵ Each member of the Board of Trustees “must be committed to the practical implications of the University’s Catholic identity.” ER Ex. 8, Art. IV, § 4.3. At least four members of the Board of Trustees must be Sisters of Mercy and the majority of the Board must be Catholic. *Id.*; Tr. 208-209.⁶

Currently, there are 24 members on the University’s Board of Trustees. Tr. 205. The Board of Trustees opens each meeting with prayer, and can attend Mass prior to the board meeting, although attendance at Mass is not mandatory. Tr. 434, 443. Five of the members are Sisters of Mercy, one is a priest, and at least 15 of the members are practicing Catholics. Tr.

⁴ Under canonical law, Catholic institutions seeking a loan must secure permission from the Catholic Church, so that the institution is not in danger of being controlled by an outside source, *i.e.*, an entity that is not affiliated with the Catholic Church. *See* Tr. 54-55

⁵ PET Ex. 1 contains one inaccuracy. Tr. 194. The Vice President, Office of President position was eliminated on March 1, 2011. Tr. 194.

⁶ The Bylaws state that “to the extent possible, the majority of the Board should be Catholics committed to the Church.” ER Ex. 8, Art. IV, § 4.3. However, Sister Sue Sanders testified that in her understanding “‘should’ is pretty mandatory.” Tr. 209.

207, 212; PET Ex. 2. The Board of Trustees also has several life trustees, including one Sister of Mercy who was formerly the Treasurer of the Chicago Sisters of Mercy. Tr. 49.⁷

The University President is the principal executive officer of the University, and is responsible for supervising and controlling “all of the business and affairs of the [University], including all matters of academic requirements and prescriptions and governance of faculty matters.” *Id.* The President has the power to appoint faculty, staff, and other employees of the University, to prescribe all of the terms and conditions for University employees, and to execute deeds, mortgages, bonds, and contracts that have been approved by the Board of Trustees. ER Ex. 8, Art. V, § 5. The University has had nineteen Presidents. *See* ER Ex. 35, p. 7. Thirteen have been Sisters of Mercy. *See id.*

The current University President, Christine Wiseman, is Catholic. ER Ex. 9, p. 2; *see* ER Ex. 36. Before joining the University, President Wiseman was the Provost and a Professor of Law at Loyola University of Chicago, the Vice President for Academic Affairs and a Professor of Law at Creighton University, and Associate Vice President for Academic Affairs⁸ and a Professor of Law at Marquette University. Tr. 356-357. Loyola, Creighton, and Marquette are all Catholic institutions founded and sponsored by the Society of Jesus,⁹ which is another Catholic order. Tr. 356-357, 369-370. President Wiseman took office on May 1, 2010, and her inauguration ceremony was held on October 22, 2010. Tr. 355, 358-359.

The President’s Cabinet assists the President in executing her duties. Tr. 99, 265. The President’s Cabinet includes the Provost, the University’s Secretary (who is also a Vice President), and five other Vice Presidents who oversee various departments within the

⁷ Life trustees do not have the power to vote. Tr. 206.

⁸ President Wiseman was the Associate Dean at Marquette University Law School, before becoming Associate Vice President for Academic Affairs. Tr. 356.

⁹ Members of this order are also referred to as Jesuits.

University.¹⁰ See PET Ex. 1; PET Ex. 4; Tr. 98-99. Most of the members of the President's Cabinet are Catholic. ER Ex. 9, p. 2. In fact, the University's current Secretary, Sister Sue Sanders, R.S.M., is a Sister of Mercy. Tr. 23, 25, 98-99; ER Ex. 9, p. 7. Her predecessor was Father Francis Tebbe, O.F.M., who served as the Executive Director of University Ministry and the University Chaplain. Tr. 195-196, 270.

B. The University's Mission Statement.

Like the CMHE mission statement, the University's mission statement emphasizes its Catholic and Mercy mission: "Saint Xavier University, a Catholic institution inspired by the heritage of the Sisters of Mercy, educates men and women to search for truth, to think critically, to communicate effectively, and to serve wisely and compassionately in support of human dignity and the common good." ER Ex. 4.¹¹ The University reiterates this mission in its Faculty Resources Manual, which is developed by the Department of Academic Affairs and distributed to full time and adjunct faculty. Tr. 295-296; see ER Ex. 31, p. 1.

C. *Ex Corde Ecclesiae.*

As a Catholic institution, the University is strongly committed to observing the Apostolic Constitution of the Supreme Pontiff Pope John Paul II on Catholic Universities, colloquially referred to as "*Ex corde Ecclesiae*," or "*Ex corde*." Tr. 305-307; see ER Ex. 33. *Ex corde* is the document by which the Catholic Church measures the Catholic identity of Catholic universities. See Tr. 306-307, 309. *Ex corde* offers guidelines by which Catholic institutions can navigate two "orders of reality that too frequently tend to be placed in opposition as though they were antithetical," namely the academic search for truth, and committed religious faith. See ER Ex.

¹⁰ President Wiseman, the University Secretary and the Vice President for University Mission and Heritage, Sister Sue Sanders, R.S.M., and the University Provost, Dr. Angela Durante all testified at the hearing. Tr. 23, 282, 355.

¹¹ The University changed its mission statement in 2005, to simplify it and make it easier to explain. Tr. 46, 200. The committee that drafted the new mission statement was chaired by a Sister of Mercy. Tr. 46-47.

33, ¶ 1 (describing these two orders as “the search for truth, and the certainty of already knowing the fount of truth”).

In promoting both of these goals, namely the search for truth and religious faith, *Ex corde* instructs Catholic universities to act differently than many other religious universities and institutions. *Ex corde* does not require that all faculty, staff, and students be Catholic. *See* Tr. 306-307; ER Ex. 33. Instead, it recognizes that although “[t]he university community of many Catholic institutions includes members of other Churches, ecclesial communities and religions, and also those who profess no religious belief,” these individuals “offer training and experience [which furthers] the various academic disciplines or other university tasks.” ER Ex. 33 at ¶ 26.

Under *Ex corde*, the role of the Catholic university is to “promote *dialogue between faith and reason*, so that it can be seen more profoundly how faith and reason bear harmonious witness to the unity of all truth.” *Id.* at ¶ 17. Consequently, *Ex corde* recognizes that “each academic discipline retains its own integrity and has its own methods,” and that Catholic universities are to guarantee academic freedom. *Id.* at ¶¶ 12, 17. The Catholic Church believes that by taking this approach, it promotes religious faith:

[M]ethodical research within every branch of learning, when carried out in a truly scientific manner and in accord with moral norms, can never truly conflict with faith. For the things of the earth and the concerns of faith derive from the same God. A vital interaction of two distinct levels of coming to know the one truth leads to a greater love for truth itself, and contributes to a more comprehensive understanding of the meaning of human life and of the purpose of God’s creation.

Id. at ¶ 17.

Under *Ex corde*, a Catholic university need not extinguish its Catholic faith or ignore its Catholic identity. *See id.* at ¶ 13. However, *Ex corde* focuses on the Catholic nature of the institution, not on the Catholic identity of the individuals at the institution. Tr. 428-430

("[Cardinal George wasn't interested in knowing how many students at the University attend Mass] because it is not ... relevant under Ex Corde. It is what we as an institution offer that is relevant under Ex Corde. Ex Corde talks about institutional commitment, the presentments that the institution makes."); see ER Ex. 33, ¶ 14; see also ER Ex. 33, ¶ 49 ("[Each Catholic University] is a living *institutional* witness to Christ and his message ... Moreover, all the basic academic activities of a Catholic University are connected with and in harmony with the evangelizing mission of the Church ..."); ER Ex. 33, ¶ 19 (instructing every university to have a faculty or at least a chair of theology); ER Ex. 33, ¶ 29 (making Catholic Bishops responsible for preserving and strengthening the Catholic identity of Catholic universities, and instructing them not to be seen as "external agents but as participants in the life of the Catholic University").

