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## Further and Further, Amen: Expanded National Labor Relations Board Jurisdiction over Religious Schools

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# FURTHER AND FURTHER, AMEN: EXPANDED NATIONAL LABOR RELATIONS BOARD JURISDICTION OVER RELIGIOUS SCHOOLS

**Abstract:** The National Labor Relations Board (“NLRB”) is charged with protecting workers’ rights through providing access to collective bargaining and enforcing unfair labor complaints. This charge meets an oft-competing mission, however, when applied to religiously affiliated educational institutions, which are guaranteed the protections of the religion clauses of the First Amendment. For many years, parochial schools have been beyond the reach of the NLRB. But with the Board’s 2014 decision in *Pacific Lutheran University*, that longstanding de facto moratorium has been called into question. This Note argues that the NLRB’s recently expanded jurisdiction is both inappropriate and likely unconstitutional. Ultimately, this Note recommends voluntary bargaining outside the NLRB framework as a way for the NLRB to avoid unconstitutional entanglement with religious schools and for religious educators to practice what they preach.

## INTRODUCTION

Across the United States, thousands of elementary and high schools affiliated with the Catholic Church educate approximately two million students each year.<sup>1</sup> It is a fundamental aspect of these schools’ educational and spiritual mission to incorporate religion into their operation.<sup>2</sup> Despite the schools’ religious leadership and identity, their teachers and professional staff are overwhelmingly laypersons.<sup>3</sup>

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<sup>1</sup> See *Frequently Requested Church Statistics*, CTR. FOR APPLIED RES. IN THE APOSTOLATE, <http://cara.georgetown.edu/caraservices/requestedchurchstats.html> [<http://perma.cc/XWH9-J8LD>]; *The Condition of Education*, NAT’L CTR. FOR EDUC. STAT., [http://nces.ed.gov/programs/coe/indicator\\_cgc.asp](http://nces.ed.gov/programs/coe/indicator_cgc.asp) [<http://perma.cc/L7V7-AF7N>] (listing enrollment statistics for Catholic pre-kindergarten, elementary, and high schools); *United States Catholic Elementary and Secondary Schools 2014–2015: The Annual Statistical Report on Schools, Enrollment, and Staffing*, NAT’L CATH. EDUC. ASS’N, <http://www.ncea.org/data-information/catholic-school-data> [<http://perma.cc/WVF9-833H>] [hereinafter *United States Catholic Elementary and Secondary Schools*] (reporting enrollment statistics for Catholic elementary and secondary schools).

<sup>2</sup> See *Private Schools in the United States: A Statistical Profile, 1993–94*, NAT’L CTR. FOR EDUC. STAT., <http://nces.ed.gov/pubs/ps/97459ch2.asp> [<http://perma.cc/2N9G-3H8S>] (“The most important goal of [Catholic parochial] schools, as rated by their principals, was religious development.”).

<sup>3</sup> See *United States Catholic Elementary and Secondary Schools*, *supra* note 1 (estimating that 97.2% of employees of U.S. Catholic elementary and secondary schools are laypersons); see also *Catholic School Leaders Chart the Future of Catholic Education at GSE Symposium*, FORDHAM UNIV. (May 2008), [http://legacy.fordham.edu/campus\\_resources/enewsroom/archives/archive\\_](http://legacy.fordham.edu/campus_resources/enewsroom/archives/archive_)

One such school is Nativity Preparatory School (“Nativity Prep”), a private, Catholic middle school in Jamaica Plain, Massachusetts affiliated with and sponsored by the Society of Jesus (“Jesuits”), led by a Jesuit president, and indirectly controlled by the regional Jesuit Provincial, who must approve appointments to the Board of Trustees.<sup>4</sup> Recently, the National Labor Relations Board (“NLRB” or “the Board”) opened an unfair labor practice charge against Nativity Prep.<sup>5</sup> The case stemmed from Nativity Prep’s termination of a social worker who allegedly spoke out, during staff orientation, about the school’s “increased emphasis on God.”<sup>6</sup> The social worker allegedly said numerous times, during the orientation and afterwards, that she “rejected” Nativity Prep’s Jesuit mission and felt oppressed by the school’s emphasis on God.<sup>7</sup>

One might expect the clergy administrators of a religious school, when faced with a staff member actively and openly undermining the school’s religious mission, to determine that the employment relationship is no longer viable.<sup>8</sup> That is what occurred in the case of Nativity Prep—a religious school wanted its faculty and staff to support its religious message, and therefore terminated an employee not aligned with those goals.<sup>9</sup> Now, however, Nativity Prep could face an investigation into the circumstances of the termination to determine whether the school’s action constituted an unfair labor practice—whether the clergy administrators of the school acted in good faith in reaching the conclusion that the social worker was undermining the school’s religious mission.<sup>10</sup>

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1273.asp [http://perma.cc/Z2K3-3BJZ] (estimating, in 2008, that laypeople made up 96% of Catholic school teachers).

<sup>4</sup> See *Our Mission*, NATIVITY PREPARATORY SCH., [http://www.nativityboston.org/our\\_school.html](http://www.nativityboston.org/our_school.html) [http://perma.cc/LXF9-58MQ] (describing school’s Jesuit affiliation and tradition); Letter from John F. Welsh, Esq., Att’y for Nativity Preparatory Sch., to Emily Goldman, Reg’l Office, NLRB at 1–2 (Jan. 29, 2015) (on file with author) [hereinafter Letter from Welsh] (describing characteristics, Jesuit affiliation, and extensive Jesuit ties of Nativity Preparatory School).

