

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAINT XAVIER UNIVERSITY,

Employer,

and

SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1,

Petitioner.

Case No. 13-RC-092296

**MOTION TO FILE BRIEF FOR *AMICUS CURIAE* ISLAMIC SAUDI
ACADEMY IN SUPPORT OF EMPLOYER**

The Islamic Saudi Academy (“ISA” or “Academy”) moves for permission to file the accompanying amicus brief in support of Xavier University’s request for review and reversal of the Regional Director’s supplemental decision and direction of election.

The Islamic Saudi Academy is a not-for-profit, K-through-12 private school located in Fairfax County, Virginia, that operates under the auspices of the Kingdom of Saudi Arabia. The Academy was established in 1984 by a Royal Decree from The Custodian of the Two Holy Mosques, King Fahd bin Abdulaziz Al-Saud, to provide Saudi Arabian children living in the United States with an education grounded in “Islamic Religion, Studies and Practices; Arabic Language; and General Education.” *See* Islamic Saudi Academy Charter at 1 (Apr. 13, 1989). Like hundreds of other Islamic schools in the United States, the Islamic Saudi Academy is dedicated to providing its students with an educational environment and curriculum that is consistent with Islamic values and conducive to building Muslim character.

As a self-identified religious school, the Islamic Saudi Academy has a compelling interest in the standard the Board applies to determine its jurisdiction over such schools. Indeed,

the Academy currently has its own pending request for Board review of a Regional Director's decision applying the standard announced in *Pacific Lutheran University*, 361 N.L.R.B. No. 157, at 6 (2015), to the Academy. See *Islamic Saudi Academy*, Case No. 05-RC-080474. Because the questions on which the Board invited briefing in this case are relevant to the Academy and its pending petition, the Academy respectfully submits this amicus brief.

The Academy agrees with Xavier's position on the questions posed by the Board. But the Academy, unlike Xavier, is a K-through-12 religious school, not a religious college or university, and it seeks to add a different perspective to the Board's consideration of those questions. Because the Board is considering whether to adopt or revise a standard that is likely to govern decisions well beyond the current matter, the Academy believes that Board would benefit from receiving its views.

The Academy thus respectfully requests leave to file the attached amicus brief to address "whether the Board should adhere to its current precedent, extend the test articulated in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), to the non-teaching employees at issue here, or take a different approach." Order at 1 (Nov. 3, 2015).

Dated: February 17, 2016

Respectfully submitted,

LATHAM & WATKINS LLP

By /s/ Jonathan Y. Ellis

Joseph B. Farrell
Jonathan Y. Ellis
Angela Walker

*Counsel for Amicus Curiae
Islamic Saudi Academy*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to File Brief for *Amicus Curiae* Islamic Saudi Academy in Support of Employer was electronically filed with the NLRB on February 17, 2016, and sent by electronic means to the following:

Amy Moor Gaylord
Melissa Sobota
FRANCZEK RADELET P.C.
300 South Wacker Drive
Suite 3400
Chicago, IL 60606-6785
amg@franczek.com
mds@franczek.com

Michele Cotrupe, Esq.
Service Employees International Union, CLC
111 East Wacker Drive
25th Floor
Chicago, IL 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

/s/ Jonathan Y. Ellis
Jonathan Y. Ellis

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

Jonathan Y. Ellis
Angela Walker
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004-1304
Tel: (202) 637-2200
Fax: (202) 637-2201

*Counsel for Amicus Curiae
Islamic Saudi Academy*

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STATEMENT OF INTEREST

The Islamic Saudi Academy (“ISA” or “Academy”) is a not-for-profit, K-through-12 private school located in Fairfax County, Virginia, that operates under the auspices of the Kingdom of Saudi Arabia. The Academy was established in 1984 by a Royal Decree from The Custodian of the Two Holy Mosques, King Fahd bin Abdulaziz Al-Saud, to provide Saudi Arabian children living in the United States with an education grounded in “Islamic Religion, Studies and Practices; Arabic Language; and General Education.” *See* Islamic Saudi Academy Charter at 1 (Apr. 13, 1989). Like hundreds of other Islamic schools in the United States, the Islamic Saudi Academy is dedicated to providing its students with an educational environment and curriculum that is consistent with Islamic values and conducive to building Muslim character. Because the questions on which the Board invited briefing in this case are also relevant to the Academy and its own case currently pending before the Board, *see Islamic Saudi Academy*, Case No. 05-RC-080474, the Academy respectfully submits this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the U.S. Supreme Court rejected the Board’s attempt to assert jurisdiction over bargaining units of lay teachers at a collection of Catholic schools in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Board and the courts have taken different views on how that decision should be interpreted and applied. *See, e.g., University of Great Falls v. NLRB*, 278 F.3d 1335, 1347-48 (D.C. Cir. 2002) (rejecting the Board’s prior standard); *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009) (same). Last year, in *Pacific Lutheran University*, the Board considered its interpretation anew once more. In that decision, the Board announced it would exercise jurisdiction over faculty members at a self-identified religious university or college, unless the university or college demonstrates: (1) “as a threshold matter, that it holds itself out as providing a religious educational environment,” and (2) “that it holds out the

petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university’s religious educational environment.” 361 N.L.R.B. No. 157, at 6 (2015). The Board is now considering whether (i) to extend that standard to certain non-teaching employees of Xavier University, another religious university, (ii) follow prior precedents involving non-teaching employees of other religious institutions, or (iii) adopt a new test altogether.

1. In the Islamic Saudi Academy’s view, the Board should abandon the test it adopted in *Pacific Lutheran* and adopt the standard set out by the D.C. Circuit in *Great Falls* and *Carroll College* for all employees of religious universities—teaching and non-teaching alike. The framework adopted by the D.C. Circuit in those decisions faithfully implements the Supreme Court’s decision in *Catholic Bishop* and applies to all employees of a religious school—whether or not those employees have a teaching role. The Board’s new standard adopted in *Pacific Lutheran*, on the other hand, ignores the teaching of those cases and is inconsistent with the limits on the Board’s jurisdiction recognized by the Supreme Court. Adhering to that new standard will inevitably “implicate sensitive issues that open the door to conflicts between” the Board and school administrators about the sincerity of the religious beliefs of a university in precisely the manner the Supreme Court held must be avoided. *Catholic Bishop*, 440 U.S. at 502-03.

2. If the Board nevertheless retains the *Pacific Lutheran* standard for exercising jurisdiction over faculty of a religious university, however, there is no reason it should not apply equally to non-teaching employees at those universities as well. Indeed, the reasoning of *Pacific Lutheran* itself dictates that result. The Board’s exercise of jurisdiction over an employee will create a “significant risk” of interfering with the school’s religious rights, if the employee is

required to serve *any* “specific role in creating or maintaining the school’s religious educational environment.” *Pacific Lutheran*, 361 N.L.R.B. No. 157, at 8. Faculty members are clearly not the only employees capable of serving such roles. It is no more appropriate for the Board to question a religious universities’ “good faith” or otherwise “second-guess[]” its public representations with respect to the religious role of its non-teaching employees than it is as to its teaching ones. *Id.* at 9.

3. Finally, whatever the Board decides about the standard for non-teaching employees of a university or college, it should not automatically extend that standard to teaching or non-teaching employees of religious primary and secondary schools. The Board has long recognized the “significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools,” *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971), when determining the proper scope of its jurisdiction. There is no reason to tackle the implications of those differences before the Board has the benefit of full argument, a factual record, and a legitimate need. *See Pacific Lutheran*, 361 N.L.R.B. No. 157, at 8 n.11 (“Our decision today is limited to addressing the requirements for units of faculty members at colleges and universities.”).

ARGUMENT

I. THE BOARD SHOULD ADOPT THE *GREAT FALLS / CARROLL COLLEGE* TEST FOR DETERMINING WHEN IT MAY EXERCISE JURISDICTION OVER TEACHING OR NON-TEACHING EMPLOYEES OF A RELIGIOUS UNIVERSITY

The Board should abandon its test from *Pacific Lutheran* and apply the framework adopted by the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), and *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), to determine whether it may assert jurisdiction over the employees—teaching or non-teaching employees—of a religious

college or university. The standard adopted in those cases faithfully implements the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), applies to bargaining units of teaching and non-teaching employees alike, and will govern judicial review of any Board decision in an unfair labor practice proceeding. The Board's new test adopted in *Pacific Lutheran University*, 361 N.L.R.B. No. 157 (2015), flatly contradicts that framework and the reasoning of those cases. It should be rejected.