Paragraphs Fourteen, Fifteen, and Twenty of *Ex corde* succinctly summarize this approach by the Catholic Church, namely, that by promoting academic freedom and free discourse in conjunction with discussions of faith and ethics, Catholic universities will promote religious faith:

14. [A] Catholic University, by *institutional commitment*, brings to its task the inspiration and light of the *Christian message*. In a Catholic University, therefore, Catholic ideals, attitudes and principles penetrate and inform university activities in accordance with the proper nature and autonomy of these activities. In a word, being both a University and Catholic, it must be both a community of scholars representing various branches of human knowledge, and an academic institution in which Catholicism is vitally present and operative.

15. A Catholic University therefore, is a place of research, where scholars scrutinize reality with the methods proper to each academic discipline, and so contribute to the treasury of human knowledge. Each individual discipline is studied in a systematic manner; moreover, the various disciplines are brought into dialogue for their mutual enhancement.

In addition to assisting men and women in their continuing quest for the truth, this research provides an effective witness, especially necessary today, to the Church's belief in the intrinsic value of knowledge and research.

In a Catholic University, research necessarily includes (a) the search for an *integration of knowledge*, (b) a *dialogue between faith and reason*, (c) an *ethical concern*, and (d) a *theological perspective*.

20. Given the close connection between research and teaching, the research qualities indicated above will all have their influence on all teaching. While each discipline is taught systematically and according to its own methods, interdisciplinary studies, assisted by a careful and thorough study of philosophy and theology, enable students to acquire an organic vision of reality In the communication of knowledge, emphasis is then placed on how human reason in its reflection opens to increasingly broader questions, and how the complete answer to them can only come from above through faith.

ER Ex. 33, ¶¶ 14, 15, 20 (italics in the original; underline added).

In keeping with its philosophy, *Ex corde* does not require that university staff be Catholic. *See id.* at ¶ 26 (“The university community of many Catholic institutions includes members of other Churches, ecclesial communities and religions, and those who profess no religious belief.”); Tr. 348. Instead, *Ex corde* offers that Catholic staff should serve as an example to the non-believing staff: “The Church sees [lay Catholics] developing presence in [universities] both as a sign of hope and as a confirmation of the irreplaceable lay vocation in the Church and in the world, confident that lay people will, in the exercise of their own distinctive role, ‘illumine and organize these (temporal) affairs . . . to the praise of the Creator and Redeemer.’” ER Ex. 33, ¶ 25.

D. The University’s Philosophy.

The University’s Philosophy Statement contains themes consistent with those espoused in *Ex corde*. *See* ER Ex. 22, p. 1. The University states its “commitment to a strong general education program that introduces students to college life and learning, broadens their knowledge in the arts and sciences, helps them integrate learning and community concerns,” and prepares them for success in life. *Id.* The University recognizes that its “atmosphere of intellectual rigor” is due to “academic freedom” where faculty may “develop and teach courses

in their areas of advance study, extend research in their disciplines, produce scholarly and creative work, and serve the University and community.” *Id.* However, like *Ex corde*, the University’s “distinctive qualities and values ... includ[e] the belief that faith and reason can interact in mutually fruitful ways.” *Id.* As a result, the University “encourages a full search for truth, including religious truth, while respecting freedom of personal expression,” and seeks to “promote[] a vigorous and compassionate dialogue among the various faith traditions, and between them and the academic disciplines.” *Id.* This furthers the University’s mission as a Catholic university, as explained by the Provost, Dr. Angela Durante:

What the mission does is provide that Catholic [lens], that Catholic culture, that Catholic ethos to the people who work in the institution and the students who are not Catholic ... to bring the culture ... the identity of a ... Catholic and Mercy institution to those people who come to us without having that background. And so, that is an important way in which we are able to have a Catholic institution and still employ those who are not Catholic or bring students in who are not Catholic.

Tr. 348.

Thus, as reflected in *Ex corde*, the University focuses on its role as an institution and its institutional commitment to the faith, in contributing to the mission of the Catholic Church. ER Ex. 33, ¶¶ 14, 27. In accordance with *Ex corde* neither the Catholic Church nor the University has any interest in determining whether specific students, faculty, or staff attend mass, are religious believers, or belong to the Catholic faith. *See* Tr. 427-428. The focus on the institutional commitment and contribution to the mission of the Catholic Church underscores the inappropriateness of the Board’s inquiry in the substantial religious character test. As explained below, the Board seeks to parse through each unit and each position, to determine the level of religious affiliation required by the University, but that inquiry is inappropriate. The test instead

should look at the University's mission and role as an institution, and its institutional commitment for furthering the Catholic Church's mission as described in *Ex corde*.

IV. THE UNIVERSITY'S CATHOLIC IDENTITY AND APPLICATION OF *EX CORDE ECCLESIAE*

A. Various Expressions of the University's Catholic Identity.

The University expresses its Catholic identity and Mercy heritage in many ways. The University's motto is "*Via, Veritas, Vita*," which is Latin for "the Way, the Truth, and the Life," and is based on Jesus Christ's proclamation in the Gospel of John, Chapter 14, verse 6. ER Ex. 22, pp. 8, 10. The University is a member of the Association of Catholic Colleges and Universities, and is also listed as a Catholic university in the Official Catholic Directory, colloquially referred to as "the Kenedy Directory." Tr. 25-27, 70; ER Ex. 1. The Kenedy Directory lists only institutions that have been recognized as official ministries of the Catholic Church. *See* Tr. 25-27.

The University also has many symbols throughout campus that express its Catholic identity and Mercy heritage, including the following: Crucifixes of Jesus Christ hanging in every classroom; its mission statement proclaiming its Catholic identity posted in the hallways; a large portrait of Mother Mary Catherine McAuley hangs in the entranceway to Warde Academic Center, the main campus instructional building; a statue of Mary the mother of Jesus Christ stands next to the Warde Academic Center in a circular plaza; a statue of Saint Francis Xavier stands in the University Chapel, which is on the main campus next to the Warde Academic Center; a Heritage Walk composed of pavers inscribed with the names of 172 Sisters of Mercy, representing Sisters of Mercy who have served at the University since 1956 (when it moved to the current campus), as well as the founding Sisters of Mercy, and the Sisters of Mercy who were

former presidents of the University, leads into the University Chapel. Tr. 131-132, 503, 530-531; ER Ex. 19.

The University's Campus Ministry is grounded in the Catholic faith, although it provides for the spiritual needs of all the University's students, whether Catholic or a member of another faith, in keeping with Catholic teachings and tradition. Tr. 104; ER Ex. 15, p. 1; *see* Tr. 348. The University Chapel, McDonough Chapel, holds a Liturgy and Mass on Sunday evenings, and at noon on Monday, Tuesday, Thursday, and Friday. Tr. 131; ER Ex. 15, p. 3. The Sacrament of Reconciliation is also available after Mass on the weekdays. ER Ex. 15, p. 3. On Wednesday, the University hosts a communal prayer service at noon. ER Ex. 15, p. 3. The University's Campus Ministry also offers Bible Study programs with Father Bob Barry, O.P, a Chapel Choir, spring break service trips to help people in need, faith-based retreats, programs analyzing whether faith matters, and other similar programs to students. *See* ER Ex. 15.