<sup>5</sup> See Nativity Preparatory Sch., Case No. 01-CA-144463, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/case/01-CA-144463> [http://perma.cc/9UD4-9NPY] (listing case against Nativity Preparatory School for unfair labor practice allegation).

<sup>6</sup> See Letter from Welsh, *supra* note 4, at 5.

<sup>7</sup> See *id.* The employer contends that the social worker in fact “repeatedly stated during the orientation, and thereafter, that she rejected the Jesuit mission of the school and that she found the school’s focus on God to be oppressive.” *Id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> NLRB v. Catholic Bishop of Chi. (*Catholic Bishop III*), 440 U.S. 490, 502 (1979) (stating that the resolution of unfair labor practice complaints at parochial schools by the NLRB “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”); see also 29 U.S.C. § 160 (2012) (“The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.”).

Such a scenario would previously have been unthinkable, for the U.S. Supreme Court nearly half a century ago firmly concluded that parochial schools were outside NLRB jurisdiction.<sup>11</sup> But in 2014, in *Pacific Lutheran University*, the Board introduced a new standard for determining its jurisdiction.<sup>12</sup> By focusing on the role of the specific employees of religiously affiliated colleges and universities, rather than the institutions as a whole, the Board made jurisdictional claims over schools like Nativity Prep a far more likely possibility.<sup>13</sup>

With *Pacific Lutheran*, the Board expanded its reach dramatically in announcing a new two-part test that would evaluate not only how a college or university held itself out as an institution, but how it held out the roles of its faculty.<sup>14</sup> If the university did not hold out specific faculty as performing a specific function in providing the school's religious educational environment, those employees would be eligible for unionization through NLRB-certified elections.<sup>15</sup> The NLRB would also have the power to resolve unfair labor practice claims made by those employees.<sup>16</sup> Since *Pacific Lutheran*, an NLRB Regional Director has already approved jurisdiction over a number of Catholic colleges and universities, and the Board has signaled plans to further expand jurisdiction over religious schools.<sup>17</sup>

Although the holding of *Pacific Lutheran* applied, on its face, only to colleges and universities, its principles and its test mark a worrisome turn

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<sup>11</sup> See *Catholic Bishop III*, 440 U.S. at 506 (concluding that Congress did not intend for church-operated elementary and secondary schools to be under NLRB jurisdiction); Susan J. Stabile, *Blame It on Catholic Bishop: The Question of NLRB Jurisdiction over Religious Colleges and Universities*, 39 PEPP. L. REV. 1317, 1324 (2013) (characterizing *Catholic Bishop's* holding as excluding teachers in church-operated high schools from NLRB jurisdiction).

<sup>12</sup> See *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157 1, 5 (2014) (articulating new test focused on holding out of both institution as a whole and specific faculty); Mary Kay Klimesh et al., *NLRB Continues Its Involvement in Cases Affecting the Academic Employer*, SEYFARTH SHAW (Jan. 14, 2014), <http://www.seyfarth.com/uploads/siteFiles/publications/NLRBContinuesitsInvolvementinCasesAffectingtheAcademicEmployer.pdf> [<http://perma.cc/9XMD-AWSM>] (noting that the principles of *Pacific Lutheran* and associated cases "have the potential for impacting primary and secondary schools").

<sup>13</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 5 (articulating new test focused on holding out of both institution as a whole and specific faculty).

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See 29 U.S.C. § 160 ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.").

<sup>17</sup> See *Seattle Univ.*, No. 19-RC-122863, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*1 (N.L.R.B. Mar. 3, 2015) ("[T]he Employer has not met its burden of establishing that its faculty serve a specific role in creating or maintaining the university's religious educational environment."); *Saint Xavier Univ.*, No. 13-RC-092296, 2015 WL 628582, at \*1 (N.L.R.B. Feb. 12, 2015) (remanding to Regional Director "for further appropriate action consistent with *Pacific Lutheran University*"); *Duquesne Univ. of the Holy Spirit*, No. 06-RC-080933, 2015 WL 628580, at \*1 (N.L.R.B. Feb. 12, 2015) (same); *Manhattan Coll.*, No. 02-RC-23543, 2015 WL 456602, at \*1 (N.L.R.B. Feb. 3, 2015) (same).

for religious elementary and secondary schools.<sup>18</sup> If it is no longer the institution, but the specific employee, that must be performing a religious function, then the de facto moratorium on parochial school jurisdiction that has continued since *Catholic Bishop* may be in jeopardy.<sup>19</sup>

This Note argues that the NLRB's expanding jurisdiction over religious schools is inappropriate, and probably unconstitutional—particularly in the case of parochial schools.<sup>20</sup> Part I explains the establishment and mission of the NLRB and the major developments in Board jurisdiction over religious schools since 1970.<sup>21</sup> Part I also details the complicated relationship between religious organizations' support for workers' rights and their current resistance to NLRB jurisdiction and unionization for their own employees.<sup>22</sup> Part II describes the *Pacific Lutheran* decision, its fallout, and the lingering uncertainty it has produced.<sup>23</sup> Part III argues that the NLRB's *Pacific Lutheran* test, and the resulting expanded Board jurisdiction, is inappropriate when applied to religious schools and likely unconstitutional.<sup>24</sup> Part III then proposes voluntary bargaining outside the NLRB framework as an alternative that could benefit both employees and religious employers.<sup>25</sup>

## I. A SHORT, BUT FRAUGHT, HISTORY: NLRB JURISDICTION OVER RELIGIOUS SCHOOLS

The National Labor Relations Act (“NLRA” or “the Act”) endows the NLRB with broad powers, yet those powers brush up against a formidable limit in the religion clauses of the First Amendment.<sup>26</sup> This Part describes

<sup>18</sup> See Klimesh et al., *supra* note 12 (noting that “the principles presented in” *Pacific Lutheran* could be extended to elementary and secondary schools).

