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**Saint Xavier University and St. Xavier University
Adjunct Faculty Organization, IEA-NEA, Petitioner.** Case 13–RC–022025

August 23, 2016

DECISION ON REVIEW AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

The issue in this case is whether, under *Pacific Lutheran University*, 361 NLRB No. 157 (2014), the Board should exclude teachers of religion from an otherwise appropriate faculty bargaining unit at this self-identified religious university. We addressed this issue in our recent decision in *Seattle University*, 364 NLRB No. 84 (2016), and found that contingent faculty teaching in that university's Department of Theology and Religious Studies and School of Theology and Ministry should be excluded from an overall unit of contingent faculty. On similar facts and for similar reasons, we hold that part-time faculty teaching in St. Xavier's Department of Religious Studies should be excluded from an overall unit of part-time faculty.

The Regional Director applied *Pacific Lutheran University* to a unit comprising all part-time faculty at St. Xavier University, excluding the School of Nursing. The Regional Director found that the University holds itself out as a religious educational environment, but that the University failed to establish that it holds out its part-time faculty, other than the part-time faculty in the Pastoral Ministry Institute, as performing a religious function.¹

¹ The Petitioner filed a petition seeking to represent a bargaining unit comprising all part-time faculty at the University other than those part-time faculty in the School of Nursing. On May 26, 2011, the Regional Director issued his initial decision in this case, in which he found that the petitioned-for unit was an appropriate bargaining unit. From June 24 to July 12, 2011, the Regional Director conducted a mail-ballot election, after which the ballots were impounded. Meanwhile, the University had sought Board review of the Regional Director's decision. On December 16, 2014, the Board issued its decision in *Pacific Lutheran University*, supra, after which it issued an order remanding the instant case to the Regional Director for further action consistent with that decision. Given the Board's decision that "[a] university's contemporary presentation is more probative," 361 NLRB No. 157, slip op. at 6, and since nearly 4 years had passed since the Regional Director's initial decision, the Regional Director reopened the record to afford both parties the opportunity to submit further evidence. Based upon the entire record in this proceeding, the Regional Director issued a supplemental decision on June 1, 2015, which again asserted the Board's jurisdiction over the University and found the petitioned-for unit appropriate. The University sought review of that decision. The Petitioner filed an opposition. The Association of Catholic Colleg-

The University seeks Board review, contending that, as a religious institution, its part-time faculty is not covered by the National Labor Relations Act. In the alternative, the University contends that part-time faculty in its Department of Religious Studies should, like faculty in the Pastoral Ministry Institute, be excluded from the bargaining unit because they are held out as performing a specific religious function at the University.

The Board has delegated its authority in this proceeding to a three-member panel. After carefully considering the record, including the University's request for review and the Petitioner's opposition, we deny review of the Regional Director's determination that the University's part-time faculty are generally covered by the National Labor Relations Act and that a unit comprising those faculty is appropriate for bargaining. However, we grant review and reverse the Regional Director's determination to include in the unit those faculty who teach in the University's Department of Religious Studies. We find that the University holds them out "as performing a specific role in creating and maintaining the school's religious educational environment" within the meaning of *Pacific Lutheran University*.²

Background

St. Xavier University is a private, nonprofit university offering undergraduate and graduate degrees at its campuses located in Chicago and Orland Park, Illinois. The University was established in 1846 by the Sisters of Mercy, and it holds itself out as a religious educational institution. Its mission statement declares as follows: "Saint Xavier University, a Catholic institution inspired by the heritage of the Sisters of Mercy, educates men and women to search for truth, to think critically, to communicate effectively, and to serve wisely and compassionately in support of human dignity and the common good." The University is organized into four schools: Education, Management, Nursing, and Continuing and Professional Studies, and the College of Arts and Sciences.

es and Universities, as amicus curiae, submitted a letter in support of the University's request for review.

No party sought review of the Regional Director's exclusion of the adjunct faculty teaching in the Pastoral Ministry Institute. In the supplemental decision, the Regional Director found that no part-time faculty taught courses in the Pastoral Ministry Institute at the time the election was held.