The University has Residence Hall Ministers in each of its residence halls. Tr. 105-106; ER Ex. 15, pp. 7-8. They are usually a graduate student, either from the University or elsewhere and their purpose is to help students address their questions about faith and spirituality. Tr. 106. The Residence Hall Ministers are assisted by Peer Ministers, students selected to be part of a year-long Peer Ministry program who help provide spiritual guidance and support to other students. Tr. 106; ER Ex. 15, pp. 7.

The University hosts a Medallion Ceremony every year, during which it welcomes new students and presents them with a medallion and a prayer book. Tr. 133. Faculty are expected to attend the Ceremony and to wear their academic robes. *See* Tr. 257-258, 515. Several University leaders, including the President, the Vice President for University Mission and Heritage, and a member of the Faculty, speak at the Ceremony. *See* Tr. 134-135. For the past

several years, as part of the Ceremony, Sister Sue Sanders, R.S.M., has explained the University's Catholic tradition, its Sisters of Mercy heritage, and the significance of the medallion to the new students. *See* Tr. 133-135. The medallion has the University's seal and motto on the front, and a quote from the Constitutions of the Sisters of Mercy on the back. Tr. 133; ER Ex. 23. One full-time faculty member, Peter Kirstein, recently reported to Sister Sue Sanders, R.S.M., the University Secretary and the Vice President for University Mission and Heritage, that other faculty had told him that they found the Medallion Ceremony to be "excessively religious." Tr. 486. He suggested that she re-write parts of the ceremony to make it less religious. *See* Tr. 486

The prayer book that is distributed is a compilation of religious prayers, significant quotes, and the history of the Sisters of Mercy. ER Ex. 23. The first page after the table of contents contains a letter from a former University President stating that it is her wish that "this collection of prayers opens up new ways to truth and life, leading all of us to a deeper trust of God's abiding love and holy mercy." *Id.* The prayer book is approximately 112 pages thick, and contains traditional Catholic prayers, and prayers for various situations. *Id.* Although the prayer book contains several prayers traditionally used by Jews, Muslims, and Hindus, these occupy a mere four pages of the prayer book. *Id.* The prayer book is not only distributed to students at the Medallion Ceremony, it is also available for all faculty, staff, and students throughout the year, is distributed freely on the University's campus, and is given to members of the public. *See* Tr. 135-136.

The University's Graduation Ceremony is also replete with the University's Catholic identity and Mercy heritage. The University holds a graduation Baccalaureate Eucharist Liturgy on the day before graduation. Tr. 132. The Graduation Ceremony begins and ends with prayer,

the President acknowledges the Sisters of Mercy during the ceremony, and the graduation booklet contains prayers and an explanation of the University's Seal. Tr. 132.

On October 22, 2010, the University held the Inauguration Ceremony for President Christine Wiseman. Tr. 357-358. The Ceremony began with a Eucharist Liturgy at McDonough Chapel, with students, faculty, President Wiseman's family, Sisters of Mercy and others in attendance. Tr. 358-360; ER Ex. 34. President Wiseman was then inaugurated at noon in a formal ceremony. ER Ex. 35. The ceremony included a call to order by a Sister of Mercy, a processional, a color guard, and prayer, as well as statements by, among others, the Auxiliary Bishop Emeritus, the Chair of the CMHE Board of Directors, a Sister of Mercy, and representatives of the faculty, staff, alumni and students. *Id.* at pp. 8-14. The ceremony also included the presentation of artifacts, which included a replica of the University's charter from 1847, the University Seal, a copy of the University's Mission Statement, iron keys to Saint Xavier Academy dating back to before 1871, and the University's Mercy Tea Cup and Saucer.¹² *Id.* at p. 11. Most of these artifacts were presented by several Sisters of Mercy. *Id.* After the presentment of artifacts, President Wiseman gave an inaugural address, emphasizing the University's Catholic identity and Mercy heritage and exhorting the faculty to exemplify the Sisters of Mercy: "For this is the obligation of mercy. And this is the obligation of each of us who teaches in these institutions. It means allowing the world and our students to see ... how people act who are immersed in rigorous intellectual inquiry and service to the poor and powerless, and yet are committed to a life of faith." *Id.*; ER Ex. 36, p. 8. President Wiseman's address was followed by a Benediction and the Provost's closing remarks. ER Ex. 35.

¹² The tea cup and saucer are a symbol of Mother Mary Catherine McAuley's request on her deathbed that her sisters have a "comfortable cup of tea," to assuage their fatigue and grief caused by her death. ER Ex. 35, p. 14.

Approximately 800 people attended the Ceremony, including over 30 Sisters of Mercy. Tr. 251.¹³

The University hosts three other celebrations every year to celebrate its Catholic identity and Mercy heritage. In March, the University celebrates Mission Day, which honors faculty, staff, and students for their service to the University in furtherance of the University's Catholic and Mercy educational mission. *See* Tr. 80-81; ER Ex. 27. At the most recent celebration in 2011, the Provost spoke about the University's Catholic mission and identity, and Sister Sue Sanders, R.S.M., spoke about the Catholic and Mercy ethos of the University's mission. Tr. 80-81, 84. The University also presented three service awards: the Mother Paulita Morris, R.S.M., Student Service Award, the Sister Isidore Perrigo, R.S.M., Staff Service Award, and the Saint Xavier University Faculty Service Award. Tr. 82; ER Ex. 11. These are presented "to persons selected by their peers for their exemplary adherence to the University's core values [and] it is a day when those values – especially service, excellence, and hospitality – are much in evidence." ER Ex. 11.

In September, the University celebrates Mercy Day and its Sisters of Mercy heritage. Tr. 80; ER Ex. 10. In 2010, the University hosted a Eucharistic Liturgy at its McDonough Chapel, and then following a reflection by a Residence Hall Chaplain, the Sisters of Mercy participated in a Mercy Heritage Walk as a "living tribute to the Mercy educators" from the past. Tr. 80; ER Ex. 10; ER Ex. 11. The University then hosted a commissioning at the Academy Bell, where "representatives from all segments of the Saint Xavier community who will serve the University in leadership roles" were commissioned. Tr. 80; ER Ex. 10. The University has already scheduled Sister Mary Sullivan, R.S.M., a Sister of Mercy who authored the biography of

¹³ Sister Sue Sanders, R.S.M., was asked if there were 20 or 30 Sisters at the event. Tr. 251. She testified "Maybe more but not a lot more. Under 50 I would guess." Tr. 251.

Mother Mary Catherine McAuley, to speak at the December, 2011, Founders' Day Celebration. Tr. 78.

In December, the University celebrates Founders' Day, and invites faculty, staff, students, alumni, members of the Board of Trustees and Sisters of Mercy to attend. Tr. 76-77; *see* ER Ex. 10. The University usually has a Sister of Mercy speak at the celebration. Tr. 76. For example, recently Sister Irenaeus Chekouras, the former president of the Sisters of Mercy, spoke at the Founders' Day celebration. Tr. 76. In 2010, the ceremony began with a call to prayer and the ringing of the Academy Bell, which survived the Great Chicago Fire of 1871. ER Ex. 10. The attendees gathered in the McDonough Chapel where a special Eucharistic Liturgy was held, which included prayers, Mass, religious music, and presentations about the University's Catholic identity and Mercy heritage by, among others, Sister Mary Waskowiak, R.S.M. Tr. 76-77, 84; ER Ex. 10; ER Ex. 11.