<sup>19</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 7 (“We find that the focus of our inquiry into whether there is a ‘significant risk’ of infringement under *Catholic Bishop* must be on the faculty members themselves, rather than on the nature of the university as a whole.” (citation omitted) (quoting *Catholic Bishop III*, 440 U.S. at 502)); Jeffrey A. Berman, *NLRB Receives an “Incomplete” in School Case*, SEYFARTH SHAW (Dec. 22, 2014), <http://www.seyfarth.com/publications/MA122214-LE> [<http://perma.cc/TSP3-FTUU>] (noting that the Board jurisdiction could be expanded beyond colleges and universities in the wake of *Pacific Lutheran*); Klimesh et al., *supra* note 12 (describing how *Pacific Lutheran*'s holding could be applied to elementary and secondary schools).

<sup>20</sup> See *infra* notes 109–212 and accompanying text.

<sup>21</sup> See *infra* notes 26–93 and accompanying text.

<sup>22</sup> See *infra* notes 94–107 and accompanying text.

<sup>23</sup> See *infra* notes 108–154 and accompanying text.

<sup>24</sup> See *infra* notes 155–191 and accompanying text.

<sup>25</sup> See *infra* notes 192–212 and accompanying text.

<sup>26</sup> U.S. CONST. amend. I (forbidding Congress from enacting legislation “respecting an establishment of religion, or prohibiting the free exercise thereof”); see *Catholic Bishop III*, 440 U.S. at 499 (stating that, despite the “broad scope” of the NLRA, the Constitution generally, and First Amendment specifically, are limits on the Board’s power); Stabile, *supra* note 11, at 1321 (argu-

the tension and history of Board jurisdiction over religious schools.<sup>27</sup> Section A gives an overview of the NLRB—its establishment, purpose, and procedures, as well as how it typically interacts with educational institutions.<sup>28</sup> Section B gives an overview of First Amendment freedom of religion principles.<sup>29</sup> Section C details the history of NLRB jurisdiction over religious schools up to its *Pacific Lutheran* decision.<sup>30</sup> Section D discusses the contradiction between religious organizations' rhetorical support for workers' rights and their resistance to Board jurisdiction.<sup>31</sup>

### *A. The National Labor Relations Board: Establishment, Purpose, and Procedures*

In 1935, Congress passed the NLRA, which sought to protect workers' rights and facilitate union representation and collective bargaining throughout the United States.<sup>32</sup> The Act also contained a list of prohibited unfair labor practices by employers.<sup>33</sup> It created the NLRB to effectuate its provisions, including procedures for unfair labor practice complaints, reviews, Board decisions, and appeals.<sup>34</sup> Following a negative response from both employers and

ing that NLRB's ability to facilitate collective bargaining should only be curtailed when a constitutional violation is likely to result).

<sup>27</sup> See *infra* notes 32–107 and accompanying text.

<sup>28</sup> See *infra* notes 30–46 and accompanying text.

<sup>29</sup> See *infra* notes 47–70 and accompanying text.

<sup>30</sup> See *infra* notes 70–93 and accompanying text.

<sup>31</sup> See *infra* notes 94–112 and accompanying text.

<sup>32</sup> National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012). In 1934, Congress had authorized the President to establish a three-member board to implement and enforce the National Industrial Recovery Act (“NIRA”), ch. 90, 48 Stat. 195 (previously codified at 15 U.S.C. §§ 701–03 (Supp., 1934)), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Pursuant to this authorization, President Franklin Roosevelt created the three-member board, the so-called “Old NLRB,” by executive order in 1934, but the NIRA was found unconstitutional the following year. *A.L.A. Schechter*, 295 U.S. at 550; Exec. Order No. 6763, (June 29, 1934), *reprinted in* 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 322, 322 (Samuel I. Rosenman ed., 1938). The Act reads, in part:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

<sup>33</sup> 29 U.S.C. § 158.

<sup>34</sup> *Id.* §§ 153, 158, 160. An employee or employee's representative may file a complaint alleging unfair labor practices with the Board, on which the Board will hold a hearing(s) and investigates before issuing a decision. *Id.* § 160(b)–(c). The Board can petition federal district or appellate courts for enforcement of its order. *Id.* § 160(e). Anyone aggrieved by an order of the Board

labor, the Labor Management Relations Act of 1947 (“LMRA”) (popularly known as the “Taft-Hartley Act”) substantially amended the NLRA.<sup>35</sup> In addition to expanding the scope of unfair labor practices, with a focus on the practices of unions themselves, the LMRA expanded the NLRB to five members from three.<sup>36</sup>

The NLRB has twenty-six regional offices across the United States, each of which is headed by a Regional Director.<sup>37</sup> Employees, employees’ representatives, or employers can file unfair labor practice charges, which are then investigated and reviewed.<sup>38</sup> The Board receives between 20,000 and 30,000 such complaints annually.<sup>39</sup> If the relevant Regional Director determines that the claim has sufficient merit, and a settlement cannot be reached, the Board will issue a complaint.<sup>40</sup> After an unfair labor practice complaint is filed, and again if settlement fails, the case is heard before an Administrative Law Judge, whose decision can be appealed to the Board.<sup>41</sup> The five Board members are appointed by the President to five-year terms.<sup>42</sup>

