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5 **UNITED STATES OF AMERICA**
6 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

7 **Seattle University,**

8 **Employer,**

9 **and**

10 **Service Employees International Union,**
11 **Local 925,**

12 **Petitioner.**

Case 19-RC-122863

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15 **SEATTLE UNIVERSITY'S REQUEST FOR REVIEW OF THE REGIONAL**
16 **DIRECTOR'S SECOND SUPPLEMENTAL DECISION AND DIRECTION OF**
17 **ELECTION**
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The fundamental issue in this case is whether the government can and should exercise control or influence over how a religiously-affiliated university carries out its religious mission. The University requests review of the Regional Director’s finding that the Board has jurisdiction over the University under the Board’s decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014) (“*PLU*”). The new test under *PLU* contravenes the United States Supreme Court’s holding in *National Labor Relations Board v. Catholic Bishop of Chicago* (“*Catholic Bishop*”), which held that Congress did not intend to bring teachers at church-operated schools within the jurisdiction of the Act. The *PLU* test contains the same constitutional infirmities as existed in the Board’s former “substantial religious character” test, which caused the D.C. Circuit Court of Appeals to require a simple, “bright line” test to determine Board jurisdiction over religiously-affiliated colleges and universities. *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The Regional Director limited testimony contrary to the Board’s order remanding the case to the Regional Director, misapplied the *PLU* test and disregarded evidence that would have compelled him to conclude that the Board did not have jurisdiction over the University. The Regional Director also found that the University does not hold out faculty members in Seattle University’s School of Theology and Ministry, and those teaching Catholic Theology, as having a “specific religious function” in their

1 teaching roles. The Regional Director disregarded or ignored plain, uncontroverted evidence that
2 clearly meets the *PLU* standard in this regard.

3 The University believes these are compelling reasons for the Board to grant review of the
4 Order, and for reconsideration of the Board's *PLU* test. The Board lacks jurisdiction in this case
5 because the University clearly meets the constitutional test set forth by the D.C. Circuit.

6 **RELEVANT FACTS**

7 **A. The Religious Mission of Seattle University is the Education of the Whole** 8 **Person**

9 Seattle University is a Catholic Jesuit university founded in 1891. *Tr. 1496*. The
10 principal apostolate of this religious community is the work of Catholic higher education at
11 Seattle University. *Employer Ex. 2, Article VI*.

12 The Jesuit religious mission seeks to allow a person to gain a deeper understanding of the
13 world around him or herself, a deeper understanding of him or herself, and a deeper
14 understanding of him or herself with God or his or her spiritual religious nature. *Tr. 602:1-1;*
15 *1496*. A goal of this approach is to encourage students to use that education to affect change in
16 the world and to be of service to others, and most notably, in following the teachings of Jesus
17 Christ with a particular focus for the poor and the disenfranchised. *Tr. 602:15-19*. This mission
18 embodies a strong commitment to the liberal arts tradition of educating students broadly and
19 deeply in a variety of areas, particularly at the undergraduate level, with a strong focus on
20 Theology and Philosophy. *Tr. 313:4-9*.

21 The Jesuit approach is a "more inclusive type of approach to Catholicism" in which
22 "you're teaching Catholic values to everybody. You're not teaching the Catholic religion to
23 everybody." *Tr. 1425:21-23*. The University's "inclusive Catholic character" engages other
24 faiths and belief systems as part of the Jesuit mission. Religious "litmus" tests of faculty and

1 students, therefore, would be contrary to the way the Jesuits practice their Catholic faith. *Tr.* 86.
2 In fact, the Jesuit inclusiveness paradigm appeals to individuals of other faiths. “[W]e reach out
3 to Protestant faith communities, Muslim, Jewish, others and make available to them what will
4 support them in their faith out of our Catholic principles of inclusion...To be Catholic is to be
5 ecumenical, so it’s an official statement of the Jesuits to be Catholic is to be ecumenical.” *Tr.*
6 *185:18-25, 186:1-5.*

7 To the Jesuits, education by its nature is not strictly secular. According to Father
8 Sundborg:

9 Jesuit education does not like the distinction between sacred and secular because we
10 believe we can find the sacred within the secular. So we don’t tend to talk about secular
11 society and then religious society, but rather what we’re about is engagement with culture
12 and that within that culture there are various kinds of sacred dimensions. And so when
13 you talk about a secular purpose, yes, we’re training lawyers and we’re training business
14 people and we’re educating people who will work in criminal justice systems and so
15 forth, and their careers will be, sort of on faith value, secular careers. But we believe the
kind of education that we offer of the *whole person* and with the -- the respect for the
transcendental or religious dimension of the person, that they will carry that out in a -- in
a different kind of way than is simply secular, if you mean by secular sort of the
exclusion of God from that realm. So we do have a secular purpose and no one’s required
to adopt a religious position at Seattle University. But we treat people as having a
religious dimension.

16 *Tr.* 88:15-25; 89:1-2 (*emphasis added*).

17 **B. *Ex Corde Ecclesiae***

18 In 1990, Pope John Paul II published *Ex Corde Ecclesiae*,¹ which is “the overall
19 document for all Catholic universities within the world in terms of laying out the parameters of
20 what it means to be a Catholic university.” *Tr.* 1511:15-17; *Employer Ex.* 82. Seattle
21 University is obligated to fall within the parameters of *Ex Corde Ecclesiae*. *Tr.* 1512. *Ex Corde*
22 *Ecclesiae* contains references throughout the document regarding the role of the faculty in

23
24 ¹ The Latin phrase “*ex corde ecclesiae*” translates in English to: “From the Heart of the Church.” *Tr.* 1511:12
(*Sundborg*).

1 Catholic universities, such as Seattle University. *Tr. 1511; Employer Ex. 82*. For example, *Ex*
2 *Corde Ecclesiae* specifically identifies the four essential components of a Catholic University as
3 follows:

4 13. Since the objective of a Catholic University is to assure in an institutional manner
5 a Christian presence in the university world confronting the great problems of society and
6 culture, every Catholic University, as *Catholic*, must have the following *essential*
7 *characteristics*:

- 8 “1. a Christian Inspiration not only of individuals but of the university community as
9 such;
- 10 2. a continuing reflection in the light of the Catholic faith upon the growing treasury
11 of human knowledge, to which it seeks to contribute by its own research;
- 12 3. fidelity to the Christian message as it comes to us through the Church;
- 13 4. an institutional commitment to the service of the people of God and of the human
14 family in their pilgrimage to the transcendent goal which gives meaning to life.”

15 *Employer Ex. 82, ¶ 13* (emphasis in original) (citations omitted). The first element—addressing
16 a Christian inspiration of community—provides that not only does the university “need to have a
17 Christian inspiration, but that the individual persons working within that institution also need to
18 have a Christian inspiration in their work within the University.” *Tr. 1513:18-23; Employer Ex*
19 *82, at 4*. Seattle University applies this inspiration through the mission, vision and values of the
20 University, in the shaping of the Core Curriculum which contains a definite Christian and
21 Catholic inspiration, in its Mission Day, in the annual baccalaureate Mass of the Holy, in its
22 commencement and related Mass at Saint James Cathedral, and in prayers at all official
23 University ceremonies and assemblies. *Tr. 1514-1515*.

24 *Ex Corde Ecclesiae* additionally provides that “[a] Catholic university has to be a living
union of individual organisms dedicated to the search for truth.” *Employer Ex. 82, ¶ 16*. The
“search for truth” is an element of the religious purpose at Seattle University. *Tr. 1521*. As

1 such, at Seattle University “every faculty person’s ultimate commitment is to the search for truth
2 and that a student needs to be confident that that is what the faculty person is pursuing.” *Tr.*
3 *1521:5-10*. The belief at Seattle University is that “truth is only obtained through the interplay
4 and the interrelationship between faith and reason together.” *Tr.* *1521*. It is the faculty at Seattle
5 University who make the “exploration of human reality in the light of faith available to the
6 students.” *Tr.* *1522:3-4*.

7 *Ex Corde Ecclesiae* addresses the Catholic concept of social justice, which Seattle
8 University actively promotes within the faculty community. *Tr.* *1523-1524*; *Employer Ex.* 82, ¶
9 34. Specifically, “throughout the university and all dimensions of any school within Seattle
10 University, the commitment to social justice is prominent, because it’s part of what [Seattle
11 University’s] Catholic identity is.” *Tr.* *1525:4-7*. Most notably, social justice is an essential
12 component of Seattle University’s mission, namely, “empowering leaders for a just and humane
13 world, which most teachers and most students see as the shorthand for what [Seattle
14 University’s] mission is about.” *Tr.* *1524:9-12*.

15 *Ex Corde Ecclesiae* is held out to Seattle University faculty as “the overall guidance or
16 the overall norms of what you have to be in order to be a Catholic university.” *Tr.* *1526-27*. It is
17 available to faculty, students and to members of the public on the University’s website, and is
18 frequently addressed during speeches at which faculty are required to attend. *Tr.* *1526, 1529-30*;
19 *1596-1597*. All faculty at Seattle University are acting in adherence with the principals
20 established in *Ex Corde Ecclesiae*, which Seattle University—as a Catholic University—is
21 obligated to satisfy. *Tr.* *1532-1534*.

22 After the publication of *Ex Corde Ecclesiae*, the United States Conference of Catholic
23 Bishops in 2000 published a document establishing the manner in which the requirements of *Ex*
24

1 *Corde Ecclesiae* would be applied to Catholic universities in the U.S. (“Application of *Ex Corde*
2 *Ecclesiae*”). *Tr. 1534-1535; Employer Ex. 83.*

3 Seattle University has a number of degree programs in Catholic theology. *Tr. 1535.*
4 Students may elect to obtain a bachelor’s degree in Catholic theology. *Tr. 1535.* Students may
5 additionally elect to obtain one of the many bachelor’s or master’s degrees offered through
6 Seattle University’s School of Theology and Ministry, including, for example, a Master of
7 Transforming Spirituality, a Master of Pastoral Studies and a Master of Divinity. *Tr. 1535.* Each
8 of the degrees offered through Seattle University’s School of Theology and Ministry are
9 “specifically Catholic and Christian degrees.” *Tr. 1535.*

10 Seattle University ensures that it complies with the requirements of *Ex Corde Ecclesiae*
11 in the delivery of its Catholic theology courses by requiring that all undergraduate students take a
12 minimum of two theology or religious study courses as part of their core curriculum. *Tr. 1536.*
13 Notably, one of those two required courses must be “particularly about Catholic teaching,
14 tradition, culture, so that all students at Seattle University who graduate with an undergraduate
15 degree will have some familiarity and knowledge about what is the Catholic faith and teaching.”
16 *Tr. 1536:17-21.* The other core theology class studies a non-Catholic or at least non-Western
17 Catholic religious tradition and tries to put it into dialogue with Catholic tradition in some way.
18 *Tr. 784:20-22; Employer Ex. 38 (UCOR 3100 Course Description).*

19 **C. The Catholic Mandatum**

20 There are explicit requirements set forth in *Ex Corde Ecclesiae* addressing the required
21 credentials of each individual who may teach Catholic theology at a Catholic university, such as
22 at Seattle University, which are specifically addressed in the Application of *Ex Corde Ecclesiae*.
23 *Tr. 1536-1537.* The most essential requirement addressed in the Application of *Ex Corde*
24

1 *Ecclesiae* is that “all Catholics who teach Catholic theology in a Catholic university are required
2 to receive a mandate from the local archbishop that they are in communion with the Catholic
3 Church in their teaching at that university.” *Tr. 1537*. As described by Father Sundborg, this
4 *mandatum* (referred to herein as the “Catholic *Mandatum*”) is “a relationship between the
5 archbishop and the individual Catholic professor.” *Tr. 1539:9-10*. Father Sundborg, in his
6 capacity as the President of Seattle University, worked directly with the Archbishop of Seattle to
7 establish a process through which Seattle University faculty teaching Catholic theology at Seattle
8 University may seek to receive the Catholic *Mandatum*. *Tr. 1537*.

