

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

**SAINT XAVIER UNIVERSITY,** )  
 )  
                   **Employer,** )  
 )  
           **and** )  
 )  
**SERVICE EMPLOYEES** )  
**INTERNATIONAL UNION, LOCAL 1,** )  
 )  
                   **Petitioner.** )

**Case No. 13-RC-092296**

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**SAINT XAVIER UNIVERSITY’S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE  
REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

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

**TABLE OF CONTENTS**

|  | <b>Page No.</b> |
|--|-----------------|
| Preliminary Statement.....   | 1               |
| LEGAL ARGUMENT.....  | 3               |
| I.    RELIGIOUS EDUCATIONAL INSTITUTIONS ARE EXEMPT FROM<br>JURISDICTION UNDER THE NLRA, REGARDLESS OF THEIR EMPLOYEES’ JOB<br>DUTIES .....  | 3               |
| A. Under <i>Catholic Bishop</i> and Its Progeny, Religious Educational Institutions Are<br>Completely Exempt from the Board’s Jurisdiction.....  | 3               |
| B. Attempting to Exercise Jurisdiction over any Religious Educational Institution Will<br>Result in Unconstitutional and Prohibited Inquiries With Respect to Employees’ Job<br>Functions, As It Did in the Regional Director’s Decision. .... | 6               |
| CONCLUSION.....  | 15              |

**TABLE OF AUTHORITIES**

|   | <b>Page(s)</b> |
|---|----------------|
| <b>Cases</b>  |                |
| <i>Board of Jewish Education of Greater Washington D.C.</i> ,<br>210 NLRB No. 50 (1974) .....   | 7              |
| <i>Cantwell v. State of Connecticut</i> ,<br>310 U.S. 296 (1940).....   | 8              |
| <i>Carroll Coll., Inc. v. NLRB</i> ,<br>558 F.3d 568 (D.C. Cir. 2009).....  | 7, 10, 14      |
| <i>Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints<br/>v. Amos</i> ,<br>483 U.S. 327 (1987) (Brennan, J., concurring)..... | 8, 9           |
| <i>Espinosa v. Rusk</i> ,<br>634 F.2d 477 (10th Cir. 1980) .....  | 8              |
| <i>Faith Center-WHCT Channel 18</i> ,<br>261 NLRB No. 11 (1982) .....   | 6              |
| <i>Hernandez v. Commissioner of Internal Revenue Service</i> ,<br>490 U.S. 680 (1989).....  | 8              |
| <i>Motherhouse of the Sisters of Charity of Cincinnati</i> ,<br>232 NLRB No. 44 (1977) .....  | 6              |
| <i>New York v. Cathedral Academy</i> ,<br>434 U.S. 125 (1977).....  | 8, 10          |
| <i>NLRB v. Catholic Bishop of Chicago</i> ,<br>440 U.S. 490 (1979).....   | <i>passim</i>  |
| <i>Pacific Lutheran University</i> ,<br>361 NLRB No. 157 (2014) .....   | <i>passim</i>  |
| <i>Riverside Church</i> ,<br>309 NLRB No. 124 (1992) .....  | 6              |
| <i>In re St. Edmund’s Roman Catholic Church</i> ,<br>337 NLRB No. 189 (2002) .....  | 6              |
| <i>Univ. of Great Falls v. NLRB</i> ,<br>278 F.3d 1335 (D.C. Cir. 2002).....  | 8, 10, 14      |

*University of Great Falls v. NLRB*,  
278 F.3d 1355 (2002).....1, 13

**Statutes**

an Act of Congress.....4

NLRA.....3

**Other Authorities**

284 NLRB 1080 (1987) .....9

First Amendment ..... *passim*

Associated Press, *Pope Francis washes feet of prisoners, baby during Holy Week ceremony*, N.Y. Daily News (Apr. 4, 2015, 12:29 AM).....10

Constitution of the United States of America .....3, 13

**SAINT XAVIER UNIVERSITY’S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE  
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**PRELIMINARY STATEMENT**

Saint Xavier University (“the University”), requested review of Region 13’s Decision and Direction of Election in *Saint Xavier University and Service Employees International Union, Local 1*, Case Number 13-RC-092296, pursuant to Section 102.67(b)&(c) of the National Labor Relations Board’s (the “Board”) Rules and Regulations, contesting the assertion of jurisdiction over the University. The Board granted the University’s request for review on February 20, 2013. On February 12, 2015, the Board vacated its Order granting review and remanded the proceeding back to the Regional Director for further action consistent with the recent Board decision in *Pacific Lutheran University (“PLU”)*, 361 NLRB No. 157 (2014).