NLRB jurisdiction over educational institutions plays out in two ways.<sup>43</sup> First, when employees petition for union representation, the Board oversees a representation election and then certifies the results of that election.<sup>44</sup> Second, the Board fields, investigates, and resolves unfair labor prac-

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can seek review by the U.S. court of appeals in the district in which the unfair labor practice was alleged, or in the U.S. Court of Appeals for the District of Columbia. *Id.*

<sup>35</sup> *Id.* §§ 141–197; 1947 *Taft-Hartley Substantive Provisions*, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/our-history/1947-taft-hartley-substantive-provisions> [<http://perma.cc/K82W-ZUNG>]; *Enforcement of the Wagner Act*, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/our-history/enforcement-wagner-act> [<http://perma.cc/Z29E-UTEB>] (“The budding [NLRB] was besieged not only by employers, but by labor unions as well.”).

<sup>36</sup> 29 U.S.C. §§ 151(a), 158.

<sup>37</sup> NLRB Rules and Regulations, 29 C.F.R. § 102.5 (2014) (defining Regional Director); *Who We Are*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/who-we-are> [<http://perma.cc/XJP6-4773>].

<sup>38</sup> Stabile, *supra* note 11, at 1322 (describing who can file unfair labor practice complaints and thereby trigger NLRB investigations); *Investigative Charges*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/what-we-do/investigate-charges> [<http://perma.cc/XJP6-4773>].

<sup>39</sup> *Investigative Charges*, *supra* note 38.

<sup>40</sup> Stabile, *supra* note 11, at 1322 (explaining that the NLRB will issue formal complaints against employers after a finding of merit in the charge and after arbitration fails); *Investigative Charges*, *supra* note 38.

<sup>41</sup> Stabile, *supra* note 11, at 1322 (explaining that, if a case is not settled following a formal complaint, it will be heard by an Administrative Law Judge, with an opportunity for appeal); *Administrative Law Judge Decisions*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/cases-decisions/administrative-law-judge-decisions> [<http://perma.cc/9PFB-4Q5G>] (describing the role of Administrative Law Judge hearings in the complaint process); *Investigative Charges*, *supra* note 38 (describing the complaint, investigation, and appeals process).

<sup>42</sup> *Who We Are*, *supra* note 37.

<sup>43</sup> See 29 U.S.C. §§ 159–62; Stabile, *supra* note 11, at 1321–22; *What We Do*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/what-we-do> [<http://perma.cc/D6XR-AJ6B>] (listing conducting elections and investigating charges as two functions of the NLRB).

<sup>44</sup> 29 U.S.C. § 159.

tice complaints.<sup>45</sup> Once a union is certified, the employer must bargain in good faith with the union regarding “wages, hours, and other terms and conditions of employment” or face an unfair labor practice complaint.<sup>46</sup> Investigations of unfair labor practice charges typically consist of Board employees gathering evidence and sometimes taking affidavits.<sup>47</sup>

### B. First Amendment Freedom of Religion Principles

The “religion clauses” of the First Amendment provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>48</sup> These clauses generally serve distinct, but complementary, purposes.<sup>49</sup> The purpose of the free exercise clause is to guarantee the religious liberty of the individual, free from compulsion from the state.<sup>50</sup> The interpretation of the scope of the establishment clause has been somewhat more varied and complex.<sup>51</sup>

Since the middle of the twentieth century, the U.S. Supreme Court has held that the establishment clause does more than what a literal reading of it would suggest—that it erects a dividing wall between the affairs of gov-

<sup>45</sup> *Id.* §§ 160–162.

<sup>46</sup> *Id.* § 158; see *Stabile*, *supra* note 11, at 1322.

<sup>47</sup> *Investigative Charges*, *supra* note 38.

<sup>48</sup> U.S. CONST. amend. I; see *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (describing the content and history of the religion clauses).

<sup>49</sup> See *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (stating that although the establishment and free exercise clauses may sometimes “overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom”); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 394 (1st Cir. 1985) (en banc) (stating that although the clauses address different forms of encroachment, they are nevertheless “compatible and mutually supportive”). There is, however, also an inherent potential tension in the clauses’ separate goals; government’s inability to promote a given religion can hinder the practice of that religion. See *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (discussing the “tension” between the clauses and the difficulty of promoting free exercise without violating the establishment clause); *Walz*, 397 U.S. at 668–69.

<sup>50</sup> See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (stating purpose of free exercise clause); Zachary J. Phillipps, *Non-Prophets: Why For-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment*, 46 CONN. L. REV. ONLINE 39, 46 (2014), <http://connecticutlawreview.org/files/2014/04/PhillippsNote.Non-Prophets.pdf> [<http://perma.cc/2JT2-9F5H>] (describing the design of the free exercise clause as protecting individuals against government interference in their religious beliefs).