² The Regional Director correctly found that the ballots may be opened and counted, but, for the reasons stated here, the ballots of part-time faculty in the Department of Religious Studies may not be counted. If those ballots have been commingled with other ballots, the Petitioner cannot be certified unless the Regional Director determines that it achieved a majority of countable ballots.

The College of Arts and Sciences includes the Department of Religious Studies. The department offers a wide variety of classes, including, in recent years, “Roman Catholic Tradition,” “Catholic-Social Teaching,” “Old Testament Religion,” “New Testament Christianity,” “Christian Ethics,” and the “American Catholic Religion.” The University requires all undergraduates to take courses in religious studies, although the courses do not have to be about Catholicism. At the time of the election, it appears that nine part-time faculty were teaching courses in the department. Unlike part-time faculty in other University departments and schools, part-time faculty hired to teach in the department may enter into an employment contract with the University referring to their expertise in theology.

Discussion

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court stated that the National Labor Relations Act must be construed to exclude teachers in church-operated schools because to do otherwise “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.” 440 U.S. at 502. The Court concluded that the Board’s assertion of jurisdiction over teachers in church-operated schools 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, 616 (1971)). For the Board to engage in such inquiry would violate the First Amendment. *Id.* at 504.³

Consistent with the Court’s decision in *Catholic Bishop of Chicago*, the Board in *Pacific Lutheran University* adopted a two-part test to determine when the Board may exercise jurisdiction over faculty members teaching at a self-identified religious college or university. 361 NLRB No. 157 (2014). Explaining that framework, the Board stated:

[T]he Act permits jurisdiction over a unit of faculty members at an institution of higher learning unless the university or college demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school’s religious educational environment.

³ In *Catholic Bishop of Chicago*, the Board had asserted jurisdiction over bargaining units of lay teachers at Catholic high schools operated by the Catholic Bishop of Chicago and the Diocese of Ft. Wayne-South Bend. The history of the Board’s treatment of faculty at religiously affiliated universities is summarized in *Pacific Lutheran University*, 361 NLRB slip op. at 3–5.

Id. slip op. at 5. The threshold showing is designed to be a “minimal” burden on the university, as its self-presentation in its mission statements, course catalogues, or website references will suffice to satisfy the requirement that the school “holds itself out as providing a religious educational environment.” *Id.*, slip op. at 6–7. In the second step of the test, the Board considers how the university deals with and holds out the faculty in the petitioned-for unit. Again, seeking to avoid intrusive inquiry into the religious tenets of the institution, the Board looks primarily at the school’s own statements, particularly job advertisements and descriptions, employment contracts, employee handbooks, and similar documents. *Id.*, slip op. at 8–9. The test boils down to “whether a reasonable prospective applicant [for a faculty position] would conclude that performance of [her] faculty responsibilities would require furtherance of the college or university’s religious mission.” *Id.*, slip op. at 9.

Applying this test, the Regional Director found that the University holds itself out as providing a religious educational environment, and therefore met the threshold test of *Pacific Lutheran University*. But the Regional Director further found that the University failed to establish that it holds out its part-time faculty, other than the part-time faculty in the Pastoral Ministry Department, as performing a religious function.

As stated, we deny review of the Regional Director’s determination that, as a group, the petitioned-for unit of part-time faculty generally do not play a “role in creating or maintaining the University’s religious educational environment.” *Id.*, slip op. at 11. As in *Seattle University*, supra:

Uncontested evidence shows that the vast majority of contingent faculty are not hired to advance the religious goals of the institution. For example, calculus teachers are hired based on their ability to teach calculus. They are not required to be Catholic or to take any part in any religious activities on or off campus; religion is not mentioned in their employment contracts.

Seattle University, slip op. at 2.⁴

⁴ Our dissenting colleague points to language in *Catholic Bishop of Chicago* to the effect that a teacher’s handling of secular subjects may involve some aspect of faith or religious doctrine. See 440 U.S. at 501–502. But, as stated above, the schools at issue in that case were high schools operated by the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend. Some of the schools were deemed “minor seminaries,” operated directly by an arm of the Catholic Church for the training of future priests and other Christian leaders. *Id.* at 492–493. In the words of that decision, “Religious authority necessarily pervades the school system.” *Id.* at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)). St. Xavier University, by contrast, is not an arm of the Church and does not hold itself out to potential students as a path to

Contrary to the Regional Director, however, we find that the University met its burden at the second step with respect to part-time faculty in the University's Department of Religious Studies. We find that a reasonable prospective applicant for a part-time faculty position in the department would expect that the performance of her responsibilities would require furtherance of the University's religious mission.