While faculty and staff are not required to attend celebrations and other campus events, Petitioner's witness conceded that attendance was "very, very strongly encouraged." Tr. 515. And, in fact, the University expects its faculty and staff to attend campus events, to be visible on campus, and not to denigrate the teachings of the Catholic faith in the course of their employment at the University. *See* Tr. 330, 346-347.

Although the University does not require faculty, staff, and students to read its pamphlets, the prayer book, descriptions of its heritage and identity, posters of events, and other handouts, it makes all of these materials widely available on campus. *See* Tr. 38, 42-43, 116, 118, 130, 136, 253. It also publishes them on its website, which is at www.sxu.edu. For example, Employer's Exhibits 2, 4, 11, 14, 15, 18, 19, 22, 30, are all prominently featured on the University's website. Tr. 27, 47, 83, 102, 104, 120-121, 130-131, 288-289.

B. The Office for University Mission and Heritage's Role in Shaping University Identity and Culture.

The Office for University Mission and Heritage plays a significant role in the University's Catholic identity and Mercy mission. As the Vice President of the Office, it is the duty of Sister Sue Sanders, R.S.M., to help focus the University community on its Catholic identity and Mercy mission. *See* Tr. 93. In this role, she explains the Catholic identity and Mercy heritage to new employees, new students, and new trustees. Tr. 94. Sister Sue Sanders, R.S.M., also works closely with and mentors new faculty and senior faculty, offering instruction about the University's links to the Catholic Church, the Catholic Church's obligations to the University, and what it means to be faculty at this particular Catholic university. *See* Tr. 94.¹⁴

Sister Sue Sanders, R.S.M., has interviewed full-time or tenure track faculty candidates to assess their fit within the University and has interviewed applicants for key administrative positions to "discuss the University's Catholic identity and Mercy ethos" and also to determine if the applicant will fit within the University. Tr. 94, 110, 226, 264; ER Ex. 9, p. 2.

Sister Sue Sanders, R.S.M., was previously the Director for the Center for Religion and Public Discourse, which is part of the Office for University Mission and Heritage. Tr. 24-25. The Center for Religion and Public Discourse has existed at the University for ten years. *See* ER Ex. 2, p. 1. The University established the Center following Pope John Paul II's exhortation in *Ex corde*:

[The Center] advances thoughtful and respectful discussion and scholarship in areas where considerations of economics, politics, science and the arts can be informed by ethical, spiritual and religious perspectives.

In establishing the Center, the University supports the position that Pope John Paul II takes in *Ex Corde Ecclesia*, that "a Catholic university is distinguished by its free search for the whole truth" and must, of necessity "engage in a dialogue

¹⁴ The following exhibits are produced by or fall within the domain of the Office for University Mission and Heritage: Employer's Exhibits 2 – 4, 9 – 11, 14, 17 – 19, parts of 22, and 24, 25 and 27. Tr. 228-229, 232.

between faith and reason.” Through a series of campus and community programs and scholarly activities, the Center provides a forum for this dialogue by creating an intellectual “free zone” where timely and sometimes controversial issues can be publicly raised, presented and debated with candor and civility.

By articulating carefully reasoned ethical, spiritual, and religious perspectives about the individual and common good, the Center promotes both the “dialogue between faith and reason” and the core values of the University, especially respect, excellence, integrity and hospitality.

ER Ex. 2, p. 1.

The University created the Center with the purpose of inserting “carefully reasoned religious and ethical perspectives into [its] daily and scholarly discourse,” and to “enhance the Catholic identity of [the University].” *Id.* at p. 5. The Center provides “an intellectual free zone” to promote discussions about politics, science, music or the arts as they are “informed by faith, ethical and religious perspectives, particularly Catholic perspectives” Tr. 30.

As part of this dialogue, the Center sponsors various programs throughout the University and community. *See* Tr. 30-32, 36-37, 95. For example, the Center sponsors the Catholic Colloquium Lecture Series, which is a series of lectures addressing the responsibility of a Catholic university to its students, faculty, staff and greater community. Tr. 31; ER Ex. 2, p. 9. The Catholic Colloquium Series was funded by a grant from the Sisters of Mercy, to give “prominence to the Catholic identity of the university by having Catholic scholars ... present ... viewpoints on particular issues informed by a Catholic perspective.” Tr. 31. Recent speakers have included several Catholic priests, a Sister of Mercy, a Cardinal, and a Bishop. *See* ER Ex. 2, pp. 9-10. Students can satisfy one of their credit requirements by attending one of the Catholic Colloquium Series lectures, and freshmen are required to attend some of the lectures. Tr. 31-32. The University advertised for the Catholic Colloquium Lecture Series by posting fliers

throughout the University and the local community, and advertising on the University's radio station. Tr. 31.

The Center also sponsors the Squeaky Weal Lecture Series, which has involved a series of lectures intended to “promote[] thoughtful consideration and civil discourse on issues of public concern, with a focus on the religious, moral and/or ethical implications of such issues for the common good.” ER Ex. 2, p. 11. Recent speakers have included President Wiseman, the Chicago Public Library Commissioner, a Cardinal, and the Cook County Board President. *Id.* The University advertised for the Squeaky Weal Lecture Series by placing ads in several Catholic Magazines; faculty, students, and the public are invited to attend. *See* Tr. 96, 147-148.

The Center produces a radio program titled “God Matters” on Sunday mornings at 9:30 a.m. Tr. 36-37. The radio program has a reach of 1 million households, and is broadcast on the University's radio station, WXAV. Tr. 36. The purpose of the program is to ask people how God is important in their lives, to link their day-to-day lives with faith. Tr. 36.

The Office for University Mission and Heritage and the Center for Religion and Public Discourse also host several other informal events between faculty and staff, which include “First Friday Tea” and “Pub Discourse.” Tr. 95; ER Ex. 9, p. 7. First Friday Tea is intended to “exemplif[y] and encourage[] Mercy hospitality in the University community [by allowing] faculty and staff to gather as colleagues in the spirit of Catherine McAuley's ‘comfortable cup of tea.’” ER Ex. 9, p. 7. Pub Discourse is an informal gathering at the University's pub to discuss the “ethical aspects of some current topic.” *Id.*

Lastly, from 2006 through 2009, the Office's Mission and Heritage Committee conducted 73 focus groups to analyze “the question of how the University did or did not embody its identity as a Catholic and Mercy institution.” *Id.* at p. 8. The Committee held separate

sessions with “virtually all staff members, all faculty, and a representative (but not randomly selected) cross-section of students.” *Id.* The University then included this self-analysis in a report to the CMHE. *Id.*

C. The Sisters of Mercy’s Continued Involvement with the University.

As the public juridic person, sponsor and corporate member of the University, the Sisters of Mercy and the CMHE are intimately involved in the University’s affairs. For example, members of the CMHE often visit the University, and President Wiseman consults with various Sisters of Mercy on a weekly, if not daily, basis in order to carry out her role as the President of the University and further its Catholic identity. *See* Tr. 74, 437. Two Sisters of Mercy serve in administrative positions for the University, one as the University Secretary and the Vice President for University Mission and Heritage, and the other as the Director of the Center for Religion and Public Discourse. ER Ex. 9, p. 7. Two Sisters of Mercy volunteer in the Campus Ministry Mercy Care program, a third Sister is an Associate Professor of Chemistry, and a fourth Sister is the Director of Planned Giving. ER Ex. 9, p. 7. Four Sisters of Mercy associates are on the University’s faculty; one is in Religious Studies and the other three are in the School of Nursing. ER. Ex. 9, p. 7. The University also has a Sister of Mercy acting as a liaison between the University and the CMHE. Tr. 74.