<sup>51</sup> See Eric Rassbach, Lemon, Marsh, and *Refounding Establishment Clause Jurisprudence*, 15 RUTGERS J. L. & RELIGION 490, 492 (2014) (discussing the lack of clarity in current establishment clause jurisprudence). See generally Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728 (2006) (chronicling Supreme Court justices’ varying approaches to the establishment clause and describing the current state of Supreme Court establishment clause jurisprudence as a “hopeless muddle” lacking clarity); Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN ST. L. REV. 683 (2008) (detailing different Supreme Court justices’ historical interpretations of the establishment clause’s scope and motivation).



ernment and those of religious groups and organizations.<sup>52</sup> In 1947, in *Everson v. Board of Education*, the Supreme Court held, for the first time, that the Fourteenth Amendment applied the establishment clause to the states.<sup>53</sup> In *Everson*, the Court reviewed a New Jersey program reimbursing the parents of children using public transportation but attending parochial schools.<sup>54</sup> Although the Court held that the reimbursement program was constitutional, it set a high bar, at least rhetorically, for judicial interpretation of the establishment clause.<sup>55</sup> The Court heard a number of education-related establishment clause challenges in the years following *Everson*, with varied holdings.<sup>56</sup>

In the 1970s, the Court took a significant step forward in the development of its establishment clause doctrine.<sup>57</sup> In 1970, in *Walz v. Tax Commission*, the Court held that regardless of the intent underlying a statute, it cannot produce “an excessive government entanglement with religion.”<sup>58</sup> The following year, in *Lemon v. Kurtzman*, the Court expanded on the holding in *Walz* and set forth three requirements for a statute to pass muster under the establishment clause.<sup>59</sup> First, the legislation must have a secular purpose.<sup>60</sup> Second, its primary result cannot be the advancement or hindrance of reli-

<sup>52</sup> See, e.g., *Walz*, 397 U.S. at 669 (stating that the religion clauses “will not tolerate . . . governmental interference with religion”); *Schempp*, 374 U.S. at 217 (referring to wall of separation); *Engel*, 370 U.S. 421, 425 (same); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (same); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 18 (1947) (stating that the establishment clause “erected a wall between church and state” and prohibits the entanglement of government in religious affairs, and vice-versa).

<sup>53</sup> See *Walz*, 397 U.S. at 702 (noting that *Everson* first applied the establishment clause to state action); *Everson*, 330 U.S. at 14–15 (reasoning that the establishment clause, like the free exercise clause, should be extended to the states through the Fourteenth Amendment).

<sup>54</sup> See *Everson*, 330 U.S. at 3.

<sup>55</sup> See *id.* at 18 (stating that, although the New Jersey program is constitutional, the Court must keep the wall dividing church and state “high and impregnable” and cannot allow “the slightest breach”).

<sup>56</sup> See, e.g., *Schempp*, 374 U.S. at 205 (holding reading biblical passages in public school unconstitutional); *Engel*, 370 U.S. at 422–24 (holding unconstitutional prayer in public school); *Zorach v. Clauson*, 343 U.S. 306, 308, 312 (1952) (holding constitutional program in which students were released from public school mid-day to attend off-site religious classes); *McCollum*, 333 U.S. at 212 (holding unconstitutional joint public school-religious group education program).

<sup>57</sup> See *Walz*, 397 U.S. at 669 (introducing new test for evaluating legislation under the establishment clause); James A. Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143, 144–45 (1981) (describing the *Walz* test and characterizing it as the first appearance of an entanglement test).

<sup>58</sup> *Walz*, 397 U.S. at 674. Identifying the government actions against which the establishment clause is meant to protect as state sponsorship, financial support, and active involvement in religion, the Court then stated, in summary, that the religion clauses “will not tolerate either governmentally established religion or governmental interference with religion.” *Id.* at 668–69.

<sup>59</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (describing new test drawing in part from *Walz*).

<sup>60</sup> *Id.*

gion.<sup>61</sup> Finally, drawing from *Walz*, the Court held the legislation cannot “foster ‘an excessive government entanglement with religion.’”<sup>62</sup> The Court, in the context of government aid, pointed to three factors in judging whether the entanglement is indeed excessive: “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>63</sup>

In the time since *Lemon*, there has been disagreement and criticism, both on the bench and beyond, over its test.<sup>64</sup> Yet the Court has repeatedly declined to strike it down and has continued to employ it.<sup>65</sup>

### *C. The NLRB's Expanding Religious Jurisdiction*

The NLRA, on its face, gives the Board broad jurisdiction over employers, with limited explicit exceptions, which do not include educational institutions or religious organizations.<sup>66</sup> Nevertheless, in its earliest decades of operation, the Board declined to exert jurisdiction over nonprofit educa-

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 613 (quoting *Walz*, 397 U.S. at 674). Although *Walz* had not indicated what might constitute “excessive entanglement,” *Lemon* held that a program through which a state reimbursed religious schools for a portion of teacher salaries and supplies was unconstitutional under this prong of the test. *See Lemon*, 403 U.S. at 606–07; *Walz*, 397 U.S. at 670.

<sup>63</sup> *See Lemon*, 403 U.S. at 615. In a striking conclusion, the Court stated that, while some entanglement is inevitable, in “our [American] system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government.” *Id.* at 625.

<sup>64</sup> *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14 (2011) (mem.) (Thomas, J., dissenting from denial of certiorari) (noting instances in which the Court had ignored *Lemon*); Gey, *supra* note 51, at 730–36 (inventorying conservative justices' opposition to the *Lemon* test).

<sup>65</sup> *See Gey, supra* note 51, at 731 (describing the *Lemon* test as “the primary focus of” essentially all the Court's establishment clause decisions since *Lemon*); *see, e.g., McCreary County v. ACLU*, 545 U.S. 844, 863 (2005) (explicitly declining to abandon *Lemon* test); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (examining school policy under *Lemon* test); *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (describing *Lemon* test as that most frequently employed by the Supreme Court in establishment clause analyses). The Court has found many different schemes to be unconstitutional entanglements. *See Hernandez v. Comm'r*, 490 U.S. 680, 694 (1989) (finding non-routine government regulatory interaction entailing questioning of religious doctrine violated First Amendment); *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (finding unconstitutional an arraignment that forced religious organization to litigate with the government over “what does or does not have religious meaning”—even if only once); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (holding that a civil court's questioning of church doctrine and evaluating of the doctrine's importance to the faith addressed “matters at the very core of a religion” and was therefore unconstitutional).