It is undisputed that faculty in the Department of Religious Studies teach courses with religious content. Undergraduates may take those courses, including some incorporating Catholic teachings and traditions, to fulfill core academic requirements. Faculty within the department have expertise in Catholic theology, other faith-based traditions, or other aspects of the religious experience.

In *Pacific Lutheran University*, we cited "integrating the institution's religious teachings into coursework" as a prime example of serving a religious function that would lead the Board to decline jurisdiction over faculty. *Id.* at 9. See *Seattle University*, slip. op. at 3. Asserting Board jurisdiction over faculty members who teach courses in these subjects at a religiously affiliated university would give rise to the First Amendment concerns of excessive Government entanglement that the Court addressed in *Catholic Bishop of Chicago*, 440 U.S. at 501–503. *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 7; *Seattle University*, slip op. at 3.⁵

We conclude that the University holds out the part-time faculty in the Department of Religious Studies as performing a specific role in maintaining the university's religious educational environment. Therefore, we exclude these faculty members from the unit of contingent faculty. In all other respects, the University's request for review is denied.

the priesthood. And as shown above, few of the part-time faculty are subject to any kind of religious authority.

⁵ We recognize the possibility that some course offerings in the Department of Religious Studies may have only a tenuous relationship to the religious mission of the University. But in order to avoid having to assess the religious content of any course, we exclude from the unit all part-time faculty in that department. See *Catholic Bishop of Chicago*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clause, but also the very process of inquiry leading to findings and conclusions.") (Footnote omitted.). See also *Seattle University*, slip op. at 3 fn. 6. Contrary to the dissent, excluding all of those faculty does not mean we have assessed the religious content of the courses they teach or otherwise compared the content of those courses to those taught by faculty in other departments and schools. As *Seattle University* and this decision demonstrate, we have not. Rather, we have assessed only the University's presentation of those courses to the faculty, students, and public at large.

ORDER

This case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 23, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

This case involves whether Saint Xavier University should be exempted from the jurisdiction of the National Labor Relations Board (NLRB or Board) because Board jurisdiction impermissibly encroaches on First Amendment guarantees associated with the University's status as a religiously affiliated institution.

As I explained in my dissenting opinion in *Seattle University*, my colleagues and I are not permitted to write from a clean slate regarding this issue.¹ It is governed by *NLRB v. Catholic Bishop of Chicago*,² where the Supreme Court rejected the Board's assertion of jurisdiction over "lay teachers" at church-operated schools, which the Board had attempted to justify on the basis that the schools were "religiously associated" rather than "completely religious."³ The Supreme Court held that the Board could not exercise jurisdiction over teachers in church-operated schools based on "abundant evidence" that doing so "would implicate the guarantees of the Religion Clauses."⁴

Significantly, the Supreme Court in *Catholic Bishop* did not merely find fault with the Board's "conclusions" regarding whether asserting jurisdiction over teachers at religiously affiliated institutions risked impinging on First Amendment guarantees.⁵ The Court held that these constitutional concerns were raised by "the very process of inquiry" undertaken by the Board in determining whether and when particular subjects, practices or institutions were sufficiently "secular" to permit the Board to

¹ 364 NLRB No. 84 (2016) (Member Miscimarra, dissenting).

² 440 U.S. 490 (1979).

³ *Id.* at 493 (quoting *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249, 250 (1975)).

⁴ *Id.* at 507.