9 In addition to the Application of *Ex Corde Ecclesiae*, the United States Conference of
10 Catholic Bishops published an accompanying document addressing guidelines for the Catholic
11 *Mandatum* (referred to herein as the “Catholic *Mandatum* Guidelines”). *Tr. 1542-1543*;
12 *Employer Ex. 84*. The Catholic *Mandatum* Guidelines specifically provide that “[a]ll Catholics
13 who teach Catholic theological disciplines in a Catholic university are required to have a
14 *mandatum*.” *See Employer Ex. 84, ¶ 2*. It is required that each individual faculty member
15 indicate in writing that he or she accepts the offer of the Catholic *Mandatum* from the
16 archbishop, which is maintained by the archbishop. *Tr. 1541*. “The object of the *mandatum* is
17 the content of the professor’s teaching, and thus, the *mandatum* recognizes both the professor’s
18 ‘lawful freedom of inquiry’ and the professor’s commitment and responsibility to teach
19 authentic Catholic doctrine and to refrain from putting forth as Catholic teaching anything
20 contrary to the Church’s magisterium.” *Employer Ex. 84, ¶ 1.2*. To this end, each Catholic
21 faculty member teaching Catholic theology courses at Seattle University does not have any
22 discretion to deviate from Catholic doctrine in teaching such courses. *Tr. 1540*. Father
23 Sundborg reinforced this *mandatum* in his testimony when he stated that “all faculty, by Faculty
24

Handbook requirement and by regulation of the university, must respect or acknowledge Catholic teaching at Seattle University.” *Tr. 1540:25-1541:18.*

Seattle University offers roughly sixteen courses in the Theology and Religious Studies curriculum within the College of Arts and Sciences where a “preponderance of Catholic theology [is] taught within them and most likely would have someone who has specific training in Catholic theology, Catholic doctrine [or] Catholic dogma.” *Tr. 1623:25-1624:3; Employer Ex. 88.* “A broad spectrum of faculty within the Theology and Religious Studies Department [teach these courses including] [t]enured, tenured track, full-time non-tenured track [and] part-time faculty.”² *Tr. 1624:5-8.*

Seattle University additionally has a School of Theology and Ministry that “function[s] as a seminary to help educate and prepare people within [various] specific [Christian] denominations to go out and minister to their flock as ministers or to work at not-for-profit organizations in leadership capacities.” *Tr. 1626:8-13.* The individuals teaching courses in the School of Theology and Ministry are primarily made up of individuals who hold credentials as ministers within specific Christian denominations or who are theologians with expertise in one or more such denominations. *Tr. 1627.* Seattle University holds these faculty members out to the community as representative of their faith and of Jesuit Catholic faith. *Tr. 1627.* Seattle University additionally holds these faculty members out to the community as demonstrating “what type of Catholic institution that [Seattle University is] in terms of being one that is embracing of other religions and looking to provide different paths of understanding and

² Specifically, between 2011 and 2014, ten fulltime non-tenure track faculty members taught courses at Seattle University within the Theology and Religious Studies program that focus on specific aspects of Christian theology or Catholic theology. *Tr. 1671-73; Employer Exhibit 92.* During that same time period, one part-time faculty member and three instructors taught such courses, none of whom are tenure track. *Tr. 1671-73; Employer Exhibit 92.*

1 knowledge around faith and one's relationship with the world and one's God as he or she
2 interprets it." *Tr. 1627:21-1628:3*. Dr. Crawford described the means through which Seattle
3 University holds these faculty members out to students during the recruitment process as
4 follows:

5 From the perspective of recruitment . . . [Seattle University lets] perspective [sic] students
6 know that they will have the opportunity to come and work with individuals and these are
7 generally individuals who have worked in the capacities in which they are looking to
8 work or have a deep knowledge and experience in the subject matter to prepare them to
9 be effective ministers, administrators, therapists or counselors or educators that will allow
them to have an opportunity to come and learn more about us and our Catholic traditions,
learn about other religious denominations and their traditions. And then that helps them
be ever [sic] better religious professionals or scholars or professionals of whatever walk
of life they're looking to do after they complete their training.

10 *Tr. 1628:7-19*.

11 **D. Seattle University's Mission, Vision and Values**

12 Seattle University's Mission, Vision, and Values Statements reflect its Catholic Jesuit
13 religious mission. The Mission Statement is as follows: "Seattle University is dedicated to
14 educating the whole person, to professional formation, and to empowering leaders for a just and
15 humane world." *Employer Ex. 6*. Seattle University has also adopted the following Vision
16 statement: "We will be the premier independent university of the Northwest in academic quality,
17 Jesuit Catholic inspiration, and service to society." *Id*.

18 The Mission Statement is a statement of Catholic Jesuit religious principles and purpose,
19 embodying the interplay of faith and reason in the multi-faceted religious concept of educating
20 the "whole person." *Tr. 1521: 10-14; 1522: 7-12*. "[W]hat we're dedicated to in the education
21 of the whole person is who that student is in front of us as a whole person and a major part of our
22 purpose as [a] university and what our faculty are engaging with and [what] they need to be
23 attentive to is that student as having a sacred or a transcendental or spiritual dimension. And
24

1 therefore, they are engaged with that aspect of faith and spirituality and religion.” *Tr. 1522: 13-*
2 *19. All faculty members are the educators of the whole person. Id.*

3 The Jesuit Catholic approach underscores everything that Seattle University attempts to
4 accomplish as an academic institution. *Tr. 313:16-17; See also Employer Ex. 16* (diagram
5 describing integrated Jesuit education); *Employer Ex. 17* (listing “Undergraduate Learning
6 Objectives” rooted in Jesuit traditions). The religious and spiritual meaning of the “whole
7 person” is described on the University’s website:

8 The essence of a Jesuit university is educating the whole person—mind, body and spirit.
9 At Seattle University, learning is enriched by service to society. Three out of four
10 undergraduates engage in community service, three times the national average...Jesuits
11 on campus set a tone at SU, one that’s focused on preparing leaders with the fundamental
12 values of the university’s humanistic Jesuit mission. Those on many spiritual paths are
13 part of the academic community, which is inclusive and welcoming of all faiths.
14 Students, faculty and staff—no matter their religious backgrounds—are drawn to the
15 Jesuit approach to education, which means more than acquiring knowledge. What you do
16 with that knowledge is equally important. It’s a place to discover your own spirituality,
17 strive to deepen who you are and explore your place in the world.

18 *Employer Ex. 91.*

19 All faculty are charged with educating the “whole person,” and are the means by which
20 Seattle University fulfills its religious mission. As stated by Dr. Crawford:

21 [I]t is the university’s belief [and] expectation that [it] is the faculty who are the standard-
22 bearers and those who carry the mission forward. And they’re the ones who help [Seattle
23 University] students appreciate it in their work . . . [in] the classroom, the laboratory, the
24 library and how they mentor them. [Seattle University’s] institutional role in support of
the Catholic faith and the support of the church is to educate its students in a way that
helps them become educated, learned, have a sense of understanding and self- reflection,
an engagement of the world all of which looks to help them develop a closer
understanding of and relationship with God. That’s how Catholic institutions, not just
Seattle University, serve the Catholic faith and the Catholic church in addition to the
work that it does in terms of research or scholarship or service that it provides to its
communities. That’s the ministry of a Catholic university.

Tr. 1629:6-22.

1 **E. The Jesuit Core Curriculum and the “Whole Person”**

2 At the heart of Seattle University’s undergraduate program is its Core Curriculum
3 (“Core”). *Tr. 765:22* (“[T]he center of gravity of a Seattle University education”).
4 Approximately 95% of undergraduates go through the Core. *Tr. 766:3*. In numbers, that
5 translates to approximately 4,000 students at any given time being in the Core. *Tr. 766:15-16*.
6 The Core has been in the Seattle University education model since its inception. *Tr. 766:23-24*.

7 The Core involves twelve courses spread out across three different modules, plus a
8 module in a student’s major. Module II of the Core requires all students to take two philosophy
9 courses and one theology course. Module III, which is focused on engaging the world, includes
10 a religious studies or theology course, as well as two additional courses in the humanities, social
11 sciences or natural sciences. *Tr. 767:14-23; Employer Ex. 39*.

12 The University Core Curriculum Learning Objectives describe the nature of the Core, and
13 how that nature informs the curriculum.

14 Rooted in Jesuit, Catholic educational traditions, the primary aim of Seattle University’s
15 Core Curriculum is formative and transformative liberal education. The key elements of
16 this curriculum are foundational knowledge in several relevant disciplines, critical
17 inquiry, reflection on learning and values, and preparation for life as an effective and
18 ethical global citizen.
19 *Employer Ex. 37*.

20 The Core’s learning objectives are derived from the University’s undergraduate learning
21 objectives, and shaped by four broad goals, each of which has specific knowledge, skills and
22 values associated with it. The first of these goals is rooted in “Jesuit Catholic Intellectual
23 Traditions:”

24 Through knowledge of Jesuit, Catholic intellectual traditions and understanding of
diverse religious traditions, students will reflect on questions of meaning, spirituality,
ethics, values, and justice.

Knowledge:

- Understand academic traditions (theological, philosophical, etc.) on which Jesuit education is based
- Understand Catholic theology
- Understand Jesuit, Catholic perspectives within the context of world religions.

Skills:

- Ability to articulate one's own spiritual/religious perspective
- Ability to appreciate and reflect on religious and spiritual perspectives other than one's own

Values:

- Respect for religious diversity

Employer Ex. 37.

An integrated, “core” curriculum has been part of the Jesuit educational tradition since at least 1599, with the publication of the *Ratio Studiorum*³, which was the initial Jesuit handbook for how to run a curriculum in a school. *Tr. 770:4-8*. The Seattle University Core is a tightly integrated core reflective of the University's Catholic Jesuit character. Jesuit education, like the training of Jesuits themselves, is designed to shape people in particular ways. It is “a transformational core; it's trying to create certain skills, values, sensibilities, world views” that form students in ways consistent with the Jesuit mission. It aspires to develop certain kinds of capabilities, knowledge, skills and values to help prepare students to be a certain kind of person in the world. *Tr. 771-772*. This is in contrast to other, “distributive” models found at most other colleges and universities, where “[y]ou take a little bit of this and a little bit of that and a little bit of other things” in a series of one-off courses. *Tr. 770:17-23*.

What sets the University Core apart is its strong emphasis on Theology and Philosophy, both central elements of Jesuit education for 450 years. *Tr. 771:10-16*. The Theology course—UCOR 2100—introduces all students to the academic study of theology as a discipline, and

1 students study elements of the Catholic Jesuit tradition. The course will also take a text, person
2 or issue that has been central to that tradition and explores it in more detail. The current offering,
3 for example, is studying the Gospel of St. John. *Tr. 784:3-8; Employer Ex. 38* (UCOR 2100
4 Course Description). UCOR 3100, “Religion in a Global Context,” studies a non-Catholic or at
5 least non-Western Catholic religious tradition and tries to put it into dialogue with Catholic
6 tradition in some way. *Tr. 784:20-22; Employer Ex. 38* (UCOR 3100 Course Description). The
7 Philosophy requirement continues 450 years of Jesuit education tradition and is a cornerstone of
8 the Core. It is more than the history of Philosophy; “[t]he Jesuits have a deep belief in the power
9 of the human being to discover God in all things, to think deeply about moral problems and
10 ethical problems, about their relationship with other human beings, and believe that philosophy
11 is a critical tool to have to be able to do that.” *Tr. 787:14-25; 788:1-5*. During the 2013 to 2014
12 academic year, a total of 101 theological and philosophical (Module II) Core Curriculum courses
13 at Seattle University were taught by twenty-four non-tenure track faculty members. *Employer*
14 *Ex. 86*.