<sup>66</sup> 29 U.S.C. § 152(2) (exempting from the definition of “employer” “the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act”); *Stabile, supra* note 11, at 1322 (noting the NLRA's lack of express exemption for educational employers and employees).

tional institutions.<sup>67</sup> In the 1970s, the Board changed course, asserting jurisdiction first over private colleges and universities whose operations significantly impacted interstate commerce, then over private, nonprofit secondary schools, and finally over all private colleges, universities, or secondary schools that met certain revenue requirements.<sup>68</sup>

Subsequently, the expansion extended to religiously affiliated educational institutions.<sup>69</sup> In 1975, in *Roman Catholic Archdiocese of Baltimore*, the Board clarified that its policy was to decline jurisdiction only over “completely religious” educational institutions, not those that were merely “associated” with a given faith.<sup>70</sup> Religiously affiliated organizations over

<sup>67</sup> *Trs. of Columbia Univ.*, 97 N.L.R.B. 424, 427 (1951) (declining to exercise jurisdiction over nonprofit university “where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities” of the university), *overruled by Cornell Univ.*, 183 N.L.R.B. 329, 334 (1970); *Stabile*, *supra* note 11, at 1323 (noting that until 1970 the Board declined to exert jurisdiction over nonprofit educational institutions).

<sup>68</sup> NLRB Other Rules, 29 C.F.R. § 103.1 (2014) (specifying Board policy of asserting jurisdiction over “any private nonprofit college or university which has a gross annual revenue . . . of not less than \$1 million”); *Academia San Jorge*, 234 N.L.R.B. 1181, 1181 (1978) (stating insufficient revenue as reason for declining jurisdiction over Catholic elementary and secondary school); *Judson Sch.*, 209 N.L.R.B. 677, 677 (1974) (asserting jurisdiction over private elementary and high school with annual revenues in excess of \$1 million); *Windsor Sch.*, 199 N.L.R.B. 457, 457 (1972) (stating insufficient revenue as reason for declining jurisdiction over private, for-profit secondary school); *Shattuck Sch.*, 189 N.L.R.B. 886, 886 (1971) (asserting jurisdiction over private secondary school with annual revenues in excess of \$1 million); *Cornell*, 183 N.L.R.B. at 334 (“[A]ssertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce . . . .”); *Stabile*, *supra* note 11, at 1323 n.27 (noting that, following its *Cornell* decision, the Board began to assert jurisdiction over secondary schools in addition to institutions of higher education). In its 1970 *Cornell* decision, the Board justified its change in policy by citing, among other factors, the “expanding congressional recognition” that employees of nonprofit institutions “are entitled to the same benefits which Federal statutes provide to employees” of for-profit organizations. *Cornell*, 183 N.L.R.B. at 332–33. The Board specifically stated that it would “no longer decline to assert jurisdiction over [nonprofit educational] institutions as a class.” *Id.* at 331 (emphasis added).

<sup>69</sup> *See Roman Catholic Archdiocese of Balt.*, 216 N.L.R.B. 249, 250 (1975); *Henry M. Hald High Sch. Ass’n*, 213 N.L.R.B. 415, 418 n.7 (1974), *enforcement denied by NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818 (2d. Cir. 1980); *see also Ass’n of Hebrew Teachers of Metro. Detroit*, 210 N.L.R.B. 1053, 1058 (1974) (“[T]he fact that an employer’s activity . . . is dedicated to a sectarian religious purpose is not a sufficient reason for the Board to refrain from asserting jurisdiction.”). In 1974, in *Board of Jewish Education of Greater Washington, D.C.*, the NLRB declined to apply its jurisdiction to a nonprofit Jewish educational association because the organization’s operations were noncommercial and did not extend beyond religious education and training. *See* 210 N.L.R.B. 1037, 1037 (1974). Yet later that same year, in its *Henry M. Hald High School Ass’n* decision, the Board exerted jurisdiction over an association operating Catholic diocesan high schools that employed lay teachers. *See* 213 N.L.R.B. at 416.

<sup>70</sup> *Archdiocese of Balt.*, 216 N.L.R.B. at 250 (“[T]he Board’s policy . . . has been to decline jurisdiction over similar institutions only when they are completely religious, not just religiously associated . . . .”). The Board pointed to the Catholic schools’ inclusion of academic subjects other than religion in their curricula, noting that simply seeking to provide an education based on Christian principles is not enough to escape jurisdiction, as “[m]ost religiously associated institutions seek to operate in conformity with their religious tenets.” *See id.*

which the NLRB exerted jurisdiction commonly responded that the Board's action violated the religion clauses of the First Amendment.<sup>71</sup> The Board maintained, however, that the NLRA endowed it with broad powers, and that carrying out its mission with "minimal intrusion" on the affairs of religious schools did not violate the First Amendment.<sup>72</sup>

It was in this context that, in 1977, in *Catholic Bishop of Chicago v. NLRB*, the U.S. Court of Appeals for the Seventh Circuit reviewed the NLRB's exertion of jurisdiction over private Catholic high schools in Illinois and Indiana.<sup>73</sup> The court rejected the Board's *Bishop of Baltimore* "completely religious" standard and concluded that Board jurisdiction over parochial schools would violate the First Amendment and undermine clergy school administrators' ability to carry out their religious missions.<sup>74</sup>