⁵ *Id.* at 502.

exercise jurisdiction.⁶ The Court made clear that “[g]ood intentions by government” were not enough to “avoid entanglement with the religious mission of the school.”⁷ Most importantly, in language that my colleagues disregard here, the Court indicated that the Board could not properly exercise jurisdiction based on a conclusion that certain teachers only taught “secular subjects.”⁸ According to the Court, even when the subject taught is secular, “a teacher’s handling of [the] subject” still holds the “potential for involving some aspect of faith or morals.”⁹ The Court’s conclusion here leaves no room for interpretation: “Whether the subject is ‘remedial reading,’ ‘advanced reading,’ or simply ‘reading,’ a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists.”¹⁰

The Regional Director found it was appropriate for the Board to exercise jurisdiction over Saint Xavier University, notwithstanding his findings that it is a nonprofit educational institution affiliated with the Catholic Church and the Sisters of Mercy (a Catholic religious order).¹¹ As described by the Regional Director:

Saint Xavier University is the oldest of the 16 Mercy colleges and universities in the world and the oldest chartered Roman Catholic educational institution in Chicago.... The 2010 Official Catholic Directory listed the University as a Catholic institution located within the Archdiocese of Chicago with two priests and five sisters.

.....

The University consistently identifies itself as a Catholic institution and publicly describes those values as inspiring the education it provides. . . . [T]he University produces many publicly available programs and publications that prominently feature Catholic and Mercy themes. This includes content on its website, registration as a Catholic university, and Catholic and Christian iconography in many of its classrooms. The University is organized as a nonprofit institution.¹²

The Regional Director applied the test articulated in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), where a

⁶ Id.

⁷ Id.

⁸ Id. at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)) (emphasis omitted).

⁹ Id. (quoting *Lemon v. Kurtzman*, supra).

¹⁰ Id. (quoting *Meek v. Pittenger*, 421 U.S. 349, 370 (1975)) (emphasis added).

¹¹ Regional Director’s Supplemental Decision and Order (Supp. Dec.), June 1, 2015, at 3.

¹² Supp. Dec. at 3, 11.

Board majority stated that jurisdiction will be asserted over faculty members at religiously affiliated universities “unless the university or college demonstrates, as a threshold matter, that it *holds itself out as providing a religious educational environment*, and that it *holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school’s religious educational environment*.”¹³

My colleagues deny review of the Regional Director’s finding that the Board should exercise jurisdiction over most of the part-time faculty at Saint Xavier University. Adhering to and applying the test announced in *Pacific Lutheran*, however, they grant review and reverse the Regional Director’s assertion of jurisdiction over “those faculty who teach in the University’s Department of Religious Studies.” In other words, my colleagues draw the precise distinction—between faculty members who teach “religious” subjects, on the one hand, and those who teach “secular” subjects, on the other—that the Supreme Court rejected as entailing the type of “inquiry” that, by itself, may impermissibly “impinge on rights guaranteed by the Religion Clauses.”¹⁴

For three reasons, I would grant Saint Xavier University’s request for review in its entirety.

¹³ Id., slip op. at 5 (emphasis added). In *Pacific Lutheran*, I dissented from the Board majority’s test for determining whether to assert jurisdiction over faculty at religiously affiliated universities, as did former Member Johnson, because (among other reasons) (i) the majority rejected the three-part test for making this jurisdictional determination articulated by the Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002), and (ii) “the standards articulated by the majority suffer from the same infirmity denounced by the Supreme Court in *Catholic Bishop* and by the D.C. Circuit in *Great Falls*: those standards entail an inquiry likely to produce an unacceptable risk of conflict with the Religion Clauses of the First Amendment.” Id., slip op. at 26–27 (Member Miscimarra, concurring in part and dissenting in part); see also id., slip op. at 27–38 (Member Johnson, dissenting).

¹⁴ *Catholic Bishop*, 440 U.S. at 502; see text accompanying fns. 4–10, supra. My colleagues exclude from the petitioned-for unit the part-time faculty in the Department of Religious Studies on the grounds that “those particular faculty teach courses with religious content.” However, this is just the type of “finely spun judicial distinction[.]” that then-Judge Breyer warned, in *Universidad Central de Bayamon v. NLRB*, would raise church/state entanglement concerns and contravene *Catholic Bishop*. 793 F.2d 383, 402–403 (1st Cir. 1985) (en banc) (“[W]e cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board ‘entanglement’ as they are administered. To order the Board to exclude priests from the bargaining unit [or] to approve its having separated the seminary from the rest of the school . . . 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.”). As explained in the text, I believe the better approach is to apply the test set forth by the D.C. Circuit in *University of Great Falls v. NLRB*, supra, without regard to the religious or secular nature of the courses taught by the petitioned-for unit faculty.