Dr. Angela Durante, who is currently the University Provost and was the Interim President before President Wiseman, was in regular contact with the CMHE while she was Interim President. *See* Tr. 301. She was a member of the CMHE President’s Council, along with the presidents of the other Mercy institutions, and she participated on the CMHE listserv. Tr. 301-302. The Executive Director of the CMHE mediates the listserv, which allows the presidents to exchange information and discuss timely issues. Tr. 302. The CMHE also worked

with Dr. Durante during the transition, to ensure that President Wiseman was well prepared for her new role as President of a Catholic and Mercy institution. *See* Tr. 303-305.

President Wiseman underwent a mandatory 3-part “president orientation” with the CMHE after she became president. Tr. 368-370.¹⁵ Each orientation began with prayer and then involved reading and discussion designed to inform President Wiseman about her obligation to understand the University and its role vis-à-vis the Catholic Bishop and the Archdiocese, as well as the Mercy tradition as informed by the Catholic intellectual tradition. *See* Tr. 369; ER Ex. 37, ER Ex. 38; ER Ex. 39. During the first part of the orientation on October 7, 2010, representatives from the CMHE and President Wiseman discussed the “Role of Higher Education in the Mission of the Sisters of Mercy and of the Catholic Church,” the University’s role as a Catholic institution, and its mission in a “well-developed Christian culture” and a “post-Christian culture.” *See* ER Ex. 37, pp. 1, 5, 7, 8. In the second orientation on November 12, 2010, the orientation focused on the CMHE sponsorship of the University. *See* ER Ex. 38. At the last orientation on December 10, 2010, representatives from the CMHE and President Wiseman discussed Catholic identity, Mercy charism, and the culture and characteristics of Sister of Mercy institutions. *See* ER Ex. 39. President Wiseman, like Dr. Durante previously, is also a member of the CMHE President’s Council, which reports to the CMHE’s Board of Trustees. Tr. 212.

The CMHE continues to be involved in the University. The CMHE recently sent a questionnaire to the University titled “Preliminary Institutional Inventory: Developing effective methods for reporting and assessing institutional effectiveness.” Tr. 69; ER Ex. 9. The questionnaire is “an accountability mechanism” that evaluates whether the University is

¹⁵ A newly inaugurated President from another Sister of Mercy institution, Mount Aloysius College, also attended the orientation. (Tr. 369); *see* ER Ex. 37; ER Ex. 38; ER Ex. 39.

implementing its mission, given its Catholic identity and Mercy heritage. Tr. 69-70. The University submitted its response on April 28, 2011. Tr. 71. In the first question, the CMHE asked the University to specifically describe how it “give[s] evidence to Catholic identity, Mercy core values, and the critical concerns of the Sisters of Mercy.” ER Ex. 9. The University prepared a seven-page response to the question, outlining in detail its actions and concerns. *Id.* In the second question, the CMHE asked the University to identify the “mission related reporting and assessment processes, methods and/or instruments that are currently being used on [its] campus,” and the effectiveness of such methods for “informing and facilitating mission-identity and mission-integration.” *Id.* The University prepared a two-page response describing its methods, and their effectiveness. *Id.*

Significantly, President Wiseman has also met regularly with Francis Cardinal George, a Cardinal of the Catholic Church, since becoming President of the University. Tr. 372. She meets with the Cardinal approximately four times per year. Tr. 372. Some of the meetings have been between only her and the Cardinal; other meetings have included representatives from all of the Catholic institutions within the Archdiocese of Chicago. Tr. 373. The Cardinal has given her specific instructions at these meetings, and has discussed the University’s progress in assimilating and incorporating the directives issued in *Ex corde*. See Tr. 372; ER Ex. 40; ER Ex. 41.

Although most of the University’s current income is from tuition, the Sisters of Mercy have contributed financially to the University. See Tr. 457. Recently, the Sisters of Mercy released approximately \$800,000 to the University, from money that had been set aside from their contributed services for their retirement benefits. Tr. 457. The Sisters of Mercy also recently provided a subordinated loan of \$5 million to the University so that it could meet its

payroll, and forestall several banks from calling their lines of credit. Tr. 456. Not only did the Sisters of Mercy provide a low rate of interest on this loan, they also agreed to postpone the accrual of interest from June 2011, until 2013. Tr. 459. The Sisters of Mercy also recently took a significant step by removing the restriction on part of the University's endowment, so that the University could access these funds in order to meet its current financial obligations. Tr. 456-457.

D. Religious Courses at the University.

The University has a Department of Religious Studies within the College of Arts and Sciences. Tr. 287. The Department of Religious Studies program offers a plethora of courses on Christian and Catholic faith, including: Old Testament Religion, New Testament Christianity, Christian Theology: Sacraments, Christian Theology: Church, Christian Theology: God, Christian Theology: Christ, Christian Theology: The Human Person, Seminar in Theology, Roman Catholic Tradition; American Catholic Experience, History of Christian Thought, Reformation, Seminar in the History of Theology, and Christian Ethics. ER Ex. 30, pp. 1-2. Students may minor in Religious Studies, minor in Catholic Studies, receive a Pastoral Ministry Minor, and enroll in a Pre-Master of Divinity Program. *Id.*

The Pastoral Ministry Minor is obtained through the University's Pastoral Ministry Institute, a joint venture between the University's Department of Religious Studies and the Catholic Archdiocese of Chicago, designed to provide "responsive programming for ministerial preparation of lay ecclesial ministers, deacon couples and vowed religious leaders assuming ever increasing authority in and responsibility for the life and mission of a racially and culturally diverse church." *Id.* at p. 3.

The Pre-Master of Divinity Program is designed for undergraduate students preparing to enter Master of Divinity programs and was developed by the University "in accordance with the

undergraduate theological and philosophical requirements identified by the National Conference of Catholic Bishops in the Program of Priestly Formation.” *Id.* at p. 2.

Every undergraduate student at the University must take two courses in Religious Studies to graduate, although the courses do not have to be courses on the Catholic faith. Tr. 294; ER Ex. 30. Students who major in religious studies must take classes in Christian theology; students who minor in Catholic Studies must take classes focusing on the Catholic tradition and Christian theology. ER Ex. 30.

The University also offers graduate programs and seminars on the Christian and Catholic faith in the areas of scripture, theology, history, pastoral theology, and ethics. *Id.* at p. 5. Some of the seminars available to graduates are as follows: Pauline Letters, Jesus and the Gospels, Faith Development, Lay Preaching and Presiding, Pastoral Counseling, Canon Law for Lay Leaders, Christology, Ecclesiology, Catholic Moral Theology, Ethics in Pastoral Care, and Religious History. *Id.* Graduate students may also receive a Graduate Certificate in Pastoral Studies through the Pastoral Ministry Institute. *Id.* This Certificate allows students to lay the groundwork for completing a graduate degree in Pastoral Ministry at a Catholic theological school and/or to be commissioned by the Catholic Archdiocese of Chicago. *Id.*

E. The University’s Students, Faculty, and Staff.

The University admits students of any faith and students of no faith. Tr. 242. Approximately 60 percent of the University’s students are Catholic, and approximately 2 to 4 percent of the students are Muslim. Tr. 240. The University has a Muslim Student Association, and a non-denominational Christian organization. Tr. 240-241.