In *Catholic Bishop*, the United States Supreme Court held that the Board lacked jurisdiction over bargaining units of lay teachers at two religious schools. The Board's exercise of jurisdiction over the schools, the Court explained, would "create[] an impermissible risk of excessive governmental entanglement in the affairs of" religious educational institutions. *Id.* at 501. And it would inevitably "implicate sensitive issues that open the door to conflicts between" the Board and school administrators about the sincerity of professed religious beliefs and the relationship of those beliefs to the school's mission. *Id.* at 502-03. Creating such conflicts would run a serious risk of "imping[ing] on rights guaranteed by the Religion Clauses" and exceed the Board's authority under the NLRA. *Id.* at 502.

In *Great Falls* and *Carroll College*, the D.C. Circuit applied *Catholic Bishop* to the two subsequent attempts by the Board to exercise jurisdiction over bargaining units at other religious schools. Noting that the Supreme Court in *Catholic Bishop* had "offered no test for determining whether a school is beyond Board jurisdiction," the D.C. Circuit articulated its own. *Carroll Coll.*, 558 F.3d at 571. Under the D.C. Circuit's framework, a religious school is exempt from the Board's jurisdiction if it "(1) holds itself out to students, faculty and the community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) 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.* at 572 (citations omitted); *Great Falls*, 278 F.3d at 1343.¹ This “bright-line” test, the Court explained, provides assurance that only “*bona fide* religious institutions” may avail themselves of the *Catholic Bishop* exemption from the NLRA, “without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands.” *Great Falls*, 278 F.3d at 1344-45.

The framework adopted in *Great Falls* and *Carroll College* applies to all employees of a religious school, regardless of their job duties. It determines not whether a *particular unit* of employees are outside the jurisdiction of the Board, but “whether an *institution* is exempt” as a whole. *Great Falls*, 278 F.3d at 1347 (emphasis added); *see Carroll Coll.*, 558 F.3d at 572 (“A *school* is exempt from NLRB jurisdiction if” (emphasis added)). As the Court explained, “[f]or the Board to exercise jurisdiction over *an educational institution* where ‘the inculcation of religious values is at least *one* purpose of the institution’ and ‘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.’” *Great Falls*, 278 F.3d at 1342 (first emphasis added).

Accordingly, after finding the standard met in those cases, the Court declared the schools were *entirely* outside the Board’s jurisdiction—without any consideration of the role of the employees in the petitioned-for units. *See id.* at 1347-48 (“Because we find that *the University of Great Falls* . . . is exempt from NLRB jurisdiction under *Catholic Bishop*, we grant the petition for review”); *Carroll Coll.*, 558 F.3d at 574 (“After our decision in *Great Falls*, *Carroll* is

¹ The D.C. Circuit has left open the possibility that the “affiliation” requirement may not be necessary to demonstrate a school’s legitimate religious character. *See Great Falls*, 278 F.3d at 1347 n.2 (“We need not and do not decide whether other indicia of religious character might replace ‘affiliation’ in other cases.”).

patently beyond the NLRB's jurisdiction.'). Indeed, the court specifically rejected the Board's prior consideration of the "role of the unit employees in effectuating" a school's religious mission, noting the "difficulty of judicially deciding which activities of a religious organization were religious and which were secular." *Great Falls*, 278 F.3d at 1339, 1342; *see also id.* at 1344.

The Board's new two-prong test adopted in *Pacific Lutheran University*, directly conflicts this framework and the reasoning of these cases. Under the second-prong of the *Pacific Lutheran* test, the Board will assert jurisdiction over teachers of even a religious university, unless the university holds out the petitioned-for faculty as performing a "*specific religious function*." 361 N.L.R.B. No. 157, at 8. "Generalized statements that faculty members are expected to, for example, support the goals or mission of the university," the Board explained, "are not alone sufficient" to meet that test. *Id.*; *see also id.* at 9. Instead, the Board has explained the university must prove that the faculty are required to perform *particular* religious functions of the sort the Board enumerated in its decision. *See id.* at 9 ("such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets," and others).

As Xavier explains, this inquiry is untenable in at least two respects. First, it ignores the difficulties—practical and constitutional—in determining whether specific functions are religious or secular in nature. *See St. Xavier Br.* 7-11. Contrary to the presumption underlying the Board's new test, at a religious school, there is no sharp distinction between activities that are "religious" and those that are "secular." *See Great Falls*, 278 F.3d at 1342 ("The line is hardly a bright one." (quoting *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987))). And the very act of "trolling" through a school's beliefs and functions trying to sort them into

those categories is precisely what the courts prohibited in *Catholic Bishop, Great Falls*, and *Carroll College*. See *Catholic Bishop*, 440 U.S. at 502; *Great Falls*, 278 F.3d at 1341-42, 1345; *Carroll Coll.*, 558 F.3d at 572. The Board’s expressed intention to limit its review to religious beliefs and functions that are “h[e]ld-out” to the public may make the inquiry somewhat less intrusive, but it will not make attempting to identify which of those held-out functions and beliefs are sufficiently religious any easier—or permissible.