On June 23, 2015, the Regional Director issued a Supplemental Decision asserting jurisdiction over the petitioned-for employees. The University subsequently requested review of the Regional Director’s Supplemental Decision and Direction of Election, pursuant to Section 102.67(b)&(c) of the Board’s Rules and Regulations, contesting the asserted jurisdiction over the University. The Board granted the University’s request for review on November 3, 2015.

The Board’s order invites the parties to address whether the Board should assert or deny jurisdiction over the specific petitioned-for employees (the University’s housekeeping employees), in addition to addressing what the appropriate test of jurisdiction should be – *i.e.*, should the Board apply the test articulated in *Pacific Lutheran University*, 361 NLRB No. 157 (2014) or take a different approach such as the standard articulated in *University of Great Falls v. NLRB*, 278 F.3d 1355 (2002). The University’s request for review did not directly address the appropriate test issue raised by the Board in its order. This supplemental brief addresses that additional issue raised in the Board’s order, namely whether the Board should adhere to its

current precedent, extend the test articulated in *Pacific Lutheran University* to the non-teaching employees at issue in this case, or take a different approach to determine when the Board will exercise jurisdiction over a religious university's employees. For simplicity, the University hereby adopts and incorporates the extensive facts and arguments raised in its request for review, in addition to the arguments raised below.

## LEGAL ARGUMENT

### **I. RELIGIOUS EDUCATIONAL INSTITUTIONS ARE EXEMPT FROM JURISDICTION UNDER THE NLRA, REGARDLESS OF THEIR EMPLOYEES' JOB DUTIES**

#### **A. Under *Catholic Bishop* and Its Progeny, Religious Educational Institutions Are Completely Exempt from the Board's Jurisdiction.**

Under the United States Supreme Court's ruling in *NLRB v. Catholic Bishop*, religious educational institutions are exempt from the National Labor Relations Act's ("the Act") jurisdiction because exercising jurisdiction over them would result in excessive entanglement prohibited by the First Amendment to the Constitution of the United States of America. The Supreme Court's holding applies to all of a religious educational institution's employees, regardless of their specific job duties, because otherwise, the Board would have to apply the "religious employer" exception on a job by job and employee by employee basis, which would result in the same unlawful inquiry deemed unconstitutional in *NLRB v. Catholic Bishop*, and subsequent decisions by the Supreme Court and the United States Courts of Appeals. And the Board, of course, does not have the power to change the analysis prescribed by the Supreme Court. Consequently, the proper analysis is simply to determine if the employer is a religious educational institution.

Prior to *NLRB v. Catholic Bishop*, the Board took the position that it had jurisdiction over all religious educational institutions. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 497 (1979). The Board decided not to exercise its jurisdiction over schools that it deemed to be "completely religious," but this was simply a matter of policy. *Id.* at 496-499. The Board believed that the First Amendment's Religion Clauses did not prevent it from exercising jurisdiction over religious schools. *Id.*

The Supreme Court rejected the Board's position in *NLRB v. Catholic Bishop*. *Id.* The Court began its analysis with the premise that an Act of Congress should not be construed to violate the Constitution if any other possible construction is available. *Id.* It reviewed the legislative history and found that "Congress simply gave no consideration to church-operated schools" when adopting the Act. *Id.* at 504. The Supreme Court examined whether exercising jurisdiction over church-operated schools would violate the First Amendment and concluded that it would, because it would lead to excessive entanglement. *Id.* at 502-503. Given the absence of clear Congressional intent to the contrary, the Court held that Congress did not intend to include teachers in church-operated schools within the jurisdiction of the Act. *Id.*