The NLRB petitioned the U.S. Supreme Court for a writ of certiorari to the Seventh Circuit's decision, which was granted.<sup>75</sup> In 1979, in *NLRB v.*

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<sup>71</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."); see, e.g., Cardinal Timothy Manning, 223 N.L.R.B. 1218, 1218 (1976) (employer raising possibility of excessive entanglement in opposition to Board jurisdiction); *NLRB v. Catholic Bishop of Chi. (Catholic Bishop I)*, 220 N.L.R.B. 359, 359 (1975) (employer contending that the schools in question were religious "minor seminary schools" and therefore Board jurisdiction would constitute excessive government entanglement), *enforcement denied by Catholic Bishop of Chi. v. NLRB (Catholic Bishop II)*, 559 F.2d 1112 (7th Cir. 1977), *aff'd*, *Catholic Bishop III*, 440 U.S. 490; *Hald*, 213 N.L.R.B. at 418 n.7 (employer invoking prospect of excessive entanglement through potential Board actions resulting from assertion of jurisdiction).

<sup>72</sup> See *Manning*, 223 N.L.R.B. at 1218 (explicitly disagreeing with employer that Board jurisdiction would result in excessive entanglement in violation of the First Amendment); see also *Hald*, 213 N.L.R.B. at 418 n.7 (reasoning that employer "[chose] to entangle itself in secular affairs" in employing lay, rather than solely religious, teachers).

<sup>73</sup> *Catholic Bishop II*, 559 F.2d at 1113–14. The Board had concluded that the Illinois schools were sufficiently similar to other nonreligious high schools to fail the *Archdiocese of Baltimore* "completely religious" standard despite their religious association. See *Catholic Bishop I*, 220 N.L.R.B. at 359; *Archdiocese of Balt.*, 216 N.L.R.B. at 250. The primary support for the Board's finding was the schools' own descriptions of their character and mission in public literature, the percentage of graduating students matriculating at the diocesan seminary college, and the schools' curricular and extracurricular offerings. *Catholic Bishop I*, 220 N.L.R.B. at 359. The court treated the Indiana schools as similarly situated despite their apparently lesser religious saturation. See *Catholic Bishop II*, 559 F.2d at 1118 n.5.

<sup>74</sup> *Catholic Bishop II*, 559 F.2d at 1118, 1123. The court first found that the Board's *Archdiocese of Baltimore* "completely religious" standard was essentially unworkable, as it contained no meaningful guide for the exercise of discretion in distinguishing between "completely religious" or "merely religiously associated" institutions. *Catholic Bishop II*, 559 F.2d at 1118; *Archdiocese of Balt.*, 216 N.L.R.B. at 250. The court then turned to the broader constitutional question, concluding that NLRB jurisdiction over parochial schools generally would unavoidably "alter[] and impinge[] upon [their] religious character" in violation of the First Amendment. See *Catholic Bishop II*, 559 F.2d at 1123. The court also observed that the NLRB's ability to order collective bargaining would infringe upon Catholic bishops' authority to operate parochial schools in accordance with their religious beliefs. See *id.*

<sup>75</sup> *NLRB v. Catholic Bishop of Chi.*, 434 U.S. 1061, 1061 (1978) (granting writ of certiorari).

*Catholic Bishop of Chicago*, the U.S. Supreme Court held that Congress did not intend for NLRB jurisdiction to include teachers at church-operated schools.<sup>76</sup> The Court found that NLRB jurisdiction over parochial schools posed a “significant risk” of infringing upon the First Amendment rights of these schools.<sup>77</sup> Finding no clear Congressional intent to include jurisdiction over religious schools in the NLRA, the Court invoked the doctrine of constitutional avoidance and held that the NLRB did not have jurisdiction.<sup>78</sup>

In the years immediately following the *Catholic Bishop* decision, the Board continued to exert jurisdiction over those religious educational institutions it deemed sufficiently dissimilar to the diocesan schools at issue in *Catholic Bishop*, particularly colleges and universities.<sup>79</sup> By 1986, however, the Board recognized that colleges and universities could possess similar characteristics—and present similar First Amendment concerns—to paro-

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<sup>76</sup> *Catholic Bishop III*, 440 U.S. at 507 (declining to uphold NLRB jurisdiction over teachers in church-operated schools in the absence of clear congressional intent to do so); see also Stabile, *supra* note 11, at 1324 (describing the Court’s holding in *Catholic Bishop III* as based upon Congress’s lack of express intent that teachers in church-operated schools should be covered by the NLRA).

<sup>77</sup> See *Catholic Bishop III*, 440 U.S. at 502 (framing the question before the Court as the “narrow inquiry [of] whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed”); see also Stabile, *supra* note 11, at 1324 (noting the Court’s concern that Board jurisdiction over church-operated high schools would result in excessive government entanglement in violation of the First Amendment).

<sup>78</sup> See *Catholic Bishop III*, 440 U.S. at 507 (concluding that “the record affords abundant evidence that the Board’s exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses”); Stabile, *supra* note 11, at 1324 (observing that the Court’s chosen interpretation of the NLRA allowed it to avoid delving into more specific questions of excessive entanglement). The Court also noted “the critical and unique role” occupied by teachers in carrying out the religious mission of parochial schools. See *Catholic Bishop III*, 440 U.S. at 501. This special role, the Court reasoned, would transform Board investigations of unfair labor practices into “inquir[ies] into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” See *id.* at 502. The Court stated that the process of these inquiries alone, not just the conclusions reached, could violate the First Amendment. See *id.* The Court also noted the breadth of subjects routinely included in collective bargaining, stating that this would inevitably touch upon religious issues. See *id.* at 502–03.