15 **F. The Role of Seattle University’s Non-Tenure Track Faculty in Creating and**
16 **Maintaining a Religious Educational Environment**

17 All Seattle University faculty are expected to maintain Seattle University’s religious
18 educational environment, which is founded in Seattle University’s Mission Statement and
19 emphasis on educating the “whole person.” *See, e.g., Tr. 1496; 1757:6-11*. Dr. Crawford further
20 explained the religious underpinnings of the University’s mission, and the essential role Seattle
21 University faculty members have in carrying that mission forward, as follows:
22

23 ³ This is an abbreviated title for “*Ratio atque Institutio Studiorum Societatis Jesu*,” i.e., “Method and System of the
24 Studies of the Society of Jesus.” *The Catholic Encyclopedia*, available at
<http://www.newadvent.org/cathen/12654a.htm>.

1 [O]ur mission statement speaks to that we are committed to educating the whole person
2 with a particular emphasis on professional formation and empowering leaders for a just
3 and humane world. And that's the way in which we serve the Catholic Church. And it's
4 our faculty who carry that forward in the most demonstrative way.

5 *Tr. 1649.* To this end, when teaching accounting at Seattle University, fulltime non-tenure track
6 accounting faculty member Sarah Bee “adhere[s] to the Jesuit ideals of educating the whole
7 person . . . [and] demonstrate[s] that in a variety of ways . . . especially with the social justice
8 aspect lead my students kind of in that direction.” *Tr. 1744.* Professor Bee gave examples of
9 how she implements social justice into her teaching of accounting by

10 [t]aking students to Africa, encouraging students to do financial literacy training, other
11 community service involvement through Beta Alpha Psi. I've served as the chair of
12 National Community Service Day for the National Beta Alpha Psi conference over, there
13 was about a thousand people that participate in that. And my students serve as leads in
14 that activity. In educating the whole person, I think that in addition to teaching them, I
15 spend a lot of time outside of class with my students. A lot more than I did when I taught
16 at the University of Washington. About a hundred times as much in fact.

17 *Tr. 1744.*

18 Seattle University encourages its faculty to develop a deep knowledge and appreciation
19 for the Jesuit paradigm. *Tr. 601.* The 2009-2014 Academic Strategic Action Plan of the
20 University contains a “Comprehensive Faculty Development” section that describes
21 opportunities for spiritual development training and learning experiences concerning Jesuit
22 pedagogy and the Ignatian Paradigm. *Employer Ex. 29; Tr. 601.* Seattle University expects that
23 Catholic social teaching informs some of the faculty's thoughts and interests relating to their
24 scholarship and looks for faculty to incorporate Catholic social teaching as they deem
25 appropriate within their coursework. *Tr. 601.* Furthermore, Seattle University ensures that
26 finalists for tenured positions are very much aware of the University's Jesuit mission and
27 approach by sending them information concerning Catholic social teachings, Ignatian pedagogy
28 and paradigm information about the University mission. The finalists are asked to read those

1 materials and to write an essay concerning how their work, training, and scholarly interests
2 would help to support and advance the University's mission as a Jesuit Catholic Institution. *Tr.*
3 *607:22-25; 608:1-7; Employer Ex. 30.* Mission and related topics are also covered in their
4 interviews and upon hire. For example, in a 2012 address for all new faculty hires, Father
5 Sundborg spoke about fulfilling Seattle University's mission by engaging in a spiritual sense.
6 *Tr. 1136.* Faculty member Dr. Eric Wehrly testified that he was present for a speech by Father
7 Sundborg to the New Faculty Institute ("NFI") in which Father Sundborg explained that "these
8 values permeate everything that we do." *Tr. 1586:11-14.* "[A]s a faculty, we feel responsibility to
9 instill those values in our students." *Id.; See also Employer Ex. 72* (New Faculty Institute 2013
10 materials showing "Jesuit Reception," "Jesuit Dinner," and a session on "The Jesuit Tradition
11 and Teaching" on the agenda). Indeed, the Faculty Handbook states that:

12 Recognition of the religious dimension of human life is fundamental to the identity of a
13 Jesuit university. For Seattle University to achieve its mission and to maintain its
14 identity, its faculty must be a community of scholarly persons with an acknowledgment
15 of or a respect for its Catholic religious and cultural tradition. *Each member of the*
16 *faculty is expected to show a respect for the religious dimension of human life...Given the*
Jesuit tradition and educational philosophy of Seattle University, the ability to contribute
actively in a variety of ways to the Jesuit ethos of the University's educational work is a
quality which the University seeks in prospective faculty members and recognizes in all
faculty as a significant asset."

17 *Employer Ex. 3, §§3.1(b) and (c)* (emphasis added).

18 While the hiring process for part-time non-tenure track positions is less formal in this
19 regard, the same focus and questions are impressed upon and asked of full-time non-tenure track
20 interviewees. *Tr. 608:21-25; 609:107.* Seattle University's Mission Statement is regularly
21 addressed with potential faculty members as a part of the interview process. *Tr. 1757-58; 1589.*
22 All faculty members at Seattle University are expected "to speak to Jesuit values and . . . as the
23 mission says, educate the whole person." *Tr. 1589.* Dr. Wehrly testified that
24

1 from the time of my first interview, from the new faculty institute, we are strongly
2 encouraged to speak to Jesuit values and to -- you know, as the mission says, educate the
3 whole person, which is not only do I teach students the tools of their trade, but also help
4 them understand how they should apply those tools and apply their trade in a way that
serves the greater good. It serves their community. It helps them marginalize, is as a -- a
sustainable practices, you know, corporate social responsibility. And so these -- these are
-- it's -- it's been evident to me from day one that it was my duty to do so.

5 *Tr. 1589.*

6 All new full-time non-tenure track faculty attend the NFI, a two-day conference with one
7 or two follow-up sessions later in the academic year. The President kicks off the NFI with an
8 address on the University's mission, and the faculty's role in that mission. There is also a panel
9 session on "Mission possible? Life-work balance as a 'whole person'" put on by faculty from
10 various schools and colleges. *Employer Ex. 87*. The premise of that presentation is that "the
11 mission only becomes meaningful to our students and colleagues if we endeavor to act it out in
12 our own working lives ourselves." *Id.*

13 Another effort by the University to imbue its faculty with Jesuit inspiration is the
14 University's Institute for Catholic Thought and Culture ("Institute"). *Employer Ex. 7*. In the
15 Academic Strategic Action Plan, *Employer Ex. 29*, Seattle University established the Institute,
16 which offers fellowships for research as well as scholarships and education and professional
17 development for faculty, staff, and students focusing on Catholic social thought. *Tr. 603:7-14*.
18 The Institute provides course development stipends to encourage faculty to create course
19 offerings that provide students the opportunities to engage with the Catholic intellectual tradition
20 in its multidisciplinary manifestations. *Employer Ex. 93*. Participants in the program include
21 full- and part-time non-tenure track faculty. *Employer Ex. 94*. There are also a Colleagues
22 program and Arrupe Seminars (named after former Jesuit Superior General Father Pedro Arrupe)
23 available at the University through which faculty and staff come together to study Ignatian
24

1 spirituality and Catholic social thought. *Tr. 604:2-11; Employer Ex. 11* (documents describing
2 Arrupe Seminar content). Additionally, each year the University holds a convocation on the
3 University's Jesuit mission. Classes are canceled for the convocation, called "Mission Day,"
4 which addresses aspects of the Catholic Jesuit mission of the University. *Tr. 606:18-22, 607:1-*

5 7. Professor Bee describes "Mission Day" as follows:

6 Every year we have a mission day where we get a theme and the theme might be the
7 humanities. That was one year it was the humanities. Because that makes us all more
8 human. And spiritual as well. Another year, it was our work around the communities.
9 So we had the Seattle University youth initiative and it's working with a two square mile
area around Seattle University. It's a chance for the -- all of the University staff and
faculty to come together and remind ourselves that we're a Jesuit institution and some of
the things that are important about that.

10 *Tr. 1742.* Core Jesuit values are also promoted through Seattle University's policy that allows
11 faculty and staff to take time off, with pay, to participate in community service activities. *Tr.*
12 *604:14-18.* Participation in all of the above activities is strongly encouraged. *Tr. 605:3.*

13 As described by Dr. Crawford, Seattle University holds its faculty out as facilitating
14 Seattle University's religious environment as follows:

15 It is through the faculty that the University -- it has its greatest and most demonstrable
16 impact on its students and the manner in which it conveys to the world. How it carries
17 out and makes and manifests its mission, and to do that serves the Catholic church who
18 its activities and work as educators and mentors of our students. And that again, as a
19 faculty we have an expectation that they engage our students in a way that allows them to
20 have every opportunity to have their intellect, their social development, and their spiritual
development enhanced such they can have a deeper understanding of themselves, but
most noticeably for us, hopefully a closer and deeper appreciation for and understanding
of God. And with that, then that they would see value in all of humanity, and go out into
the world and try to make a difference and serve those who are less fortunate, particularly
the poor.

21 *Tr. 1648.* Father Sundborg similarly testified as follows:

22 [Seattle University] has a mission, which is founded on a theological principal. And it
23 has all the different ways in which people contribute to that education, based on that
24 theological principal. And each person in a specific way contributes to that. And that

1 purpose is a religious purpose of serving God through the education of our students and
2 how they affect society.

3 That's a clear dimension of our mission and our purpose and our vision of the Jesuit
4 Catholic inspiration. It's unmistakable in our values in regard to faith. Every faculty
5 person who comes to Seattle University knows that mission. By agreeing to work and
6 serve at Seattle University, they're part of that mission, as they would be in any
7 institution that has a mission.

8 And therefore, that mission is religious and their contribution to it is a specific one,
9 because we believe that, you know, the ways in place or the places in which we find God
10 are not simply in a narrowly defined religious way, like a church or a sanctuary or a
11 temple or a religious service.

12 God is found just as much in the issues of poverty or migration or economy or in
13 literature and that that's our understanding of religion. And that's a viable understanding
14 of religion. And imposing on Seattle University an understanding of religion that's a
15 narrow one about worship is foreign to our ability as a university to carryout [sic]our
16 religious purpose. So the faculty do carry out a specific religious function within our
17 understanding of religion or religious function. And what's important that we be able to
18 be understood on our own terms in terms of what we mean by the religious purpose of
19 our universities, rather than it extraneously be determined for us about what is religious
20 and what is not. That's what is at the very heart of this discussion.

21 *Tr. 1564-65.* He stated that outsiders, such as parents, would know this by how the
22 University expresses its Catholic Jesuit character in all of its publications, websites and
23 curriculum. "[T]he university does hold out every single faculty person as part of carrying out a
24 specific religious function in terms of their overall religious purpose of our university. And
contributing to it. And that faculty person would be incapable of missing that religious purpose
of the university that's everywhere." *Tr. 1566.* The religious function is found in the Mission
statement, and physically in campus buildings such as the St. Ignatius Chapel, Mission Day, the
Baccalaureate Mass, and the Mass of the Holy Spirit. *Id.*

25 Full-time non-tenure track faculty who testified at the hearing agreed that the Mission
26 Statement was a religious statement expressing the core of the Jesuit religious educational
27 mission. Dr. Wehrly, a full-time non-tenure track faculty member in the Albers Business School

1 (who was an eligible voter in the 2014 election), testified that he serves a religious function by
2 fulfilling the mission of the University and the religious underpinnings of the mission, as
3 expressed in the Mission Statement. *Tr. 1594*. He gave as an example the manner and content
4 of his coursework addressing shareholder wealth maximization, in which he applies the mission
5 to that topic by having students consider the possible role of stakeholders (the community) on
6 corporate governance and finance, in addition to the traditional financial concept of profit
7 maximization. *Id. at 1593*. He testified further that his Assistant Dean encouraged him to
8 incorporate the Jesuit mission into his coursework, and that curriculum revisions (such as when
9 he lead the effort to develop a Master of Science and Business Analytics degree) incorporate the
10 mission of “educating the whole person” into the curriculum review process. *Id. at 1585*. He
11 has seen the Mission Statement hundreds of time around campus, has the statement in his e-mail
12 signature, has seen his colleagues’ e-mail signatures containing the statement, and noted that
13 Albers has a similar mission statement. *Id. at 1584*. The Mission Statement is also addressed in
14 the New Faculty Institute, and his job interview included a discussion of the role of the Jesuit
15 mission in his prospective employment. *Id.* He noted that his educational framework at the
16 University differed from his prior teaching role at the University of Washington, which lacked
17 any of these Catholic Jesuit values. *Id. at 1586*.