Although *Catholic Bishop* specifically addressed teachers in church-operated schools and the Court recognized the "critical and unique role" of teachers in fulfilling the mission of a church-operated school, the Court did not limit its holding to apply only to teachers. Instead, the Court's holding was based on the fundamental principle that if the Act covered religious educational institutions, it would lead to excessive entanglement because of the Board's significant role in determining and enforcing alleged violations of the Act:

Good intentions by government-or third parties-can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon*, *Meek*, and *Wolman*.

The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. . . . [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d, at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many

instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

*Id.* at 502.

Because “nearly everything” that occurs in the schools affects the employees and “is ... arguably a condition of employment,” the Board would be responsible for deciding what constitutes terms and conditions of employment and, therefore, mandatory subjects of bargaining. *Id.* at 503 (internal quotations omitted). The Court, quoting an “aptly summarized” point by the Pennsylvania Supreme Court decision, noted that the “introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management.” *Id.* at 503. Thus, the Board’s inquiry would “inevitably . . . implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions,” which would “give[] rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.” *Id.* at 503 (quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Thus, the Board cannot exercise jurisdiction over the institution, because doing so would necessarily and inevitably require the Board to review and decide the merits of sensitive religious issues and whether the institution’s bargaining positions aligned with its religious purpose and professed religious values, and could potentially lead to requirements that the institution bargain over issues directly contrary to its professed religious beliefs.<sup>1</sup>

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<sup>1</sup> The potential conflicts are readily apparent, and given the Supreme Court’s clear ruling, there is no need to describe all of the potentially sensitive issues. Suffice it to say that such issues could arise in a wide variety of areas related to the employees’ terms and conditions of employment, particularly in light of potential shifts in doctrinal interpretation. For example, whether a religious educational employer’s health insurance should cover abortions, or

**B. Attempting to Exercise Jurisdiction over any Religious Educational Institution Will Result in Unconstitutional and Prohibited Inquiries With Respect to Employees' Job Functions, As It Did in the Regional Director's Decision.**

The Board has a longstanding practice of declining to assert jurisdiction over nonprofit, religious organizations, regardless of whether the primary functions of the employees at issue are secular or non-secular, finding that secular employees provide vital services toward the mission of the religious institution. *See, In re St. Edmund's Roman Catholic Church*, 337 NLRB No. 189 (2002) (declining to exercise jurisdiction over custodial employees, even though the custodial employees may be considered secular employees, because there was a close integration between the church and the school and the custodial employees provided services that the religious institution would not be able to accomplish its mission without); *Riverside Church*, 309 NLRB No. 124 (1992) (declining to exercise jurisdiction over garage attendants who spent all of their working time in the garage performing routine maintenance and cleaning functions for the employer because their secular tasks were necessary for the church to accomplish its religious mission); *Faith Center-WHCT Channel 18*, 261 NLRB No. 11 (1982) (declining to assert jurisdiction over a religious radio station because the Board has traditionally declined jurisdiction over religious, noncommercial activities of noncommercial, nonprofit religious organizations) *Motherhouse of the Sisters of Charity of Cincinnati*, 232 NLRB No. 44 (1977) (declining to exercise jurisdiction over lay employees that included kitchen employees, drivers, garage servicemen, housekeepers, laundry employees, maintenance workers, grounds-keepers, and power plant employees, employed in a complex of convent residence halls, a nursing home, and a power plant run by a nonprofit religious organization known as the Sisters of Charity of Cincinnati because the Sisters of Charity of Cincinnati was a religious organization and because

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same-sex partners, could be issues that open the door to conflict between a religious employer (or its affiliated religious organization) and the union.