In accord with *Ex corde*, the University generally does not require that its faculty or staff subscribe to the tenets of the Catholic faith, attend mass, or have any religious belief because such requirements “would be antithetical to the ecumenical character of Catholic institutions.”

Tr. 428; *see also* Tr. 323, 330; ER Ex. 33, ¶¶ 21-22, 25-27. As *Ex corde* clearly explains, the Church's and the University's concern should be whether the University as an institution, rather than individual employees or staff, complies with the Church's directives and furthers the Church's mission.

LEGAL ARGUMENT

I. THE BOARD'S SUBSTANTIAL RELIGIOUS CHARACTER TEST IS INCONSISTENT WITH CONSTITUTIONAL REQUIREMENTS AND SHOULD BE ABANDONED

A. The Board's Substantial Religious Character Test Is Inconsistent with Constitutional Requirements

The Regional Director concluded that the Board has jurisdiction over the University using the Board's substantial religious character test. The Board's substantial religious character test, however, is unconstitutional and violates the First Amendment to the United States Constitution. Accordingly, the University requests that the Board grant its request for review, and decline jurisdiction over the University.

The Board began exercising jurisdiction over all private, nonprofit, educational institutions in the 1970's. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 497 (1979). Several church-operated schools challenged the Board's jurisdiction under the First Amendment, but the Board rejected their arguments. *Id.* at 497. The Board concluded that it had jurisdiction over all religious schools, although as a policy matter, it decided not to exercise jurisdiction over schools that were "completely religious." *Id.* at 496, 498.

The Supreme Court rejected this conclusion in *NLRB v. Catholic Bishop*. The Court held that the Board does not have jurisdiction over religious educational institutions¹⁶ because exercising jurisdiction would result in excessive entanglement, in violation of the First

¹⁶ Although the schools in *Catholic Bishop* were parochial schools, the Board has since recognized that the ruling applies to educational institutions at every level. *Trustee of St. Joseph's Coll.*, 282 NLRB 65, 68 (1986).

Amendment. *Id.* at 507; *see also id.* at 504 (“We see no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.”). Specifically, the Court found that by exercising jurisdiction in such cases, the Board would necessarily have to “inquire into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” *Id.* at 502. This inquiry, in and of itself, violates the First Amendment: “It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Id.*

Understanding how such an inquiry violates the First Amendment is paramount to understanding the reasons why the Board’s current substantial religious character test is unconstitutional.

First, the Board violates the First Amendment when it trolls through an institution’s beliefs to determine if it is “religious enough” to be deemed a religious institution. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“[T]he inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established ... that courts should refrain from trolling through a person’s or institution’s religious beliefs.”); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (finding the Board’s test unconstitutional because the nature of the inquiry boils down to whether the institution is sufficiently religious); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 414 n.2 (8th Cir. 2007) (“An inquiry into an organization’s religious views to determine if it is pervasively sectarian ‘is not only unnecessary

but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.'") (quoting *Mitchell v. Helms*).

Second, the Board further violates the First Amendment by delving into a religious institution's practices and parsing out which practices are "secular" and "religious," because this very process results in excessive entanglement. See *Hernandez v. Commissioner of Internal Revenue Service*, 490 U.S. 680, 694 (1989) (noting the inherent problem in having IRS agents distinguish between secular and religious activities and noting "that pervasive monitoring for the subtle or overt presence of religious matter is a central danger against which we have held the Establishment Clause guards") (internal quotations omitted); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs."); *New York v. Cathedral Academy*, 434 U.S. 125, 132-133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."); *Cantwell v. State of Connecticut*, 310 U.S. 296, 307 (1940) (finding a state statute unconstitutional because it conditioned the receipt of solicitation licenses based on the state authority's determination of what constituted a religious cause); *Espinosa v. Rusk*, 634 F.2d 477, 480-481 (10th Cir. 1980) (finding a statute unconstitutional where it required the state secretary to appraise the facts, exercise judgment, and form an opinion as to whether a religious institution's activities such as feeding the poor and hungry, were for a secular or religious purpose); see also *Espinosa*, 634 F.2d at 482 (Barrett, J., dissenting) ("The particular problem

relates to the definition of ‘religious’ and ‘secular’ activities and the interrelationship one to another. This in turn is bound up in one of the most trying and vexing tasks found in constitutional law—that of defining ‘religion’ for purposes of First Amendment rights.”).

The Board has applied a substantial religious character test in which it considers “all aspects of a religious school’s organization and function that may be relevant to ‘the inquiry whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed.’” *Trustee of St. Joseph’s Coll.*, 282 NLRB 65, 68 n.10 (1986). Under this test, the Board analyzes the purpose of the employer’s operations, the role of the unit employees in effectuating that purpose, and the potential effects of exercising jurisdiction. *Univ. of Great Falls*, 331 NLRB 1663, 1664 (2000). The Board also looks at the extent of the affiliated religious group’s involvement in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether the school uses religious criteria when appointing or evaluating the faculty. *Id.* at 1664-1665; *see also Ecclesiastical Maintenance Serv.*, 325 NLRB 629, 630 (1998).

Courts have repeatedly rejected this test, however, because it “involve[s] just ‘the sort of intrusive inquiry that [the Supreme Court’s ruling in] *Catholic Bishop* sought to avoid,’ with the [Board] trolling through the beliefs of schools, making determinations about their religious mission, and that mission’s centrality to the primary purpose of the school.” *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009); *see Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-1342 (D.C. Cir. 2002); *see also Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1263-1264 (10th Cir. 2008) (citing with approval the D.C. Circuit’s rejection of the Board’s substantial religious character test); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 399-403 (1st Cir. 1986) (en banc, 3-3 decision) (then-Judge Breyer writing for the court and rejecting the

Board's test). In essence, "[d]espite its protestations to the contrary, the nature of the Board's inquiry boils down to 'is it *sufficiently* religious?'" *Univ. of Great Falls*, 278 F.3d at 1343 (emphasis in original). This inquiry is plainly unconstitutional. *Id.*

For example, in *University of Great Falls*, the university's president was questioned about the nature of the University's religious beliefs, and how its religious mission was implemented. *Id.* The president was "required to justify the method in which the [u]niversity [taught] gospel values, and to respond to doubts that it was legitimately 'Catholic.'" *Id.* The president was asked, "What good is a Catholic institution unless [it] espouse[s] the values and the teachings and the traditions of the Catholic Church?" *Id.* Such an inquiry is "the *exact* kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid." *Id.* (emphasis in original).

The proceedings in Case No. 13-RC-022025 present a perfect example of the intrusiveness of the Board's inquiry under the substantial religious character test. Throughout that hearing, the petitioner questioned the sufficiency of the University's Catholic identity. The petitioner focused on the University's academic freedom policy (Tr. 223, 440), its decision not to require faculty to teach from a Catholic perspective in non-religious classes (Tr. 219-220, 223, 323), its non-discrimination policy (Tr. 218-219), its decision to admit students and hire faculty without having them sign an attestation of faith (Tr. 340, 441-442), its decision to admit non-Catholic students and hire non-Catholic faculty, including students and faculty "of non-faith" (Tr. 219-221, 240, 242, 317), its decision to not require students to attend Mass (Tr. 239-240), its decision to allow faculty to select textbooks (Tr. 224, 331, 515, 522), its decision to not require students and faculty to review various pamphlets and articles about the University's Catholic identity or participate in various religious events (*see* Tr. 233-237, 252-253), and its decision to

not require faculty to proselytize non-Catholics (Tr. 330). All of these questions show that at the heart of the Board's test and the petitioner's questioning, is one central inquiry: "How Catholic are you?" Under the Board's test, the religious educational institution is put "on trial," to prove how religious it is—and the resulting questions are precisely the types of questions that the Supreme Court and the Courts of Appeals have held to be unconstitutional. *Univ. of Great Falls*, 278 F.3d at 1343; *Catholic Bishop of Chicago*, 440 U.S. at 1320; *Carroll Coll., Inc.*, 558 F.3d at 572.