18 Sarah Bee, another full-time non-tenure track faculty member who was eligible to vote in
19 the 2014 election, testified similarly that the Mission Statement contains the religious purpose of
20 “educating the whole person,” which necessarily meant faculty carry out that religious mission
21 by being educators. *Tr. 1744*. Her trips to Africa and the way she taught her courses were based
22 on the Mission statement principle of educating the whole person. *Id.* Even the Union’s own
23
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1 witness corroborated this, when he stated that “by definition, everything has religious meaning to
2 the Jesuits, them being a religious order.” *Tr. 1776.*⁴

3 **G. The Special Religious Function of Faculty in the School of Theology and**
4 **Ministry and Faculty Teaching Catholic Theology Courses**

5 **1. School of Theology and Ministry.**

6 The School of Theology and Ministry “is dedicated to offering quality theological
7 education and ongoing formation for those preparing to enter the field of church-sponsored
8 ministry or social entrepreneurship directed at working for social justice from a faith-based
9 perspective. *Employer Ex. 103 (Statement on Educational Effectiveness: Quality Theological*
10 *and Ministerial Education)*. The school “is deeply committed to preparing women and men for
11 ministry to the church and world.” *Id.* “To live out this reality, faculty take seriously the need to
12 continuously monitor and evaluate, update and enhance our programs when and where
13 necessary.” *Id.* The School’s Mission Statement is found in the School of Theology and
14 Ministry’s Faculty Handbook:

15 With God’s help
16 and in creative partnership
17 with participating churches
18 in the Pacific Northwest,
19 the School of Theology and Ministry
20 educates and forms
21 women and men as leaders in Christian ministry
22 to serve, challenge and heal churches, communities and all creation.

23 ⁴ This witness, Benedict Stork, also testified that a professor discouraged him from using pornography in a Visual
24 Storytelling Mr. Stork was going to teach, stating that in the professor’s experience at Seattle University he had had
“bad luck” with incorporating pornography into his curriculum. Mr. Stork eventually abandoned the idea. *Tr. 1782-1783.*

1 *Employer Ex. 48, at 5.* The Values Statement, also in the School’s Faculty Handbook, states that
2 the School’s mission is “rootedness in Christ and openness to the Spirit,” and also incorporates
3 “[t]he Jesuit and Ignatian respect for the whole person in solidarity with the real world.” *Id.*

4 The School partners with twelve Christian denominations and the Unitarian Universalist
5 Association to provide “direct and regular assistance in navigating the requirements for
6 ordination and leadership.” *Employer Ex. 98.* The Advising Handbook for Faculty and Staff
7 contains course requirements, with denomination “overlays” to ensure courses meet the
8 particular denomination’s doctrinal requirements. *Employer Ex. 104.* The School is
9 “ecumenical and interreligious,” meaning “faith perspective and tradition matter in the classroom
10 not only for [the student’s] own learning, but also for...fellow students... We are committed to
11 creating well-rounded ministers and leaders for more a more just and humane world.” *Employer*
12 *Ex. 97, at 3 (Admissions FAQs).*

13 All faculty who teach in Seattle University’s School of Theology and Ministry are
14 training students for professional ministry. *Tr. 1685; Employer Ex. 100.* As such, as Dean
15 Markuly explained:

16 [V]irtually all of our faculty are professional -- our adjunct faculty are professional, most
17 of them, ordained ministers [T]he few exceptions to that would be those who are
18 teaching in the counseling program who are being hired specifically to teach a specific
19 type of a specialization that’s required for our accreditation and their counseling degree.
And in those cases, we would always look for somebody who had some kind of
denominationally -- denominational affiliation, if possible. But we would look for the
best candidate to be teaching that specific issue.

20 *Tr. 1685.* Approximately 90 to 95 percent of courses within the School of Theology and
21 Ministry contain a period of prayer. *Tr. 1698.* Additionally, there are regular community prayer
22 gatherings within the school, which “students, particularly those who are leading toward
23
24

1 ordination actually as part of their coursework . . . lead . . . for their colleagues and their fellow
2 students.” *Tr. 1699.*

3 As described by Dean Markuly, all faculty in the School of Theology and Ministry—
4 including non-tenure track and adjunct faculty—serve a specific religious function insofar as

5 [t]hey’re teaching theological traditions, they’re teaching the work of religion. They’re
6 doing it through different prisms; systematic theology, pastoral counseling, from the
7 perspective of historical theology, spirituality, liturgy worship. But it’s ultimately -- it’s
ultimately a religion curriculum.

8 *Tr. 1699.* Dean Markuly further identified the manner through which the School of Theology
9 and Ministry holds out its faculty as performing a specific religious function:

10 On our website we give their credentials. Within classes, they’re very -- they’re very
11 open to sharing where they come from, what they’ve done, who they are [T]he vast
majority of our faculty have served as pastors. Sometimes they’re currently serving as
12 pastors. Some of the people that we bring in are actually faculty from other institutions as
well who are theological leaders nationally and internationally.

13 *Tr. 1700.* Father Sundborg similarly testified that faculty member in the School of
14 Theology and Ministry are held out as performing a specific religious function

15 because we’re certifying them for being people that can carry out that pastoral ministry
16 function with our degree in pastoral studies, for instance or in master divinity within that
community that they’re going to serve in. So we are by our degree saying, this is a
17 person who is qualified to be able to be a leader of others in faith within a religious
community. So we seek people who are wanting to prepare for that kind of ministry and
then we certify them through our degree that they are well prepared for that.

18 *Tr. 1554.*

19 Additionally, training for the ministry is an integral emphasis of Seattle University’s
20 outreach to prospective students of its School of Theology and Ministry. *Tr. 1691.* To this end,
21 in its recruitment efforts, Seattle University “is very clear that . . . [the School of Theology and
22 Ministry is] an ecumenical school that’s operating out of the context of a Jesuit and Catholic
23 institution.” *Tr. 1691, 1700; Employer Exs. 96 and 97.*

1 Seattle University's School of Theology and Ministry partners with a number of Christian
2 denominations as well as the Universalist Unitarian Church. *Tr. 1683; Employer Exs. 98 and 99.*
3 Through this partnership process, on any given year Seattle University has approximately 150
4 people that are consulting with it in developing and implementing its curriculum within the
5 school. *Tr. 1684; Employer Exs. 98 and 99.* Seattle University and each partner signs a
6 memorandum of understanding ("MOU") with one another memorializing their intent "to partner
7 . . . to prepare their students in our school for their requirements to become ordained and to be
8 religious leaders within their tradition." *Tr. 1702.*

9 Many of the non-tenure track faculty members are ordained ministers or members of
10 religious orders. *Tr. 1709-1712; Employer Ex. 102.* Seven non-tenure track faculty in the
11 School appear on the Excelsior list of eligible voters: Richard Cunningham, March Gunderson,
12 Gretchen Gundrum, William James, Alexandra Kovats, Kathryn Morse and Richard Russell.
13 *Employer Ex. 89 (Excelsior list); Employer Exs. 101 and 102 (faculty lists).*

14 **2. Faculty Teaching Catholic Theology.**

15 Catholic theology is taught in the College of Arts and Sciences, Department of Theology
16 and Religious Studies. *Tr. 1622-1623.* As generally described above, the *Ex Corde Ecclesiae*
17 requires that "all Catholics who teach Catholic theology in a Catholic university are required to
18 receive a mandate from the local archbishop that they are in communion with the Catholic
19 church in their teaching at that university." *Tr. 1537.* To this end, Catholic Theologians at the
20 University do not have any discretion to deviate from Catholic doctrine in teaching these
21 courses. *Tr. 1540.*

22 A broad spectrum of faculty within the Theology and Religious Studies Department,
23 including tenured, tenured track, full-time non-tenured track and part-time faculty teach these
24

1 courses. *Tr. 1624; Employer Ex. 92*. Thirteen non-tenure track faculty taught these courses in
2 the 2011-2014 academic years. *Employer Ex. 92*. A comparison with the Excelsior list shows
3 five Catholic theology faculty were eligible to vote in the 2014 election: Lynn Hofstad, Wesley
4 Howard-Brook, Erica Martin, Daniel Peterson and Philip Tite. *Employer Exs. 89 and 92*.

5 **ARGUMENT**

6 **I. PLU AND THE REGIONAL DIRECTOR’S ORDER**

7 **A. *Pacific Lutheran University***

8 In *PLU*, the Board reexamined the standard it applied for determining when it should
9 decline to exercise jurisdiction over faculty members at self-identified religious educational
10 institutions in accordance with *Catholic Bishop*. 361 NLRB No. 157, 1. It discarded the
11 “substantial religious character” test it had developed in the 36 years since the Supreme Court
12 decided *Catholic Bishop*. Under that test, the Board decided on a case-by-case basis whether a
13 religious-affiliated school had a “substantial religious character” to fall outside of Board
14 jurisdiction. This inquiry included the extent to which the affiliated religious group was
15 involved in the daily operation of the school, the degree to which the school had a religious
16 mission and curriculum, and whether the school used religious criteria in appointing or
17 evaluating faculty. *Id.* After reviewing decisions by the D.C. Circuit in *University of Great*
18 *Falls* and *Carroll College*, as well as by the First Circuit in *Universidad Central de Bayamon v.*
19 *NLRB*, 793 F.2d 383 (1st Cir. 1986) (*en banc*), *denying enf. to* 273 NLRB 1110 (1984), and after
20 inviting and reviewing briefs filed by interested parties, the Board put forth a new test in *PLU*
21 that “is faithful to the holding of *Catholic Bishop*, sensitive to the concerns raised by the parties
22 and amici, and consistent with our statutory duty.” 361 NLRB No. 157, at 5.

23 Under its new test, the Board will not decline to exercise jurisdiction over faculty
24 members at a college or university that claims to be a religious institution unless the college or

1 university first demonstrates, as a threshold matter, that it holds itself out as providing a religious
2 educational environment. This threshold test adopts the first two parts of the D.C. Circuit’s
3 “bright line” test under *University of Great Falls* and *Carroll College*, under which the Board
4 lacks jurisdiction if the institution (1) holds itself out to students, faculty, and community as
5 providing a religious educational environment; (2) is organized as a nonprofit; and (3) is
6 affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious
7 organization, or with an entity, membership of which is determined, at least in part, with
8 reference to religion. *Univ. of Great Falls*, 278 F.3d at 1343 (citations omitted).⁵ Once that
9 threshold is met, the college or university must then show that it holds out the petitioned-for
10 faculty members as performing “a religious function.” 361 NLRB No. 157, at 1. “This requires
11 a showing...that it holds out those faculty as performing a specific role in creating or
12 maintaining the university’s religious educational environment.” *Id.* In applying its test to
13 Pacific Lutheran University, the Board concluded that Pacific Lutheran University failed to
14 demonstrate that it held out its faculty as performing a “specific role in creating or maintaining
15 the university’s religious educational environment.” *Id.* at 5.