the services provided at the nursing home were ancillary to their religious objective); and *Board of Jewish Education of Greater Washington D.C.*, 210 NLRB No. 50 (1974) (declining to assert jurisdiction over the employer because the employer was a nonprofit religiously oriented institution whose activities were noncommercial and were intimately connected with the religious activities of the institution). Further, as recently as June 5, 2015, the General Counsel of the Board affirmed on appeal the Regional Director’s refusal to assert jurisdiction over secular employees at a Catholic cemetery because the “Board will generally not assert jurisdiction over noncommercial, nonprofit religious organizations. This is true even if the employees at issue are secular, so long as they are employees without whom the employer could not accomplish its religious mission.” Case No. 14-CA-142172 (June 5, 2015). Like the employees in these cases, the petitioned-for employees in this case provide vital services toward the religious mission of St. Xavier; therefore, the Board should decline to assert jurisdiction over them.

Second, under *Catholic Bishop*, it is inappropriate for the Board to exercise jurisdiction over what it deems to be “non-religious” employees at religious educational institutions. To do so requires the Board to engage in analyzing and determining the employer’s religious mission, the employees’ role in furthering that mission, whether the employees’ duties are “sufficiently religious” in nature to be exempt from jurisdiction, and whether the employer was acting in good faith during bargaining in light of its professed religious values – precisely what the Regional Director did in his June 23 Order in this case.

The Supreme Court has already held that it is these inquiries (*i.e.*, “trolling”) through the institution’s beliefs that are unconstitutional. *Id.* at 502 (“It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.”); *Carroll Coll., Inc. v.*

*NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009) (“Probing into the school’s religious views would needlessly engage in the trolling that *Catholic Bishop* itself sought to avoid.”) (internal quotations omitted); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-1344 (D.C. Cir. 2002) (finding that it is the intrusive inquiry, or trolling, into the institution’s religious views that violate the First Amendment); *see also Hernandez v. Commissioner of Internal Revenue Service*, 490 U.S. 680, 694 (1989) (noting the inherent problem in having IRS agents distinguish between secular and religious activities and noting “that pervasive monitoring for the subtle or overt presence of religious matter is a central danger against which we have held the Establishment Clause guards”) (internal quotations omitted); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) (“What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs.”); *New York v. Cathedral Academy*, 434 U.S. 125, 132-133 (1977) (“The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . .”); *Cantwell v. State of Connecticut*, 310 U.S. 296, 307 (1940) (finding a state statute unconstitutional because it conditioned the receipt of solicitation licenses based on the state authority’s determination of what constituted a religious cause); *Espinosa v. Rusk*, 634 F.2d 477, 480-481 (10th Cir. 1980) (finding a statute unconstitutional where it required the state secretary to appraise the facts, exercise judgment, and form an opinion as to whether a religious institution’s activities such as feeding the poor and hungry, were for a secular or religious purpose).

These cases demonstrate why the Board's current precedent asserting jurisdiction over secular, non-teaching employees is inappropriate. In *Hanna Boys Center*, the Board asserted jurisdiction over a group of non-teaching employees because it found that their job duties were "overwhelmingly secular." 284 NLRB 1080 (1987). In coming to this conclusion the Board did a fairly exhaustive inquiry into the specific duties and responsibilities of the petitioned-for employees and assessing whether those duties and responsibilities were religious or secular. *Id.* It is precisely this inquiry, however, that has been found to be unconstitutional and subsequently rejected by the Board. The Board should, thus, reject the test set forth in *Hanna Boys Center* as it applies to all employees of a religious institution.

As alluded to above, the Board need look no further than the Regional Director's decision itself for an example of this impermissible entanglement where it states that "a reasonable applicant for employment as a housekeeper would not conclude that performance of their job duties requires furtherance of a religious mission." June 23 Order, at 2. As Justice Brennan warned in his *Amos* concurrence, "the character of an activity [as religious or secular] is not self-evident," 483 U.S. at 343, and clearly was not to the Regional Director because he improperly made assumptions about the secular duties of these employees rather than understanding the pivotal roles these employees play in furthering the institution's religious mission. His conclusion overlooks the centrality to Catholic faith and Catholic identity of cleanliness as a demonstration of willing servitude. As John Wesley famously expressed in a late 18th-century sermon, "Slovenliness is no part of religion. Cleanliness is indeed next to Godliness." The Bible is replete with examples from which Wesley drew his famous exhortation, from Haggai 2:11-14(explaining that ceremonially pure things can be defiled by the unclean) to other examples like Genesis 18:4 (Abraham providing water to his guests so they