The Board's test is also unconstitutional because it vests the government with the responsibility of examining and determining whether activities are secular or religious. The Tenth Circuit's ruling in *Colorado Christian University* is instructive. In that case, the State of Colorado provided scholarships to attendees of private and public schools, including secular and religious schools, except for schools that were "pervasively sectarian." *Colorado Christian Univ.*, 534 F.3d at 1250. To determine if a school was pervasively sectarian, the state's officer examined whether the policies issued by the school trustees adhered closely to religious doctrine, whether all of the students and faculty shared the same "religious persuasion," and whether the contents of the college theology courses tended to "indoctrinate" the students. *Id.* The Tenth Circuit found this inquiry "fraught with entanglement problems," because in order to decide if a group of believers were all of one religious persuasion, the state officer had to "wade into issues of religious contention." *Id.* at 1264.

In *Colorado Christian University*, the university claimed it was nondenominational because it had students of several different faiths; the state took another approach, viewing all Christians as part of the same religious faith, regardless of denomination. *Id.* The Tenth Circuit noted, however, that the "correct" answer depended on one's ecclesiology, and that "under the

First Amendment, the government is not permitted to have an ecclesiology, or to second-guess the ecclesiology by our citizens. ‘Courts are not arbiters of scriptural interpretation.’” *Id.* at 1264-1265 (quoting *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)). Finding that “[s]uch inquiries have long been condemned by the Supreme Court,” the Tenth Circuit struck down the statute, relying on a Supreme Court case holding that: “The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.” *Id.* (quoting *New York v. Cathedral Academy*, 434, U.S. 125, 133 (1977)).

The Board’s substantial religious character test creates the same result.¹⁷ The best example of this is the following questioning of Sister Sue Sanders, R.S.M., in which the petitioner in Case 13-RC-022025 asked her to explain the line between “Catholic” and “non-Catholic:”

Q. [Petitioner’s counsel]: Based on your knowledge which appears to be fairly extensive about how the university operates, would it suffice to make a requirement of being Catholic for the purpose of serving on the board of trustees if an individual were raised Catholic, but no longer actively participates in the Catholic church?

A. [Witness]: You know what, I honestly don’t know how to answer that question because it’s not come up. As a person, I mean that gets to a definition of what’s Catholic and—

Q. [Petitioner’s counsel]: No, I’m not asking you to define what’s Catholic.... what I’m asking you is, in your opinion ... specifically with regard to the requirement of being Catholic on the board of trustees, is it adequate that one was raised Catholic but is currently not attending church or anything like that?

[Objection by Respondent’s counsel]: And I’d just like to note for the record, this is exactly the type of inquiry that is not permitted.... [I]t’s not within the

¹⁷ When the University Provost, Dr. Angela Durante, testified that proselytizing is not characteristic of the Catholic religion, counsel for the petitioner in Case No. 13-RC-022025 responded “Sorry, that’s – you know, religious bias coming out here.” Tr. 330. She understandably brought her own viewpoint into the analysis. It’s precisely that concern which prohibits the Board from determining which of the University’s activities are “substantially religious” and which are not.

Board's jurisdiction to determine what is the definition of Catholic and what is not.

[Petitioner's counsel]: I'm not asking for a definition of Catholic.

[Respondent's counsel]: We are trolling [here]... you know, are they Catholic, is this enough to be Catholic? And that's the kind of questions that the Supreme Court says you're not allowed to ask.

[Discussion on the Record in which the Hearing Officer overrules the objection]

A. [Witness]: I just don't know how to answer your question, truthfully.

Tr. 214-215.

Furthermore, the Board's test is unconstitutional because under it, the Board sits in the place of the Catholic Church and the University, and decides whether the University's conduct aligns with how the Board thinks a Catholic university should act. For example, the University provides academic freedom to its faculty because this is consistent with the teachings of *Ex corde*, which is the foundation for Catholic education. See Tr. 306-307, 440. Similarly, the University does not require students or faculty to be Catholic or to attend Mass consistent with *Ex corde*. See Tr. 306-307, 347-348, 428. Nor does the University require faculty to propagate or proselytize the Catholic faith as part of their teaching because this "is not characteristic of the Catholic religion." Tr. 330. And the University does not prohibit faculty from teaching ideas or concepts that are contrary to those of the Catholic Church, as long as they are taught within the context of the class' academic curriculum. Tr. 330. These facts weigh against the University under the Board's substantial religious character test;¹⁸ yet, they are the very tenets of the Catholic Church.

¹⁸ In Case No. 13-RC-022025, the Regional Director specifically relied on the University's adherence to the principles of *Ex corde*, in deciding to exercise jurisdiction: "One factor supporting my finding that the exercise of jurisdiction is appropriate in this case is the Employer's adherence to the doctrine that encourages the University's faculty to function free of any religious requirements or constraints. The Employer follows *Ex Corde*, which is the

The end result under this approach is absurd. The University's practices are approved by and aligned with the Catholic Church's teachings, making it a religious university from the Catholic Church's viewpoint. Yet because it follows the philosophy of the Catholic Church as proclaimed in *Ex corde*, the Board considers it to be "non-Catholic" and "non-religious." Such a conclusion highlights the inherent danger of excessive entanglement found in the Board's substantial religious character test.

Lastly, the Board appears to acknowledge that the test is unconstitutional by applying the D.C. Circuit's three-part test in various cases. In *Salvation Army*, the Board recognized that its substantial religious character test had been found unconstitutional by the D.C. Circuit in *University of Great Falls*. *Salvation Army*, 345 NLRB 550 (2005). The Board assumed that the D.C. Circuit's three-part test applied, but concluded that it had jurisdiction because the Salvation Army did not meet the first prong, namely, it did not hold itself out as a religious educational institution. *Id.*

The Board appeared to abandon the substantial religious character test completely in a more recent case. *Catholic Social Services*, 344 NLRB No. 167 (2010). In *Catholic Social Services*, neither the Board nor the Regional Director applied the substantial religious character test. *Id.* Similarly, neither the Board nor the Regional Director discussed or referred to the Board decisions in *University of Great Falls*, 331 NLRB 1663 (2000), and *Carroll College, Inc.*, 345 NLRB 254 (2005). *Id.* Instead, they relied primarily on the Supreme Court's decision in *Catholic Bishop*, when concluding that the Board had jurisdiction. *Id.*

The Board, following its lead in *Salvation Army*, also analyzed the case under the D.C. Circuit's three-part test. *Id.* at *2. The Board noted that "[e]ven were we to apply that test here

Catholic Church's guiding document for universities to promote academic freedom." Case No. 13-RC-022025 Decision and Direction of Election, p. 9.

... it is clear that the Employer does not meet the first prong of the test because the Employer does not ‘hold itself out... as providing a religious educational environment.’” *Id.* The Board then proceeded with a lengthy analysis explaining how the employer failed to meet the first prong of the three-part test because its main function was to provide social services, and not education. *Id.* at *2-*4.