Second, the *Pacific Lutheran* standard ignores the inevitable entanglement of the Board in religious issues that exercising jurisdiction over *any* employee of a religious school will entail. See *St. Xavier’s Br.* 11-13. Where the “*raison d’etre*” of an institution “is the propagation of a religious faith,” the Board’s adjudication of unfair labor practices at that institution “will necessarily involve inquiry into the good faith of the position asserted by the [administrators] and its relationship to the school’s religious mission.” *Catholic Bishop*, 440 U.S. at 502-03. That is particularly true should the Board exercise jurisdiction—as *Pacific Lutheran* indicates it will—over employees who are “expected to . . . support the [religious] goals and mission” of the school, but are not publicly tasked with a “*specific . . . function*” that the Board finds sufficiently religious. 361 N.L.R.B. No. 157, at 8; see, e.g., Supplemental Decision, *Saudi Arabia Academy*, Case No. 05-RC-080474, at 11 (disregarding each ISA employee’s duty to “conduct themselves in a manner that respects Islamic values and traditions” as a “generalized statement” that is insufficient to meet the second prong of *Pacific Lutheran*). An expectation may be stated in a “general[.]” form, but future collectively bargaining about the implementation of that expectation or disciplinary action for conduct that violates it will be specific—and the Board will have thrust itself into the position of determining whether such implementation or conduct stems from a

faithful understanding of the school’s religious goals or not.² That it cannot do. *See Catholic Bishop*, 440 U.S. at 502.

In short, the *Pacific Lutheran* test cannot be squared with *Catholic Bishop* or the D.C. Circuit’s interpretation of that decision in *Great Falls* and *Carroll College*. As the D.C. Circuit has explained, when reviewing Board decisions in unfair labor practice proceedings, the court will “give no deference to the NLRB’s application of [the *Catholic Bishop*] exemption to the National Labor Relations Act.” *Great Falls*, 278 F.3d at 1340-41; *see id.* at 1341 (“We therefore are governed by the Supreme Court’s decision in *Catholic Bishop*, as we read it, not as it is read by the Board.”). The Board should therefore abandon its current jurisdictional test and adopt the test articulated by the D.C. Circuit in *Great Falls* and *Carroll College*.

II. IF THE BOARD RETAINS THE *PACIFIC LUTHERAN* TEST, IT SHOULD EXTEND THE HOLDING-OUT STANDARD TO NON-TEACHING EMPLOYEES

If the Board nevertheless retains the *Pacific Lutheran* standard, it should, at a minimum, extend what protection of religious liberty that standard does provide to non-teaching employees of religious universities. Specifically, the Board should not exercise jurisdiction over non-teaching employees of a university that are held out as performing any specific religious function at the school. It should not require that an employee serve a religious *teaching* role and it should not delve into the actual functions of those employees or second guess whether those functions are necessary to create and maintain the school’s religious educational environment.

In granting Xavier’s request for review, the Board asked whether it should “adhere to its current precedent [or] extend the test articulated in *Pacific Lutheran* . . . to the non-teaching

² Indeed, the Board’s refusal to consider such “generalized” expectations fatally undermines its view expressed in *Pacific Lutheran* that faculty who do not meet the second-prong “are hired, fired, and assessed under criteria that do not implicate religious considerations.” *Pacific Lutheran*, 361 N.L.R.B. No. 157, at 8.

employees at issue here.” Order at 1 (Nov. 3, 2015). As an example of its “current precedent,” the Board referred to its decision in *Hanna Boys Center*, 284 NLRB 1080 (1987), where it exercised jurisdiction over “clerical employees, recreation assistants, cooks, their helpers, and child-care workers” of a religious organization. *See id.* at 1083. The Board found *Catholic Bishop* inapplicable in *Hanna Boys Center* because there was “no indication in the record” that the petitioned-for employees “[we]re required to, or d[id] in fact, involve themselves in the religious or secular teaching of the [boys at the center].” *Id.* Neither the standard nor the mode of analysis in *Hanna Boys Center* can survive the Board’s decision in *Pacific Lutheran*.