First, the instant case, like *Seattle University*, vividly illustrates the First Amendment problems created by the Board majority test in *Pacific Lutheran*, and the distinction my colleagues draw between secular faculty (who my colleagues find are subject to Board jurisdiction) and “faculty [who] teach courses with religious content” (who my colleagues find are exempt from Board jurisdiction) is forbidden by the main teaching of *Catholic Bishop*, where the Supreme Court emphasized that the “very process of inquiry” associated with this type of evaluation raises First Amendment concerns,¹⁵ that the Board could not appropriately focus selectively on “secular” subjects,¹⁶ and that “[w]hether the subject is “remedial reading,” “advanced reading,” or simply “reading,” a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists.”¹⁷ Lengthy reflection is not needed to recognize that it will often be impossible to determine whether faculty members at religiously affiliated schools who ostensibly teach “secular” subjects nonetheless perform “a specific role in creating or maintaining the school’s religious educational environment.”¹⁸ However, under *Pacific Lutheran*, it now appears that the Board majority

¹⁵ 440 U.S. at 502.

¹⁶ *Id.* at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. at 617) (emphasis omitted).

¹⁷ *Id.* (quoting *Meek v. Pittenger*, 421 U.S. at 370) (emphasis added). I do not find persuasive my colleagues’ distinction between the high schools at issue in *Catholic Bishop* and Saint Xavier University here. In *Universidad Central de Bayamon*, then-Judge Breyer, whose opinion states the en banc decision of the court, concluded that the *Catholic Bishop* analysis is not limited to secondary schools or schools that are “pervasively sectarian”; it also applies to “a college that seeks primarily to provide its students with a secular education, but which also maintains a subsidiary religious mission.” 793 F.2d at 398–399; *id.* at 400–401 (finding Board’s exercise of jurisdiction over university that “holds itself out to students, faculty and community as a Catholic school” presents the same “state/religion entanglement” problems that underlay the Court’s *Catholic Bishop* holding”); see also *University of Great Falls*, above at 1342 (discussing *Bayamon* approvingly).

¹⁸ *Pacific Lutheran*, supra, slip op. at 5. Indeed, my colleagues implicitly acknowledge this problem when they “recognize the possibility that some course offerings in the Department of Religious Studies may have only a tenuous relationship to the religious mission of the University.” Contrary to my colleagues’ assertion, however, excluding from the unit all part-time faculty in that Department does not “avoid having to assess the religious content of any course.” Rather, my colleagues exclude part-time faculty in the Department of Religious Studies on the basis that they “teach courses with religious content,” which necessarily means that they *have* assessed the religious content of those courses. My colleagues say that they have not assessed the religious content of those courses but “only the University’s presentation of those courses to the faculty, students, and public at large.” However, whether the content of a course is examined by looking at a syllabus distributed only to students taking the course or at publicly available documents is beside the point. Either way, it is the content of the course that is being evaluated. Assessing the University’s “presentation” of a course means assessing the course’s content as set forth in that presentation.

will scrutinize the content of courses to determine whether they include any “religious” material, or whether their subject matter is exclusively “non-religious”: no limiting principle would obviate the need for the Board to closely examine individual topics and subtopics when making religious/secular and exempt/nonexempt determinations regarding particular faculty members and departments.¹⁹

Second, as explained in my separate opinion in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 26–27, when determining whether a religious school or university is exempt from the Act’s coverage based on First Amendment considerations, I believe the Board should apply the three-part test articulated by the D.C. Circuit in *University of Great Falls v. NLRB*, supra. Under that test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.²⁰ In my view, Saint Xavier University has clearly raised a substantial issue regarding whether it is exempt from the Act’s coverage under that three-part test. As the Regional Director found, the University holds itself out to the public as providing a religious educational environment, and it is organized as a nonprofit. Additionally, the University is affiliated with the Catholic Church and the Sisters of Mercy. Accordingly, I would grant the University’s request for review on the grounds that substantial questions exist regarding (i) whether the Board lacks jurisdiction over the University as a religiously affiliated educational institution, and (ii) whether the *Pacific Lutheran* standard is unconstitutional under the First Amendment. I would consider these jurisdictional and constitutional issues on the merits.