As recognized by the Board in both *Salvation Army* and *Catholic Social Services*, the substantial religious character test is unconstitutional. The Board appears to be moving toward discarding the test, which is the appropriate response to the D.C. Circuit’s criticism since the Board, as an administrative forum, is not the final arbiter of constitutional issues. *See Quinn v. City of Boston*, 325 F.3d 18, 34 (1st Cir. 2003). Accordingly, the Board should grant the University’s request for review and enunciate a clear and complete departure from the substantial religious character test.¹⁹

B. The Board Should Adopt the Bright-Line Three-Part Test Used by the D.C. Circuit

The D.C. Circuit’s *University of Great Falls* test sets forth a simple, three-part test as a bright-line rule for determining whether the Board has jurisdiction “without delving into matters of religious doctrine or motive.” *Carroll Coll., Inc.*, 558 F.3d at 572; *Univ. of Great Falls*, 278 F.3d at 1344-1345. Under this test, a school is exempt from the Board’s 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

¹⁹ The Board’s current approach of applying the D.C. Circuit’s test without clearly overruling the substantial religious character test is unacceptable. Regional Directors, Hearing Officers, and Administrative Law Judges will continue to apply this unconstitutional test until the Board clearly overturns it. *See Butterworth Mortuary*, 270 NLRB 1014, 1020 (1984); *Biscuit and Cracker Workers Local Union No. 405*, 109 NLRB 985, 994 n.11 (1954); *Ranco, Inc.*, 109 NLRB 998, 1009 n.8 (1954) *rev’d on other grounds*, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

- (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., Inc., 558 F.3d at 572; *Univ. of Great Falls*, 278 F.3d at 1344-1345.

This test meets the constitutional standards because it utilizes a limited, restrained line of inquiry. Under this test, the Board does not troll through the religious institution's beliefs, questioning the institution's motives or beliefs. *Univ. of Great Falls*, 278 F.3d at 1344. Under it, the Board does not sit as arbiter, determining whether an action is secular or religious. Nor does the Board analyze whether (in its own view), the religious institution is "sufficiently religious" to be exempt. *Id.* In short, this test is constitutional.

On the other hand, the test provides the Board with assurance that the institutions availing themselves of the *Catholic Bishop* exemption are *bona fide*²⁰ religious institutions, thereby providing all of the information necessary to determine whether the institution lies within the Board's jurisdiction. *See id.* Consequently, the Board should adopt the three-part test developed by the D.C. Circuit as the proper test for determining whether it has jurisdiction over a religious school or university.

C. The Board Does Not Have Jurisdiction Under the D.C. Circuit's Three-Part Test²¹

The University easily meets the three-part test used by the D.C. Circuit. First, the University's mission statement, seal, motto, daily Mass, classroom crucifixes, campus Chapel,

²⁰ Religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit protection under the First Amendment. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). The First Amendment protects all sincerely held ethical or moral beliefs that play the role of a religion or function as a religion to the individual, or impose a duty of conscience upon the individual. *Welsh v. United States*, 398 U.S. 333, 339-340 (1972); *McGinnis v. U.S. Postal Service*, 512 F. Supp. 517, 518 (N.D. Cal. 1980).

²¹ At the November 15, 2012 hearing, the parties stipulated to the accuracy, but not the relevancy, of Joint Exhibit 1, which contains a list of facts related to the employees in the proposed bargaining unit. The University maintained its relevancy objection. Given that the Board's test is unconstitutional, those facts are irrelevant. The only criteria for determining whether the University is a religious educational institution are the three factors set forth in the *University of Great Falls* test.

campus ministers, peer ministers, prayer book, Medallion Ceremony, Graduation Ceremony, Inauguration Ceremony, Founders' Day Ceremony, Mercy Day Ceremony, Mission Day, Center for Religion and Public Discourse, Catholic Colloquium Series, Squeaky Weal Lecture Series, God Matters radio program and the frequent presence of Sisters of Mercy and CMHE representatives on campus all show that the University holds itself out as a Catholic university providing a religious educational environment, as does the fact that it is listed in the Official Catholic Directory. *See Univ. of Great Falls*, 278 F.3d at 1345 (finding that the university's mission statement that it offered students a foundation for implementing the teachings of Jesus within the Catholic tradition, the presence of Catholic icons in the classroom, and being listed in the Catholic Directory satisfied the first prong of the test). Similarly, the University's pamphlets and information available on campus and on the website regarding its history, its mission, the heritage and involvement of the Sisters of Mercy, and its Catholic identity, provide abundant proof that the University holds itself out as providing a religious educational environment. In fact, the active adjunct faculty who testified at the hearing for Petitioner, unequivocally identified the University as a Catholic university and acknowledged that it held itself out as such. Tr. 512, 518.

Second, it is undisputed that the University is organized as a nonprofit 501(c)(3) corporation. ER Ex. 7; Case No. 13-RC-022025 Regional Director's Decision and Recommendation, p. 3.²²

Third, the University is directly affiliated with and sponsored by the Sisters of Mercy and its corporate arm, the CMHE. The Sisters of Mercy not only founded the University, and

²² The Internal Revenue Service recognizes the University, and all agencies of the Catholic Church listed in the Official Catholic Directory (*i.e.*, the Kenedy Directory), as non-profit religious institutions exempt under Section 501(c)(3) of the Internal Revenue Code. Consequently, the University is currently subject to conflicting opinions between governmental bodies as to whether it is a religious educational institution.

continue to be involved actively in the University, they also hold the reserve powers over the University. They have the exclusive power and authority, through the CMHE, to approve or reject amendments to the University's Articles of Incorporation and specific provisions of the University's Bylaws, thereby satisfying the third element of the test. *See Univ. of Great Falls*, 278 F.3d at 1345 (holding that a university met this element where reserve powers were held by the Sisters of Providence). Accordingly, since the three elements of the *University of Great Falls* test are easily met, the Board does not have jurisdiction over the University.

CONCLUSION

The Board's substantial religious character test, used to determine whether the Board had jurisdiction over religious educational institutions, is unconstitutional and violates the First Amendment to the United States Constitution, because, as explained in more detail above, it focuses incorrectly on the religious nature and function of individual positions and individual employees, as opposed to the religious nature and function of the institution as a whole. The Board should explicitly discard this test, and adopt the three-part test used by the D.C. Circuit.

The University clearly meets the requirements set forth under the D.C. Circuit's three-part test, and therefore, the Board should grant its request for review, and decline jurisdiction over the University.

Respectfully submitted,

SAINT XAVIER UNIVERSITY

By: _____



Amy Moor Gaylord
Joshua D. Meeuwse
FRANCZEK RADELET P.C.
300 South Wacker Drive
Suite 3400
Chicago, Illinois 60606-6785
(312) 986-0300

Dated: December 12, 2012

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a copy of the foregoing **SAINT XAVIER UNIVERSITY'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION** to be served upon the following, via electronic filing, facsimile, and mail, on this 12th day of December, 2012:

VIA ELECTRONIC FILING:

Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.,
Washington, D.C. 20570-0001

VIA FACSIMILE:²³

Regional Director-Region 13
National Labor Relations Board
Peter Sung Ohr
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604

VIA MAIL:

Counsel for Petitioner
Leslie J. Ward, Esq.
Service Employees International Union, CLC
111 East Wacker Drive
25th Floor
Chicago, Illinois 60601



²³ The University is serving the Regional Director via facsimile because his email address is not available on the Board's website.