First, even accepting that *Catholic Bishop* permits the Board to inquire into the religious functions of petitioned-for employees at all, the Board itself recognized in *Pacific Lutheran* that the exercise of jurisdiction over an employee will create a “significant risk” of interfering with the school’s religious rights, if the employee is required to serve *any* “specific role in creating or maintaining the school’s religious educational environment.” 361 N.L.R.B. No. 157, at 8. It announced, for example, that it would decline to exercise jurisdiction not only over faculty who are required to “engag[e] in religious indoctrination or religious training,” but also those that are required to “conform to [the school’s] religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties.” *Id.* at 9. And it made clear that if it determined that the petitioned-for faculty would be “subject to employment-related decisions that are based on religious considerations,” it would decline jurisdiction. *Id.* at 10 n.19.

Teachers undoubtedly serve a “critical and unique role” in creating and sustaining a religious school’s religious environment. *Id.* at 8. But it hardly follows that they are the only employees capable of or responsible for creating and sustaining a religious environment, or that only teachers may be subject to employment-related decisions that are based on religious

considerations. Indeed, the Board has recognized as much in the past by refusing to exercise jurisdiction over non-teaching employees of religious institutions that perform “secular tasks,” such as custodial or maintenance work, “without which the Employer would be unable to accomplish its religious mission.” *Riverside Church in the City of N.Y.*, 309 N.L.R.B. 806, 807 (1992); *see also St. Edmund’s Roman Catholic Church*, 337 N.L.R.B. 1260, 1261 (2002); *cf. Ecclesiastical Maintenance Servs., Inc.*, 325 N.L.R.B. 629, 630-31 (1998) (exercising jurisdiction over a unit of employees at a religiously-affiliated company that did not “participate in the religious aspects or promote the religious mission of the [e]mployer”).

For example, in the primary and secondary school setting, the Islamic Saudi Academy expects *all* of its employees to “to conduct themselves in a manner that respects the Islamic values and traditions of the Academy and its students.” ISA Employee Handbook at 30. This includes dressing in keeping with Islamic customs and professional traditions; respecting the school’s observation of Muslim holidays, and refraining from encouraging students to celebrate any other holidays; and either fasting or eating out of view of the Academy’s students and Muslim employees during the month of Ramadan. Various non-teaching employees are also required to help maintain the religious education environment in other specific ways, such as the assistant cafeteria manager’s responsibility to ensure the food served satisfies the Islamic dietary code and the bus drivers’ responsibility to maintain the separation of boys and girls on the Academy’s buses. Should the Board involve itself in the negotiations over any of these terms of employment or a dispute over whether a non-teaching employee has faithfully abided by them, it could not avoid “impermissibly entangl[ing]” itself in the school’s “religious beliefs or practices,” in precisely the manner it sought to avoid in *Pacific Lutheran*.

Second, the Board recognized in *Pacific Lutheran* that its efforts to identify whether an employee serves a specific role in creating or maintaining a religious function must be limited to examining the school's public representations, not delving into whether, in fact, the employees supports the school's religious environment. *See* 361 N.L.R.B. No. 157, at 7. As the Board explained, an "examination of the actual functions performed by employees could raise the same First Amendment concerns as an examination of the university's actual beliefs." *Id.* at 8. The Board rightly acknowledged that, under *Catholic Bishop*, it must "avoid 'trolling' through a university's operation to determine whether and how it is fulfilling its religious mission." *Id.*

As explained above, the Academy ultimately does not agree that limiting the Board's "trolling" to employee functions that are held out to the public alleviates the First Amendment concerns identified by the Supreme Court in *Catholic Bishop*. *See supra* at 6-7. But if the Board is going to be sorting employee functions in that manner, at the very least, it is just as important that the Board refrain from questioning a religious school's "good faith or otherwise second-guessing" its public representations about the religious role of its non-teaching employees as its teaching employees. *Pacific Lutheran*, 361 N.L.R.B. No. 157, at 9. As the Board rightly recognized, a religious school should not be required to "explain its beliefs" or how it goes about "fulfilling its religious mission." *Id.* at 8.