Third, even if one applies *Pacific Lutheran*, I would grant review because I believe there is a substantial issue regarding whether Saint Xavier University is an exempt religiously affiliated educational institution on the basis

¹⁹ As described in my dissenting opinion in *Seattle University*, some of these determinations could be quite challenging. See *Seattle University*, supra, slip op. at 5 (Member Miscimarra, dissenting) (describing examples). Obviously, the Board has no expertise regarding these types of matters; and even if it were otherwise permissible to address such matters, it is almost certain that the courts will not give deference to Board findings as to whether a particular course or material is sufficiently “religious” to warrant a determination that the faculty member who provides relevant instruction is exempt on First Amendment grounds.

²⁰ 278 F.3d at 1343.

that (1) it holds itself out as providing a religious educational environment (which the Regional Director found and my colleagues do not dispute), and (2) individuals in the petitioned-for unit play a specific role in creating or maintaining the University's religious educational environment.²¹ As to this last question, I believe substantial questions exist with respect to the role played by part-time faculty in supporting the Catholic identity and furthering the Catholic mission of the University, as well as in facilitating dialogue among various faith traditions and between those traditions and academic disciplines.²²

²¹ As explained above, I disagree with my colleagues' decision to grant review and reverse the Regional Director with respect to only the part-time faculty in the University's Department of Religious Studies, as I believe *Catholic Bishop* forecloses the distinction my colleagues draw between those faculty and the other unit faculty.

²² For example, according to the University's request for review, the University's faculty manual states that the University's mission . . . sees all learning as essentially 'religious,' and its Philosophy Statement states that the University seeks to "promote [] a vigorous and compassionate dialogue among the various faith traditions, and between them and the academic disciplines." Moreover, the request for review states that the University must adhere to *Ex Corde Ecclesiae*, promulgated by Pope John Paul II, and to the Application of *Ex Corde Ecclesiae*, promulgated by the U.S. Conference of Catholic Bishops. According to the request for review, *Ex Corde Ecclesiae* requires all faculty at Catholic universities "to respect Catholic doctrine and morals in their research and teaching." Also according to the request for review, the Application of *Ex Corde Ecclesiae* states that "faculty" at Catholic universities "participate in [the] important task" of "safeguarding and strengthening the Catholic identity of the university," and that "[a]ll professors are expected to be aware of and committed to the Catholic mission and identity of their institutions." Thus, unlike my colleagues, I believe a substantial question warranting review exists regarding whether part-time faculty—regardless of whether they are "calculus teachers [who] are hired based on their ability to teach calculus" or "[f]aculty within the [Department of Religious Studies who] have expertise in Catholic theology, other faith-based traditions, or other aspects of the religious experience"—are "hired to advance the religious goals of the institu-

Further, I believe substantial questions exist as to whether part-time faculty "are subject to employment-related decisions that are based on religious considerations."²³

For the reasons set forth above, I believe the Board should grant review of the Regional Director's decision that the Board has jurisdiction over the petitioned-for part-time faculty members. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 23, 2016

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

tion." See *Great Falls*, supra, 278 F.3d at 1346 ("That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious."); *Pacific Lutheran*, supra, slip op. at 31 (Member Johnson, dissenting) ("The majority also errs fundamentally here by assuming a false dichotomy between 'religious' and 'secular' instruction.").

²³ *Pacific Lutheran*, supra, slip op. at 10 fn. 19. For example, the University's request for review represents that *Ex Corde Ecclesiae* "calls for the recruitment of adequate university personnel, especially teachers and administrators, who are both willing and able to promote" the University's Catholic identity (emphasis added). The request for review also refers to record evidence that (i) candidates for part-time faculty positions are told during the interview process that they are expected to support the University's Catholic identity and Mercy heritage, and if candidates are unable to describe their relationship to the University's mission, they are unlikely to be hired; (ii) there would be negative consequences for faculty who denigrate the University's religious mission; and (iii) the University strongly encourages part-time faculty to participate in or attend the University's religious events and programs, and part-time faculty who actively participate may be more likely to be promoted.