16 The Board’s avowed intention in fashioning this test was to ensure that the assertion of
17 the Board’s jurisdiction, and the test the Board uses, do not violate the Religion Clauses of the
18 First Amendment of the Constitution. *Id.* at 3. It agreed with *Catholic Bishop* that “[i]t is not
19 only the conclusions that may be reached by the Board which may impinge on rights guaranteed
20 by the Religion Clauses, but also the very process of inquiry leading to findings and
21 conclusions.” *Id.* at 3, citing 440 U.S. at 502. “First, our test must not impinge on a university’s
22 religious rights and must avoid the type of intrusive inquiry forbidden by *Catholic Bishop*.
23

24 ⁵ The Board’s threshold test does not include the third element of the D.C. Circuit’s “bright line” test.

1 Second, our decision on whether to assert jurisdiction over faculty members must give due
2 consideration to employees' section 7 rights to decide whether to engage in collective
3 bargaining." 361 NLRB No. 157, at 5. The Board determined that the *University of Great Falls*
4 test "overreaches because it focuses solely on the nature of the institution, without considering
5 whether the petitioned-for faculty members act in support of the school's religious mission." *Id.*
6 at 6. The focus of the inquiry is whether there is a "significant risk" of infringement under
7 *Catholic Bishop*, which requires an examination of the specific employees in the petitioned-for
8 unit. *Id.* The Board cited, incompletely, *Catholic Bishop* when the Board wrote that "if teachers
9 play a 'critical and unique role' in creating and sustaining a religious educational environment,
10 the Board's assertion of jurisdiction over them could result in interference in management
11 prerogatives and 'open the door to conflicts between clergy-administrators and the Board.'" *Id.* at
12 8, *quoting in part* 440 U.S. at 503 (omitting "or conflicts with negotiators for unions" from
13 quoted sentence). If teachers do not play a role in effectuating the university's religious mission
14 and are not under religious control or discipline then there are no concerns about excessive
15 entanglement under the First Amendment. *Id.* at 8.

16 The Board stated it did not want to examine actual faculty functions, because to do so
17 could raise First Amendment concerns. *Id.* Consequently, and to "avoid 'trolling' through a
18 university's operation to determine whether and how it is fulfilling its religious mission," the
19 Board set out its "holding out" principle: It will decline jurisdiction if the university "holds out"
20 its faculty members, in communications to current or potential students and faculty members,
21 and the community at large, as performing a specific role in creating or maintaining the
22 university's religious purpose or mission." *Id.* The Board "will not examine faculty members'
23 actual performance of their duties." *Id.* It "eliminates the need for a university to explain its
24

1 beliefs, avoids asking how effective the university is at inculcating its beliefs, and does not
2 ‘coerce[] an educational institution into altering its religious mission to meet regulatory
3 demands.’” *Id.*, citing *Univ. of Great Falls, supra* at 1344-1345 (addressing universities that
4 hold themselves out as religious or religiously-affiliated).⁶ Evidence that faculty members are
5 required to conform to its religious doctrine, tenets or beliefs, are subject to dismissal for
6 teaching a doctrine that is at odds with the religious tenets of the institution or are expected to
7 comply with (or not openly contravene) religious tenets, are required to serve a religious function
8 such as integrating the institution’s religious teachings into coursework, serving as religious
9 advisors, propagating religious tenets, or engaging in religious indoctrination or religious
10 training, will cause the Board to decline jurisdiction. *Id.* at 8, 10 n.19. A commitment to
11 diversity and academic freedom means that religion has no bearing on faculty members’ job
12 duties or responsibilities. *Id.* at 8. To the Board, this test “will not entangle the Board, or
13 reviewing courts, into the university’s religious beliefs and practices.” *Id.* at 10. Faculty who
14 are not held out as performing such specific roles are “indistinguishable” from faculty at secular
15 colleges and universities because both faculty “perform nonreligious instruction and are hired,
16 fired, and assessed under criteria that do not implicate religious considerations.” *Id.* at 8.

17 **B. The Regional Director’s Order**

18 The Regional Director came to the inescapable conclusion that the University “holds
19 itself out as providing a religious educational environment.” *Order*, at 10. “Therefore, the
20 University meets the first step of the *Pacific Lutheran University* standard.” *Id.*

21
22
23 ⁶ The Board will look at job descriptions, employment contracts, faculty handbooks, statements of accrediting
24 bodies, and statements to prospective and current faculty and students, though the Board “will not seek to look
behind these documents to determine what specific role petitioned-for faculty actually play in fulfilling the religious
mission of a school or to inspect the university’s actual practice with respect to faculty members.” *Id.* at 9.

1 In addressing the second prong of the *PLU* test, the Regional Director found that the
2 University does not hold out its faculty as performing a religious function. *Id.* at 11.
3 Consequently, the Regional Director concluded that the University failed the new standard, and
4 that the Board had jurisdiction in this case. In so holding the Regional Director considered the
5 Faculty Handbook statements that faculty members are “expected to show respect for the
6 religious dimension of human life” as “generalized,” without considering testimony from many
7 witnesses regarding the specific religious meaning of those terms. He wanted to see statements
8 about God, Catholicism, Christianity or Jesuits in these statements. He viewed these statements
9 as “weaker” than the *PLU* mission statement. *Id.* He did not cite the University’s Mission
10 Statement. He stated that faculty members are not required to serve as religious advisors to
11 students, propagate tenets of the Society of Jesus or, with one exception (Catholic Theologians),
12 conform to the tenets of Catholicism in their teaching duties. *Id.* He also found no evidence that
13 job postings or appointment letters included any statements requiring faculty members to
14 integrate the Catholic Church’s or Society of Jesus’s tenets into coursework, to serve as religious
15 advisors, to propagate the tenets of the Society of Jesus, engage in religious training, or to
16 conform to the tenets of Catholicism in the course of their duties. *Id.*

17 The Regional Director did find that faculty in the School of Theology and Ministry
18 perform a religious function, but not for Seattle University. He notes the name of the School and
19 the role of faculty in training students for denominational and lay ministry and leadership. He
20 refers to the Advising Handbook, which “does seem to demand a religious function of faculty”
21 but calls that function “mechanical” because that religious function is performed on behalf of the
22 School’s Christian (and Unitarian) partners. He also acknowledged that “reasonable prospective
23 applicants for faculty jobs in the School of Theology and Ministry likely would conclude that
24

1 performance of their faculty responsibilities would include some religious or at least spiritual
2 element, or at least be imbued with a religious atmosphere.” *Id.* at 13. He stated, however, that
3 these religious functions are for different denominations than the Catholic Church, so therefore
4 they are not religious functions under *PLU*. *Id.*

5 Regarding the University’s Catholic Theologians, the Regional Director stated that the
6 requirement that such faculty receive the *mandatum* from the Archdiocese of Seattle does not
7 mean they perform a religious function for Seattle University. *Id.* at 11.

8 **II. THE NATIONAL LABOR RELATIONS ACT EXCLUDES RELIGIOUSLY-**
9 **AFFILIATED COLLEGES AND UNIVERSITIES UNDER *CATHOLIC BISHOP***

10 In *Catholic Bishop*, the Supreme Court held that Congress did not intend to bring
11 teachers at church-operated schools within the jurisdiction of the Act. 440 U.S. at 507. “Our
12 examination of the statute and its legislative history indicates that Congress simply gave no
13 consideration to church-operated schools.” *Id.* at 504-505 (citations omitted). The Court also
14 held that the Act excludes church-operated schools because exercising jurisdiction would result
15 in excessive entanglement in violation of the First Amendment Religion Clauses. *Id.* at 507.
16 The Court saw inevitable entanglement when the Board exercised its statutory role to enforce the
17 Act in matters involving religious schools:

18 The resolution of [unfair labor practice] charges by the Board, in many instances, will
19 necessarily involve inquiry into the good faith of the position asserted by the clergy-
20 administrators and its relationship to the school’s religious mission. It is not only the
21 conclusions that may be reached by the Board which may impinge on rights guaranteed
22 by the Religion Clauses, but also the very process of inquiry leading to findings and
23 conclusions.

24 The Board’s exercise of jurisdiction will have at least one other impact on church-
operated schools. The Board will be called upon to decide what are “terms and
conditions of employment” and therefore mandatory subjects of bargaining...Inevitably
the Board’s inquiry will implicate sensitive issues that open the door to conflicts between
clergy-administrators and the Board, or conflicts with negotiators for unions.

1 *Id.* at 502-503 (citations omitted).

2 It makes no difference that the teachers at issue teach “secular” subjects. “Religious
3 authority necessarily pervades the school system.” *Id.* at 501, *quoting Lemon v. Kurtzman*, 403
4 U.S. 602, 617 (1971). The Court also noted that, regardless of whether the teacher was teaching
5 a religious or secular subject, “a teacher remains a teacher, and the danger that religious doctrine
6 will become intertwined with secular instruction persists.” *Id.* (citations omitted). The Board,
7 too, extended this principle to non-teachers at religious institutions. The Board has held that it
8 will not exercise jurisdiction over employees performing “secular” tasks such as custodial or
9 maintenance work for a church employer. *St. Edmund’s High School*, 337 NLRB 1260, 1261
10 (2002) (declining jurisdiction over unit of custodial employees employed at a parochial high
11 school; prior cases, including *Hanna Boys Center*, 284 NLRB 1080 (1987), distinguished
12 because they did not involve an employer “which was itself a religious institution pursuing a
13 religious mission.” *Id.* at 1260-61); *Riverside Church*, 309 NLRB 806, 801 (1992) (declining
14 jurisdiction over service and maintenance unit employed by a church and who performed
15 “secular tasks without which the Employer would be unable to accomplish its religious
16 mission.”). “The substantial religious character of these church-related schools give rise to
17 entangling church-state relationships of the kind the Religion Clauses sought to avoid.” *Catholic*
18 *Bishop, supra* at 503, *quoting Lemon*, 402 U.S. at 616 (internal citations omitted). If a school’s
19 mission is a religious one, all school activities ultimately serve a religious purpose. The *Catholic*

1 *Bishop* court found that teachers of both religious and secular subjects, regardless of their
2 personal faith and religious activities, were exempt from the Act’s jurisdiction.⁷

3 The D.C. Circuit addressed *Catholic Bishop* by creating a jurisdictional test that avoids
4 the constitutional infirmities inherent with the Board’s former “substantial religious character
5 test.” Under the “substantial religious character” test, the Board collected evidence and asked if
6 the institution was “sufficiently religious.” The D.C. Circuit found this too intrusive because it
7 required the Board to “troll” through the school’s religious beliefs, assessing the nature of the
8 beliefs and its religious mission. *Carroll College, supra* at 572; *Univ. of Great Falls, supra* at
9 1343. The three part “bright line” test adopted by the D.C. Circuit avoids these problems
10 because it “allow[s] the Board to determine whether it has jurisdiction without delving into
11 matters of religious doctrine or motive, and without coercing an educational institution into
12 altering its religious mission to meet regulatory demands.” *Univ. of Great Falls*, 278 F.3d at
13 1345.

14 The *PLU* test, and the Regional Director’s Order, perpetuate the constitutional problems
15 identified in *Catholic Bishop* and by the D.C. Circuit. Instead of asking if the college or
16 university is “religious enough,” the Board now asks if a university’s Mission, Vision, Values,
17 and other declarations of purpose, including the faculty’s role in fulfilling that purpose, are
18 “religious enough.” Both questions require the Board to make a determination of what is
19

20 ⁷ Then-Judge Breyer, in *Bayamon*, dismissed the Board’s position that it and the courts would address constitutional
issues as they arose in a collective bargaining relationship involving a religiously-affiliated university:

21 Under this rationale...we cannot avoid entanglement by creating new, finely spun judicial distinctions that
22 will themselves require further court or Labor Board ‘entanglement’ as they are administered. To order the
Board to exclude priests from the bargaining unit; to approve its having separated the seminary from the
23 rest of the school; to create special burden of proof rules; to promise that courts in the future will control
the Board’s efforts to examine religious matters, is to tread the path that *Catholic Bishop* forecloses. These
ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely
what the Supreme Court in *Catholic Bishop* sought to avoid.