could wash their feet) or John 13:1-17 (Jesus washing his disciples' feet). Even today, Pope Francis performs ritual washing to show his willingness, and by extension that of Catholics, "to become more slave-like in the service of people as Jesus did." See, e.g., Associated Press, *Pope Francis washes feet of prisoners, baby during Holy Week ceremony*, N.Y. Daily News, (Apr. 4, 2015, 12:29 AM), <http://www.nydailynews.com/news/world/pope-francis-washes-feet-prisoners-baby-holy-week-article-1.2173180> (quoting Holy Week homily by the pontiff). It is this very prospect of Saint Xavier being required to "litigat[e] in court about what does or does not have religious meaning [that] touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Academy*, 434 U.S. 125, 132-133 (1977).

The language in *Catholic Bishop* and the underlying logic compel the conclusion that the First Amendment prohibits the Board from exercising jurisdiction over religious educational institutions regardless of the petitioning employees' job duties or function. Simply put, under *NLRB v. Catholic Bishop* and its progeny, the only appropriate inquiry is whether the employer qualifies as a religious educational institution, and to determine the answer, the Board must apply the non-intrusive three-part test adopted by the United States Court for the District of Columbia. *Carroll Coll.*, 558 F.3d at 572; *Univ. of Great Falls*, 278 F.3d at 1344-1347. The three-part test established by *Univ. of Great Falls* is whether the "college or university: (a) holds itself out to students, faculty and the community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled directly or indirectly, by a recognized religious organization, or with an entity, membership of which it is determined, at least in part, with reference to religion." *Id.* This test is the more appropriate test than the one set forth in *PLU* because it avoids the constitutional problems that arise when the Board, as is required under the *PLU* test, has to inquire into the institution's religious beliefs and

individual employee duties and responsibilities to determine if they are religious enough for the Board to decline jurisdiction over the institution.

Just as with the “substantial religious character” test, the Board’s *PLU* test is inconsistent with *Catholic Bishop* and its progeny because it fails to address the unavoidable entanglement problems that inevitably arise when the Board is asked to enforce the Act against a religious university in the collective bargaining arena. *Catholic Bishop* and subsequent appellate cases likewise foresaw the unavoidable entanglement issues related to the Board’s role in enforcing the Act against a religious college or university through the Board’s unfair labor practice procedures. Beyond the Regional Director’s decision, it is not hard to see that the reality of collective bargaining and the unfair labor practice charge mechanism for enforcing the Act will lead to constitutional conflicts. For example, if the Region were to assert jurisdiction in this case and the unit was subsequently certified, the Board would:

- Grant to bargaining unit members a Section 7 right to strike in an attempt to prevent or hinder the University from carrying out its religious mission of providing education to students;
- Require the University to negotiate over mandatory subjects of bargaining – wages, benefits, and other terms and conditions of employment – and make it unlawful to refuse to bargain over such proposals, subjecting the University to sanctions by the Board;
- Require the University to bargain over contract provisions including seniority, job qualifications, promotions, job assignments and disciplinary criteria, that may be contrary or detrimental to the University’s religious mission, and make it an unfair labor practice to refuse to bargain over the same;

- Require the University to disclose information to the union or to the Board which the Board deems relevant to bargaining proposals, grievances, or unfair labor practice proceedings, including information, communications or documents substantiating the University's position that an employment decision or bargaining position is contrary to its religious mission;
- Prevent the University from insisting on a union waiver of the union's right to bargain over a mandatory subject of bargaining that the University believes would infringe on its religious mission. For example, the union may want to bargain over the myriad of religious services and events that the University currently encourages its staff to attend. Requiring the University to bargain over the religious services and events would clearly infringe on its religious mission.