Moreover, as long as the school holds out its non-teaching employees as serving a religious function of some sort in the school, the Board can be assured that claiming the *Catholic Bishop* exception to the NLRA will "come at a cost." *See id.* at 9. Just as a religious school's public representations might attract some potential applicants and dissuade others from apply to faculty positions, so too will similar public representations attract and dissuade applicants for non-teaching positions. Thus, limiting the Board's inquiry to a school's representations will

serve the same “market check” for non-teaching positions as it does for teaching positions under *Pacific Lutheran*. *Id.*

For these reasons, if the Board chooses to retain its standard from *Pacific Lutheran*, it should follow the same standard and mode of analysis when determining whether to exercise jurisdiction over non-teaching employees of religious universities.

III. THE BOARD SHOULD LIMIT ITS OPINION IN THIS CASE TO EMPLOYEES OF RELIGIOUS COLLEGES AND UNIVERSITIES, NOT PRIMARY AND SECONDARY SCHOOLS

Finally, whatever the Board’s decides in this case, it should limit its decision to setting the standard for employees of religious *colleges* and *universities*—not blindly extend its decision to religious primary and secondary schools. As the Supreme Court and the Board have long recognized, there are “significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.” *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). While religious colleges are often “characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students,” the “‘affirmative if not dominant policy’ of the instruction in pre-college church school is ‘to assure future adherents to a particular faith by having control of their total educations at an early age.’” *Id.* (citation omitted); *see also Pacific Lutheran*, 361 N.L.R.B. No. 157, at 8 (expressing the Board’s view that a “commitment to diversity and academic freedom” may indicate that “religion has no bearing on . . . job duties and responsibilities”).

Moreover, the setting of a primary and secondary school is markedly different than the university setting. Every day, parents entrust their minor children to the temporary custody of their children’s primary or secondary schools. For the time these students are in the schools’ care, “for many purposes ‘school authorities act *in loco parentis*,’ with the power and indeed the duty to ‘inculcate the habits and manners of civility’” and, in the case of religious schools, the

parents' religious beliefs. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (citations omitted). That process "is not confined to books, the curriculum, [or] . . . class." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). Primary and secondary schools "must teach by example." *Id.*

For many years, these differences led the Board to adopt the view that *Catholic Bishop* did not even apply to institutions of higher learning. See, e.g., *Barber-Scotia Coll., Inc.*, 245 N.L.R.B. 406, 407 (1979); *Thiel Coll.*, 261 N.L.R.B. 580, 581-82 (1982). Of course, the Board has since rejected that view—and rightly so. But it has always recognized that those differences were relevant to the Board's inquiry into the religious environment of a school. See *Trustee of St. Joseph's Coll.*, 282 N.L.R.B. 65, 68 n.10 (1986) ("These differences will be one of the factors which we consider when evaluating the pervasiveness of a school's religious orientation.").

In short, there are sound reasons to view employees of a primary and secondary school differently than employees at a college or university when it comes to the First Amendment concerns that underlie *Catholic Bishop*. As in *Pacific Lutheran*, the only issue in this case is whether the Board should assert jurisdiction over employees of a college and university. As in *Pacific Lutheran*, the Board should be careful to limit its decision to that setting. See 361 N.L.R.B. No. 157, at 8 n.11 ("Our decision today is limited to addressing the requirements for units of faculty members at colleges and universities.").

CONCLUSION

For the foregoing reasons, the Board should either (i) abandon its test from *Pacific Lutheran University* and apply the *Great Falls/Carroll College* framework to determine its jurisdiction over all employees of a religious university, or (ii) at a minimum, extend the religious protections of *Pacific Lutheran* to non-teaching employees of religious universities. In any event, the Board should refrain from setting the standard for primary and secondary schools until it has a sufficient factual record before it.

Dated: February 17, 2016

Respectfully submitted,

LATHAM & WATKINS LLP

By /s/ Jonathan Y. Ellis

Joseph B. Farrell
Jonathan Y. Ellis
Angela Walker

*Counsel for Amicus Curiae
Islamic Saudi Academy*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for *Amicus Curiae* Islamic Saudi Academy in Support of Employer was electronically filed with the NLRB on February 17, 2016, and sent by electronic means to the following:

Amy Moor Gaylord
FRANCZEK RADELET P.C.
300 South Wacker Drive
Suite 3400
Chicago, IL 60606-6785
amg@franczek.com

Michele Cotrupe
Service Employees International Union, CLC
111 East Wacker Drive
25th Floor
Chicago, IL 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@nrlb.gov

/s/ Jonathan Y. Ellis
Jonathan Y. Ellis