24 793 F.2d 383, 402 (1986) (*en banc*).

1 “religious.” Both require the Board, or a Regional Director, to substitute its/his interpretation of
2 religious mission for that of the religious institution who created and carries out that mission. In
3 addition, under *PLU*, the Board will now have to decide what constitutes a “specific function”
4 that is “religious.” Only then can the Board determine if a faculty member is “held out” as
5 performing a “specific religious function.” The Board will have to troll through the same facts
6 and issues as it did under its former case law. It will need to determine what the university’s
7 religious mission is, the role of the faculty in carrying out that religious mission, and whether
8 faculty are held out as serving such a role.⁸ Otherwise, the Board will be unable to make
9 determinations of “specific” “religious” functions.

10 The Board’s new test also casts a blind eye to the unavoidable entanglement problems
11 that will arise when the Board is asked to enforce the Act against a religious university in the
12 collective bargaining arena. *Catholic Bishop* and subsequent appellate cases foresaw the
13 inevitable entanglement issues related to the Board’s role in enforcing the Act against a religious
14 college or university through the Board’s unfair labor practice procedures. It is not hard to see
15 that the reality of collective bargaining and the unfair labor practice charge mechanism for
16 enforcing the Act will lead to constitutional problems. For example, Board jurisdiction over a
17 religiously-affiliated university will:

- 18 • Grant to faculty members a section 7 right to strike in an attempt to prevent or
19 hinder the university from carrying out its religious mission of providing
education to students;
- 20 • Require a university to negotiate over “mandatory subjects of bargaining”—
21 wages, benefits and other terms and conditions of employment—including union
proposals to provide insurance coverage covering contraception, abortion or other

22 ⁸ Under the new approach, if the faculty members perform a religious function, but are not held out as such, the
23 Board will still assert jurisdiction. Conversely, if the faculty members perform no religious function, but the
24 university holds them out as performing a religious function, the Board will not assert jurisdiction. This is an absurd
result, making it more likely the Board will assert jurisdiction in both cases, rendering the “holding out” requirement
meaningless.

1 reproductive services, and will make it unlawful to refuse to bargain over such
2 proposals, subjecting the university to sanctions by the Board;

- 3 • Require the university to bargain over contract provisions including seniority, job
4 qualifications, promotions, job assignments and disciplinary criteria, that may be
5 contrary or detrimental to the university's religious mission, and will make it an
6 unfair labor practice to refuse to bargain over the same;
- 7 • Require the university to disclose information to a union the Board deems
8 relevant to a union bargaining proposal or grievance, or to the Board in an unfair
9 labor practice proceeding, which can include any information, communications or
10 documents substantiating the university's position that an employment decision or
11 bargaining position is contrary to its religious mission;
- 12 • Prevent a university from insisting to impasse on a union waiver of the union's
13 right to bargain over a mandatory subject of bargaining that the university
14 believes would infringe on its religious mission.

15 These problems are a few examples of why *Catholic Bishop* concluded that “[i]nvariably
16 the Board’s inquiry will implicate sensitive issues that open the door to conflicts between clergy-
17 administrators and the Board, or conflicts with negotiators for unions.” 440 U.S. at 502-503;
18 accord *Bayamon, Id.* at 402 (Religiously-affiliated universities pose same risk that Board will
19 violate the Religion Clauses as do secondary schools; “[u]nfair labor practice charges would
20 seem as likely; the Board’s likely scrutiny would seem at least as intense; the necessary
21 distinctions between religious and labor matters would seem no easier to make; and whether one
22 could readily “fence off” subjects of mandatory bargaining with a religious content would seem
23 similarly in doubt”). It is not just the Board engaging in unconstitutional “trolling” to determine
24 what a “religious” function is that violates the Religion Clauses. It is also the inevitable risk of
the Board investigating and issuing unfair labor practice rulings contravening the Religion
Clauses that have caused every reviewing court to conclude that the Board cannot assert
jurisdiction over a religious and religiously-affiliated school.

1 **III. THE REGIONAL DIRECTOR'S ORDER CONTAINS JUST THE SORT OF**
2 **INQUIRY THE BOARD STATES WILL NOT HAPPEN UNDER *PLU***

3 The Board maintains in *PLU* that “examination of the actual functions performed by
4 employees could raise the same First Amendment concerns as an examination of the university’s
5 actual beliefs, and we are again faced with the need to avoid ‘trolling’ through a university’s
6 operation to determine whether and how it is fulfilling its religious mission.” *PLU, supra* at 8.
7 “Although we will not examine faculty members’ actual performance of their duties, we shall
8 require that they be held out as performing a *specific religious* function.” *Id.* (emphasis in
9 original). “We will not seek to look behind these documents to determine what specific role
10 petitioned-for faculty actually play in fulfilling the religious mission of a school or to inspect the
11 university’s actual practice with respect to faculty members.” *Id.* at 9. Despite these
12 pronouncements, or perhaps out of necessity under the *PLU* test, the Regional Director did look
13 behind the documents to come to the erroneous conclusion that the faculty at issue are not held
14 out as serving a religious function under the University’s religious mission.

15 The Regional Director found that there “is no evidence in the record that faculty members
16 are required to serve as religious advisors to students, propagate the tenets of the Society of
17 Jesus, engage in religious training, or conform to the tenets of Catholicism in the course of their
18 job duties.” *Order*, at 11. He refers to evidence by three of the petitioner’s witnesses that they
19 were never informed at the time of hire that they must adhere to, or propagate, Catholic doctrine.
20 *Id.* Furthermore, he found no evidence that faculty members must hold a particular view of
21 Catholic and Jesuit tenets when teaching the required course in Catholicism. *Id.* By seeking
22 such evidence, the Regional Director is guilty of the type of scrutiny the Board states it wants to
23 avoid.

1 To the Board, the appropriate test should not “limit the Catholic Bishop exemption to
2 religious institutions with hard-nosed proselytizing.” *Id.*, quoting *Univ. of Great Falls, supra* at
3 1346. The Regional Director, by seeking evidence of “hard-nosed” proselytizing such as
4 “indoctrinating” students, “propagating” Jesuit tenets or “conforming” Catholic tenets to their
5 coursework, commits the same error as the Board committed under the “substantial religious
6 character” line of cases, and which the Board expresses a desire to avoid under *PLU*. The D.C.
7 Circuit found such an emphasis untenable:

8 If the University is ecumenical and open-minded, that does not make it any less religious,
9 nor NLRB interference any less a potential infringement of religious liberty. To limit the
10 *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing, that
11 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
Establishment Clause—not to prefer some religions (and thereby some approaches to
indoctrinating religion) to others.

12 *Univ. of Great Falls, supra* at 1346.

13 The court continued: “That a secular university might share some goals and practices
14 with a Catholic or other religious institution cannot render the actions of the latter any less
15 religious.” *Id.*

16 **IV. THE REGIONAL DIRECTOR DISREGARDED FACTS SHOWING THAT**
17 **PETITIONED-FOR FACULTY SERVE A SPECIFIC ROLE IN CREATING OR**
MAINTAINING SEATTLE UNIVERSITY’S RELIGIOUS MISSION

18 **A. The Regional Director’s Order Properly Concluded that the University met**
19 **the First Prong of the *PLU* test**

20 The Regional Director’s *Order* reaffirmed his earlier Supplemental Decision and Order
21 that the evidence adduced during the initial representation hearing showed that the University
22 held itself out as providing a religious educational environment. As such, Seattle University
23 meets the first prong of the *PLU* test. The University, therefore, will address only the second
24 prong of the *PLU* test. Based on the evidence produced during the reopened hearing, Seattle

1 University has met the second prong because it holds out its non-tenure track faculty as
2 performing a specific religious function in maintaining a religious educational environment.

3 **B. The Regional Director Misapplied the Second Prong by Ignoring or**
4 **Overlooking Evidence that the University Holds Out All Faculty Members as**
5 **Performing a Specific Function in Creating or Maintaining a Religious**
6 **Educational Environment**

7 Seattle University satisfies the second prong under *PLU*, which asks whether the
8 university holds out petitioned-for faculty as performing a specific role in creating or
9 maintaining its religious educational environment. *See PLU*, 361 NLRB No. 157 at 10. The
10 Board imagines examples of such a function, including requiring faculty to integrate religious
11 teachings into coursework, serve as religious advisors, engage in religious indoctrination, or
12 conform to its religious doctrine. *Id.* at 11–12. The Board, however, cautions that these
13 examples are “intended only to demonstrate that there must be a *connection* between the
14 performance of a religious role and faculty members’ employment requirements.” *Id.* at 12, n.14
15 (emphasis in original). To this end, the second prong turns on whether the “religious nature of
16 the university *affects* faculty members’ job duties or requirements,” or stated otherwise, whether
17 the “religious nature of the university will have any *impact* at all on their employment.” *Id.* at 11
18 (emphasis added).

19 Among other things, the Board will consider whether faculty members “are hired, fired,
20 and assessed under criteria that . . . implicate religious considerations.” *Id.* at 11. The Board will
21 also consider whether faculty roles are different than those that “they would be expected to fill at
22 virtually all universities.” *Id.* at 12. Relevant evidence includes but is not limited to
23 “communications to current or potential students and faculty members and the community at
24 large,” *Id.* at 11, as well as job descriptions, employment contracts, and faculty handbooks, *Id.* at
12. The Board will “rely on the institution’s own statements about whether its teachers are

1 obligated to perform a religious function, without questioning the institution's good faith or
2 otherwise second-guessing those statements" and focus "on whether a reasonable
3 prospective applicant would conclude that performance of [his or her] faculty responsibilities
4 would require furtherance of the college or university's religious mission." *Id.* at 12–13. The
5 Board emphasized that its "holding out" inquiry is "limited" and, as such, that it will not examine
6 faculty members' actual performance of their duties. *Id.* at 11, 13.

7 The Regional Director's decision is riddled with inconsistencies and errors of fact. He
8 states that job postings and appointment letters make no mention of God, Christianity,
9 Catholicism or Jesuits, while at the same time stating that those documents identify the
10 University as Jesuit Catholic. *Order*, at 4. He states that only the President and Provost
11 interview administrators and tenure/tenure-track faculty to mission, completely ignoring
12 testimony from two non-tenure track faculty witnesses and one Dean that they interview or were
13 interviewed to mission. *Tr.* 1587-89. He asserts that the only evidence suggesting a difference
14 between full-time and part-time non-tenure track faculty is the benefits received by full-time
15 faculty. *Order*, at 5. This ignores completely the extensive record showing the service
16 requirement, attendance at the New Faculty Institute ("NFI") and associated seminars, extensive
17 committee participation and presence on the Academic Assembly. He refers to a 2013 speech by
18 Father Sundborg, in which "only a portion" was devoted to Jesuit Catholicism, while ignoring
19 the speeches placed into the record, and agendas for the NFIs dating back to 2010 showing both
20 a speech devoted to the Jesuit Catholic identity of the University, and follow-up sessions devoted
21 to living the concept of the "whole person." *Employer Exs.* 72, 75, 85, 87; *Tr.* 1445-46, 1589.
22 He incorrectly states that students are required to take two theology courses, "only one of which
23 must include a component of Catholic tradition." *Order*, at 6. In fact, there are two Catholic
24

1 theology courses required, both of which teach theology, not just tradition. *Tr. 784:3-8;*
2 *Employer Ex. 38* (UCOR 2100 Course Description); *Tr. 784:20-22; Employer Ex. 38* (UCOR
3 3100 Course Description); *Employer Ex. 37* (Core learning objectives, citing objective of
4 understanding Catholic theology and Jesuit, Catholic perspectives within the context of world
5 religions). He states it is “unclear” if Seattle University abides by *Ex Corde Ecclesiae*, and he
6 does not see evidence that faculty are informed of the requirements contained therein. *Order*, at
7 6. *Ex Corde Ecclesiae* and related documents are posted on the University’s website and
8 frequently are cited in the President’s speeches. *Tr. 1526, 1529-30*. In addition, the University’s
9 President worked directly with the Archbishop to implement the *Ex Corde Ecclesiae* and
10 Catholic *Mandatum*. *Tr. 1537; 1540*. In short, the Regional Director’s Order omits necessary
11 facts and misstates others.