These problems are just a few of the myriad examples why the Court in *Catholic Bishop* concluded that “[i]nvariably 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.” 440 U.S. at 502-503; *accord Bayamon*, 793 F.2d at 402 (Religiously-affiliated universities pose same risk the Board will violate the Religious Clauses as do secondary schools; “[u]nfair labor practice charges would seem as likely; the Board’s likely scrutiny would seem as likely; the Board’s likely scrutiny would seem at least as intense; the necessary distinctions between religious and labor matters would seem no easier to make; and whether one could readily “fence off” subjects of mandatory bargaining with a religious content would seem similarly in doubt”). It is not simply the Board engaging in unconstitutional “trolling” to determine 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 compelled every reviewing court that has examined this risk to conclude that the Board cannot assert jurisdiction over a religious or religiously-affiliated school.

Member Johnson thoroughly addressed these concerns in his dissent in *PLU*. Explaining the reasons why he believed the Board's new test to be erroneous, Member Johnson correctly pointed out in his dissent that the Act must bow to the United States Constitution while the test established by the majority takes a wrong turn by essentially balancing the Act against the Constitution. 361 NLRB No. 157. One of the pivotal rules for statutory interpretation is the doctrine of constitutional avoidance, which was the basic tenet underlying the *Catholic Bishop* Supreme Court decision. *Id.* The constitutional avoidance rule requires the Board to interpret the Act to "avoid *even the risk of* a constitutional conflict." *Id.* (emphasis in the original). In other words, unless there is clear evidence that Congress wanted there to be a showdown between the Constitution and the Act, the Board should not interpret the Act to create conflict. *Id.* Member Johnson would adopt the test established by the D.C. Circuit in *Great Falls* to determine whether or not the Board may exercise jurisdiction over a religious institution. *Id.* In support of this position, Member Johnson noted that: (1) courts have consistently overturned Board cases where the Board has attempted to expand the interpretation of *Catholic Bishop* and assert jurisdiction over religious institutions, and (2) he fully expects courts will do the same with the Board's new test established in *PLU*. He concluded that *Great Falls* test is the appropriate test for the Board to apply because it avoids the unconstitutional pitfalls of trolling into the religious functions of individual employees or groups of employees that the test in *PLU* requires.

Thus, the language in *Catholic Bishop* and the underlying logic compel the conclusion that the First Amendment prohibits the Board from exercising jurisdiction over religious

educational institutions' employees, regardless of the petitioning employees' job duties or function. Simply put, under *NLRB v. Catholic Bishop* and its progeny, the only appropriate inquiry is whether the employer qualifies as a religious educational institution, and to determine the answer, the Board must apply the non-intrusive three-part test adopted by the United States Court for the District of Columbia. *Carroll Coll.*, 558 F.3d at 572; *Univ. of Great Falls*, 278 F.3d at 1344-1347.

**CONCLUSION**

Under the United States Supreme Court's ruling in *NLRB v. Catholic Bishop*, and its progeny, the Board does not have jurisdiction over any of a religious educational institution's employees. Accordingly, the job duties and functions of the employees at issue in this case are irrelevant.

Respectfully submitted,

SAINT XAVIER UNIVERSITY

A handwritten signature in black ink, appearing to read 'M. A.', written over a horizontal line.

By \_\_\_\_\_

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

Dated: November 25, 2015

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that she caused a copy of the foregoing **SAINT XAVIER UNIVERSITY'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION** to be served upon the following, on this 25th day of November, 2015:

**VIA ELECTRONIC FILING**

NLRB  
Office of the Executive Secretary  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570-0001

**VIA ELECTRONIC MAIL**

Michele Cotrupe, Esq.  
Service Employees International Union, CLC  
111 East Wacker Drive  
25<sup>th</sup> Floor  
Chicago, Illinois 60601  
cotrupem@seiu1.org

Regional Director Peter Sung Ohr  
National Labor Relations Board  
The Rookery Building  
209 S. LaSalle Street, Suite 900  
Chicago, IL 60604-5208  
peter.ohr@nlrb.gov

By:  \_\_\_\_\_