12 Seattle University easily meets the second prong under *PLU*. Seattle University’s
13 mission is religious, and Seattle University consistently and regularly communicates to all
14 existing and prospective faculty that their participation in the mission is integral and required.
15 To this end, Seattle University’s religious mission affects non-tenure track faculty job duties and
16 impacts their employment. Additionally, Seattle University regularly holds its faculty members
17 out as having a role in maintaining Seattle University’s religious environment. For each of these
18 reasons, Seattle University satisfies the second prong under *PLU*.

19 As detailed above, each Seattle University faculty member is expected to maintain Seattle
20 University’s religious educational environment, which is founded in Seattle University’s Mission
21 Statement and emphasis on educating the “whole person.” Two full-time faculty members
22 testified that the Statement is religious, because the education of the “whole person” is imbued
23 with the Catholic and Jesuit concept of the physical and spiritual being that make up all of
24

1 humanity, and which spawns social justice (another Jesuit concept). *Tr. 1590; 1732* (educating
2 the “whole person” means “to educate them intellectually, for social justice . . . [and in] trying to
3 help them be a moral person”).

4 Seattle University leadership and faculty meet Catholic Jesuit curriculum objectives and
5 satisfy the University’s mission in various ways. “Social Justice” is the University’s mission in
6 action, as it aspires to “level the playing field” in terms of social inequity and to “give back” to
7 others. *Tr. 1733*. One professor described how she incorporates the University’s mission of
8 educating students in the area of social justice into her accounting courses. *Tr. 1734*. She was
9 also involved in a business initiative in Africa that was funded through Seattle University
10 wherein Seattle University accounting students traveled to and provided business training to
11 entrepreneurs in Malawi. *Tr. 1734-1736*. Another faculty member testified about how the
12 mission is put into action in his business courses. *Tr. 1584*.

13 The University’s Mission, Vision and Values describe Seattle University as being
14 “dedicated to educating the *whole person*, to professional formation, and to empowering leaders
15 for a just and humane world.” *Employer Ex. 6* (emphasis added). Father Sundborg differentiated
16 this Mission from others that may exist at other, non-Catholic Jesuit universities:

17 A Jesuit mission in education is we seek to educate and to form the whole person so that
18 he or she will be of-service, particularly for justice within our world. There’s a lot that’s
19 contained within that simple sort of a statement. We believe the whole person has a
20 transcendental or religious dimension or spirituality. We acknowledge respect and try to
21 foster the awareness of that within our students. So we seek to educate and to form the
22 whole individual of the student, whoever that student is, accepting him or her for who
23 they are, taking them for who they are and seeking to educate the whole person. Always
24 with a purpose of how will you use your education, for whom will you use it, how will it
make a difference to make our world more humane, more just, more sustainable. So our
overall education is one that focuses on that sort of humanistic or that liberal arts base but
with a dimension of their religious or the spiritual dimension of what the person
is...We’re the oldest educational organization in the world, we’re the most widespread,
and we have a common mission. And part of that is that -- of our common mission within

1 our purpose is that we have a very sequential organized way of forming or educating
2 students through a core curriculum. It's at the heart of what we're about.

3 *Tr. 53:7-23; 54:2-8.*

4 The Regional Director dismissed the Mission Statement as being "generalized," and
5 "weak" in comparison to the mission statement in *PLU*. What is not obvious to the Regional
6 Director is, however, obvious to administrators, faculty, staff, students and parents. Seattle
7 University's mission statement is inherently religious. *See, e.g., Tr. 1649* ("[O]ur mission
8 statement speaks to that we are committed to educating the whole person with a particular
9 emphasis on professional formation and empowering leaders for a just and humane world. And
10 that's the way in which we serve the Catholic Church."); *Tr. 1744* (testifying that "educating the
11 whole person" is a Jesuit ideal); *Tr. 1564* (testifying that Seattle University's mission "is founded
12 on a theological principal. In fact, under the Jesuit spiritual tradition, "the whole person" has a
13 transcendental and spiritual dimension to it. "The University and the faculty know that the
14 whole includes the transcendental and religious dimension, the sacred dimension of the person."
15 *Tr. 152:5-7*. This Mission informs the University's Vision that it "will be the premier
16 independent university of the Northwest in academic quality, Jesuit Catholic inspiration, and
17 service to society," as well as its Values Statement that reads, in part, "We treasure our Jesuit
18 Catholic ethos and the enrichment from many faiths of our university community." *Employer*
19 *Ex. 6*. Indeed, a Union witness testified as much when he confessed that "by definition,
20 everything has religious meaning to the Jesuits, them being a religious order." *Tr. 1776*. The
21 Regional Director failed to adhere to the Board's requirement that the Regional Director "rely on
22 the institution's own statements about whether its teachers are obligated to perform a religious
23
24

1 function, without questioning the institution's good faith or otherwise second-guessing those
2 statements." *PLU*, 361 NLRB No. 157 at 12.⁹

3 The Regional Director's Order barely addresses the University's Core, which is of an
4 overwhelming Catholic Jesuit character. There are required classes in Catholic theology,
5 comparative theology with reference to Catholicism, and Philosophy based on Ignatian
6 principles. Virtually all students must take these courses in addition to other Core courses. *Tr.*
7 771-772.

8 Seattle University holds out all its faculty members as integral to creating and
9 maintaining its mission. As Dr. Crawford testified:

10 [A]ny person who works for Seattle University or any Catholic institution, is serving in
11 that function, that they are carrying forward the missions, the goals, the hopes, the
12 aspirations of the Catholic faith, and particularly telling the good news of that. I mean I
13 think there is an evangelization element to what a faculty person or anyone who works
14 for a Catholic institution serves either through their own connection to the Catholic faith,
15 if they are Catholic, or if they're not, they demonstrate the broadness of the Catholic
16 tradition in terms of the small C and how it is open and respectful of and supportive of all
17 individuals and sees inherent worth in them. And we demonstrate that through how we
18 teach, the research we do, and the manner in which we engage the communities of which
19 we are a part.

20 * * *

21 [O]ur mission statement speaks to that we are committed to educating the whole person
22 with a particular emphasis on professional formation and empowering leaders for a just
23 and humane world. And that's the way in which we serve the Catholic Church. And it's
24 our faculty who carry that forward in the most demonstrative way.

Tr. 1648-49.

25 In 2005, Father Sundborg gave a speech on Seattle University's "Mission Day" in which
26 he differentiated between "spiritual freedom" and "academic freedom." *Tr.* 1558; *Employer Ex.*
27 85. According to Father Sundborg,

28 academic freedom is for the sake of the overall purposes of the university. It's a means to
29 the end of the teaching and the scholarship and the overall delivery of the mission of the

⁹ In the initial hearing, the Union entered three mission/core values statements from public universities in
Washington. *Union Exs.* 91-94. None of these refer to "educating the whole person."

1 university. And it needs to be there in order for that there really be a pursuit of truth by
2 both faith and reason within our university. [It] [c]annot impede that reason.

3 *Tr. 1558.* To this end, the speech captures the essence of Seattle University's faculty's role in
4 maintaining Seattle University's religious purpose in educating "the whole person."

5 **C. In the Alternative, the Board Lacks Jurisdiction over Full-Time Non-Tenure**
6 **Track Faculty**

7 The totality of the evidence demonstrates that the University has taken extra steps to
8 engage its full-time non-tenure track faculty into the religious educational mission. The
9 Regional Director ignored this evidence. Both Employer and Union full-time non-tenure track
10 faculty witnesses testified that they attended the New Faculty Institute, in which the University's
11 mission and the faculty's role within that mission is reviewed annually, both in a speech by the
12 President and in a separate Q&A session with faculty panelists. *Tr. 1445; 1589; 1786.* Part-
13 time faculty did not attend. Job interviews of these faculty incorporate the mission, and those
14 being interviewed addressed how they will educate within the mission. *Tr. 1757-58; 1589.* Dr.
15 Wehrly testified how they were encouraged by their deans and other faculty to incorporate the
16 mission into their teaching. *Tr. 1584.* Professor Bee testified that she incorporated the mission
17 into her work outside the classroom with students, such as when she travelled to Africa to teach
18 new entrepreneurs. *Tr. 1744.* These faculty members all testified that the Mission Statement is a
19 religious mission the core of which is "educating the whole person" for a just and humane world.
20 *Tr. 1594; 1744.* It is not right for the Regional Director to come to his own conclusion based
21 merely on his belief that the University's mission is not religious enough.

22 Witnesses Wehrly and Bee, who are included in the proposed bargaining unit, spoke of
23 their knowledge of the religious dimension of the education of the "whole person," and
24 incorporated that knowledge into their teaching with the encouragement and support of their

1 School. The collective evidence demonstrates that full-time non-tenure track faculty are held out
2 as performing the religious function of “educating the whole person,” and are so informed
3 through their Schools, speeches, the New Faculty Institute, their job interviews, and the
4 pervasive presence of the Mission Statement throughout campus and on the University’s website.

5 The University’s Catholic and Jesuit inspiration pervade the University’s curriculum, its
6 view of the teacher vocation within that curriculum, and the formation of the “whole person” by
7 means of the Jesuit educational mission. The Regional Director ignored the above-noted
8 evidence in concluding that the University’s faculty members have no specific religious function.
9 The religious function of the faculty is to teach at a Catholic and Jesuit university, a critical role
10 without which the University would not exist. Catholic and Jesuit tenets consider the vocation of
11 teaching to be sacred and to have a religious aspect which the Regional Director overlooks.
12 University faculty members in the petitioned-for unit teach in the Core, which is based on the
13 Jesuit religious tenet of formation of the whole person. To substitute his version of “religious
14 function” for that of the Catholic faith and the Society of Jesus, thereby concluding that the
15 University’s faculty members in the instant case are not “religious enough,” repeats past errors.

16 **D. The Regional Director Erred in Asserting Jurisdiction Over Faculty in the**
17 **School of Theology and Ministry**

18 The Regional Director disregarded clear and uncontroverted evidence in concluding that
19 faculty in the School of Theology and Ministry perform no specific religious function. The
20 Union put forth no evidence or testimony contradicting the evidence put forth by the University
21 in this regard. Had the Regional Director used the same analysis as he did with other faculty, he
22 would have come to the unavoidable conclusion that the School’s faculty members perform a
23 unique and specific religious function in preparing students for the ministry and spiritual
24 leadership. It is manifest that the Board lacks jurisdiction over faculty who teach courses in the

School of Theology and Ministry. Under such circumstances, the Regional Director should have excluded those faculty from the proposed bargaining unit, and ordered a new election to comply with *PLU*.

Incredibly, the Regional Director found that the Board has jurisdiction over the School’s faculty despite his conclusion that its faculty members perform a specific religious function. *Order*, at 12-13. He notes the name of the School—Theology and Ministry—as “suggesting” a religious function. *Id.* at 12. He finds it “difficult to locate the specific religious role” of the faculty, while at the same time concluding that various functions “demand a religious function of faculty” and that a prospective applicant “would conclude that performance of their faculty responsibilities would include some religious or at least spiritual element, or at least be imbued with a religious atmosphere.” *Id.* at 12-13. Throughout his whole analysis, the Regional Director does not once refer to the School’s Mission Statement found in the School’s Faculty Handbook:

With God's help
and in creative partnership
with participating churches
in the Pacific Northwest,
the School of Theology and Ministry
educates and forms
women and men as leaders in Christian ministry
to serve, challenge and heal churches, communities and all creation.

Employer Ex. 48, at 5. He also disregards the Values Statement found in the handbook, including statements that the School’s mission is “[r]ootedness in Christ and openness to the Spirit,” “[t]he Jesuit and Ignatian respect for the whole person in solidarity with the real world,” and “Reverence for all God’s creation.” *Id.* He ignores these obvious statements of religious mission, which use words such as God, Christian, Christ and Spirit. At the same time, he devalues the University’s overall Mission Statement as “generalized” because that Statement

1 lacks these words. Finally, he injects his belief that there is a “tension” between Seattle
2 University’s Jesuit mission and the role of the School of Theology and Ministry. *Order*, at 12.
3 This suggests a predetermined and incorrect understanding of Jesuit Catholicism, which is
4 inclusive, and which engages other faiths and belief systems as part of its religious mission. *Tr.*
5 *86; 185-186.*

6 Seattle University’s School of Theology and Ministry functions as a seminary to help
7 educate and prepare students for ministerial careers or for similar leadership capacities. *Tr.*
8 *1626:8-13.* It is truly unique, one of only a few schools worldwide that offer ecumenical
9 seminary training. *Tr. 1687-90.* The individuals teaching courses in the School of Theology and
10 Ministry are primarily made up of individuals who hold credentials as ministers within specific
11 Christian denominations or are theologians with expertise in one or more such denominations.
12 *Tr. 1627.* Seattle University unequivocally holds these faculty members out to the
13 community—both tenure and non-tenured track— as representative of their faith and of Jesuit
14 Catholic faith. *Tr. 1627-1629.* The University additionally holds these faculty members out to
15 the community as demonstrating “what type of Catholic institution that [Seattle University is] in
16 terms of being one that is embracing of other religions and looking to provide different paths of
17 understanding and knowledge around faith and one’s relationship with the world and one’s God
18 as he or she interprets it,” beginning during the recruitment process and thereafter. *Tr. 1627:21-*
19 *1628.* The Advising Handbook spells out the specific religious function in advising students
20 studying to be ministers and spiritual leaders in various Christian denominations. It is squarely
21 within the religious mission of the University to engage other faiths, and the School of Theology
22 and Ministry is but one, obvious example. The Regional Director sees “tension;” the Jesuits see
23 their faith in action.

1 There are approximately twenty-one full- and part-time non-tenure track faculty members
2 who teach within Seattle University's School of Theology and Ministry, all of whom fall outside
3 the boundaries of the Board's jurisdiction based on their special role in providing training for the
4 ministry and faith-based leadership on behalf of the thirteen denominational partners of the
5 School. *Tr. 1628-1629; Employer Exs. 101 and 102.*

6 **E. The Regional Director Erred in Asserting Jurisdiction Over Seattle**
7 **University's Catholic Theologians**

8 All non-tenured track faculty members teaching courses in Catholic theology in Seattle
9 University's School of Theology and Religious Studies are outside the scope of the Board's
10 jurisdiction. The Regional Director erred in ruling otherwise. All Seattle University faculty
11 members teaching courses in Catholic theology are required to comply with *Ex Corde Ecclesiae*
12 and the Application by, *inter alia*, "receiv[ing] a mandate from the local archbishop that they are
13 in communion with the Catholic church in their teaching at that university" and by teaching
14 consistently with Catholic doctrine. *Tr. 1537-1540.* Thus, these non-tenured track faculty
15 members teaching courses in Catholic theology in Seattle University's School of Theology and
16 Religious Studies are outside the scope of the Board's jurisdiction based on their specific
17 religious function. *See Tr. 1671-73; Employer Ex. 92.*

18 **F. The Regional Director Should Have Ordered a New Election**

19 It is standard procedure that challenged votes should be segregated before impounding
20 "as the validity of such ballots might be affected by a final Board determination." NLRB
21 Casehandling Manual, Part 2, Representation Proceedings, §§11280.3, 11302.1(a) (September
22 2014). This procedure was not followed in the May-June 2014 mail ballot election because, at
23 that time, the Board had not decided *PLU* and Seattle University had no reason or occasion to
24 challenge or segregate individual votes based on the particular religious function of individuals

1 who indisputably perform a specific religious function. Thus, absent a mechanism to link votes
2 with their voters, the election must be deemed invalid and a new election held. *See Grace Line,*
3 *Inc.*, 4 NLRB 763, 764 (1938) (failure to segregate ballots that might have materially affected the
4 results of an election deemed grounds for a new election); *Western Union Telegraph Co.*, 38
5 NLRB 483, 486 (1942) (absent method to ascertain whether ballots were cast by persons
6 subsequently declared ineligible, a new election was required).

7 In sum, if it is determined that some but not all members of the proposed bargaining unit
8 are, in effect, outside Board jurisdiction under this unworkable *PLU* test, a new election must be
9 held.

10 **V. THE REGIONAL DIRECTOR’S DENIAL OF SEATTLE UNIVERSITY’S**
11 **REQUEST FOR SPECIAL PERMISSION TO APPEAL WAS PREJUDICIAL**
12 **ERROR**

13 At the reopened hearing, the University offered the testimony of Father Sundborg
14 regarding the religious purpose of the University, in order to explain the religious function of
15 faculty within the University’s mission. The petitioner objected to these questions regarding the
16 religious purpose of the University. After two recesses, and after consultation with the Regional
17 Director, the Hearing Officer sustained the objection and limited all testimony and evidence to
18 the second prong of the test set forth by the Board in *PLU*. 361 NLRB No. 157.

19 Under 29 CFR 102.65(c), the University requested special permission to appeal this
20 ruling because it contravened the clear language of the Board’s Order granting the University’s
21 Request for Review (“Board Order”), dated June 12, 2015, and the Regional Director’s
22 Corrected Order reopening the record issued on June 24, 2015 (“Regional Director’s Corrected
23 Order”) (together referred to as “the Orders”) and because of the prejudice to the University by
24 not being able to submit evidence that is necessary to meeting the new *PLU* test. The essence of

1 the proffered testimony was to establish that the University holds out its faculty as performing a
2 specific religious function.

3 The Hearing Officer's ruling sustaining the objection and her order limiting the evidence
4 directly contravenes the plain language of the Orders. The Board Order granted the Request for
5 Review and remanded the case to "the Regional Director to reopen the record to permit the
6 parties to adduce additional evidence in light of the Board's decision in *Pacific Lutheran*
7 *University*." (Citation omitted.) The Regional Director's Corrected Order used identical
8 language in reopening the record. In neither of the Orders was there any limitation on the
9 evidence the parties were allowed to offer to meet either or both prongs of *PLU*. Had the Board
10 wanted to limit the evidence, it would have set forth such limitations in its Order. The Hearing
11 Officer's ruling and Regional Director's subsequent denial of the Request for Special Permission
12 to Appeal disregarded the plain language of the Board's Order.

13 This denial is highly prejudicial to Seattle University. At the time of the initial hearing in
14 this case in March 2014, the Board had not yet issued *PLU*. Seattle University offered testimony
15 and evidence regarding its religious mission, but did not offer testimony and evidence to address
16 the Board's new, two-pronged standard. It was necessary to adduce additional testimony
17 regarding the Catholic Jesuit mission and the faculty's role within that mission in order to
18 establish how the University holds out its faculty within that ethos. This prejudiced the
19 University's ability to offer evidence directly relevant to the new *PLU* standard, and invited the
20 Regional Director to substitute his own judgment of what is "religious" in his consideration of
21 the University's evidence. It is a necessary to define the religiously-affiliated university's
22 religious purpose in order to establish the faculty's role and functions in furthering that purpose.

1 The denial of the Request for Special Permission to Appeal deprived the University of the ability
2 to offer such evidence.

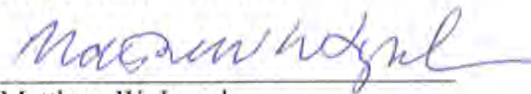
3 As stated above, the ruling and order rewrote the Board's Order without notice, which is
4 not within the scope of the Hearing Officer's or Regional Director's duties in conducting the
5 hearing.

6 CONCLUSION

7 For these reasons, the University requests the Board to accept review of the Regional
8 Director's Order. The *PLU* test contains the same constitutional infirmities as the test it replaces.
9 The Board should adhere to the D.C. Circuit's "bright line" standard under *University of Great*
10 *Falls* and *Carroll College* and dismiss the petition for lack of Board jurisdiction. Furthermore,
11 the Regional Director disregarded evidence establishing the religious mission of Seattle
12 University, and the faculty's role in creating and maintaining that mission. His refusal to accept
13 evidence regarding the University's religious purpose prejudiced the University from putting on
14 its case regarding how the University holds out its faculty as performing religious functions. The
15 Regional Director also should have ordered a new election because of the unambiguous manner
16 in which the University holds out its faculty in the School of Theology and Ministry and the
17 University's Catholic Theologians as performing clear religious functions.

18 Dated this 31st day of August 2015.

19 Respectfully submitted,

20 

21 Matthew W. Lynch
22 SEBRIS BUSTO JAMES
23 14205 SE 36th Street, Suite 325
24 Bellevue, Washington 98006
Tel: 425-450-3387 / Fax: 425-453-9005
Attorneys for Seattle University

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5 **UNITED STATES OF AMERICA**
6 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

7 SEATTLE UNIVERSITY,

Case No. 19-RC-122863

8 Employer,
9 and

CERTIFICATE OF SERVICE

10 SERVICE EMPLOYEES INTERNATIONAL
11 UNION, LOCAL 925,

Petitioner.

12 I, Matthew W. Lynch, certify under penalty of perjury under the laws of the United States
13 that, on August 31, 2015 I caused to be served Seattle University's Request for Review of the
14 Regional Director's Second Supplemental Decision and Order on the parties listed below in the
15 manner shown:

16 Mr. Gary Shinnors
17 Executive Secretary
18 National Labor Relations Board
19 1099 14th St. N.W.
20 Washington, D.C. 20570-0001

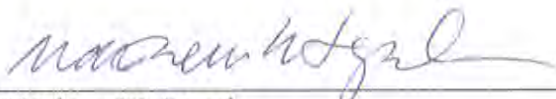
[X] By NLRB E-Filing
[] By United States Mail
[] By Facsimile
[] By Electronic Mail

21 Mr. Paul Drachler
22 Douglas Drachler McKee & Gilbrough LLP
23 1904 3rd Avenue, Suite 1030
24 Seattle, Washington 98101-1170
25 pdrachler@qwestoffice.net

[] By NLRB E-Filing
[] By United States Mail
[] By Facsimile
[X] By Electronic Mail

26 Mr. Ronald K. Hooks
27 Regional Director
National Labor Relations Board, Region 19
915 Second Avenue, Suite 2948
Seattle, Washington 98174-1006
ronald.hooks@nlrb.gov

[] By NLRB E-Filing
[] By United States Mail
[] By Facsimile
[X] By Electronic Mail


Matthew W. Lynch

CERTIFICATE OF SERVICE - 1

SEBRIS BUSTO JAMES
4205 SE 36th Street, Suite 325
Bellevue, Washington 98006
(425) 454-4233