<sup>79</sup> See, e.g., *Bishop Ford*, 623 F.2d at 822 (declining to affirm Board jurisdiction over Catholic parochial school deemed sufficiently similar to schools at issue in *Catholic Bishop* cases); Lewis Univ., 265 N.L.R.B. 1239, 1239 (1982) (stating that the Court’s *Catholic Bishop* holding covered only “parochial elementary and secondary schools” and concluding that the university in question “is not church-operated as contemplated by *Catholic Bishop*”); Coll. of Notre Dame, 245 N.L.R.B. 386, 387 (1979) (distinguishing, for purposes of exercising jurisdiction, between institutions of higher education and elementary and secondary schools); see also Stabile, *supra* note 11, at 1324 (describing the NLRB’s initial view that *Catholic Bishop* did not prohibit it from exercising jurisdiction over colleges and universities). In addition to colleges and universities, however, the Board also exercised jurisdiction in 1979 over a Catholic secondary school, determining that it was not “church-operated” because it was “governed by an independent, lay board of trustees” rather than the local diocese. See Roman Catholic Diocese of Brooklyn, 243 N.L.R.B. 49, 50–51 (1979).

chial schools.<sup>80</sup> The Board therefore adopted a new approach, which came to be known as the “substantial religious character” test.<sup>81</sup> Under this approach, the Board holistically evaluated, “on a case-by-case basis, all aspects of a religious school’s organization and function that may be relevant to ‘the inquiry whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed.’”<sup>82</sup>

In 2000, the Board applied the “substantial religious character” test in choosing to enforce NLRB certification of a representation election for faculty members of the University of Great Falls, a private Catholic university founded by the Order of the Sisters of Providence.<sup>83</sup> The university ap-

<sup>80</sup> See *Tr. of St. Joseph’s Coll.*, 282 N.L.R.B. 65, 68 (1986) (declining to draw a distinction, because of First Amendment concerns, between elementary and secondary schools and institutions of higher education); see also *Livingstone Coll.*, 286 N.L.R.B. 1308, 1309 (1987) (describing the Board’s conclusion, in *St. Joseph’s College*, that the nature and characteristics of the college “raised a significant possibility” of First Amendment infringement from Board jurisdiction); *Stabile*, *supra* note 11, at 1324 (describing the Board’s reasoning in applying *Catholic Bishop* beyond elementary and high schools).

<sup>81</sup> See *St. Joseph’s Coll.*, 282 N.L.R.B. at 68 (“[W]e find that we can more properly accommodate first amendment concerns by considering the application of *Catholic Bishop* to all educational institutions on a case-by-case basis.”); see also *Catholic Bishop III*, 440 U.S. at 503 (“[P]arochial schools involve substantial religious activity and purpose.” (alteration in original) (quoting *Lemon*, 403 U.S. at 616)); *Univ. of Great Falls v. NLRB (Great Falls II)*, 278 F.3d 1335, 1339 (D.C. Cir. 2002); *Univ. of Great Falls (Great Falls I)*, 331 N.L.R.B. 1663, 1664 (“Since *Catholic Bishop*, the Board has decided on a case-by-case basis whether a religion-affiliated school has a ‘substantial religious character’ and therefore whether the exercise of the Board’s jurisdiction would present a significant risk of infringing on that employer’s First Amendment rights.” (quoting *Catholic Bishop III*, 440 U.S. at 502)), *vacated*, *Great Falls II*, 278 F.3d 1135; *Stabile*, *supra* note 11, at 1324 (describing the development of the “substantial religious character” test).

<sup>82</sup> See *St. Joseph’s Coll.*, 282 N.L.R.B. at 68 n.10 (quoting *Catholic Bishop III*, 440 U.S. at 502). In the case of *St. Joseph’s College*, the Board applied the “substantial religious character” test and determined that the school was church-operated because of the high degree of administrative control exerted by the Sisters of Mercy of Maine and the explicit religious requirements imposed by it on college faculty members. See *id.* at 68. By contrast, the Board applied the same test to the case of *Livingstone College* and decided that jurisdiction was appropriate given the “primarily secular” purpose of the college, lax religious requirements for faculty members, and lack of day-to-day administrative involvement by the overseeing church. See *Livingstone*, 286 N.L.R.B. at 1310. In 1987, in *Jewish Day School of Greater Washington*, the Board relied on the test and chose not to exercise jurisdiction over a Jewish K–12 school in a unionization push by teachers of secular subjects, citing the school’s substantial religious purpose as evidenced by a “substantial suffusion of religion into the curriculum,” required prayer services, and efforts to conform with Jewish doctrine, among other factors. See 283 N.L.R.B. 757, 761–62 (1987).

<sup>83</sup> *Great Falls I*, 331 N.L.R.B. at 1663, 1666. In employing the test, the Board looked beyond the institution’s religious affiliation, examining factors such as “the purpose of the employer’s operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.” See *id.* at 1664. In reaching its conclusion that “the University’s purpose and function are primarily secular,” the Board cited a number of factors relating to the school’s operation, including its governance and lay leadership, lack of Catholic emphasis in the curriculum, faculty hiring without religious requirements, absence of Catholic doctrine in university policies, and the sizeable non-Catholic proportion of the student body. See *id.* at 1665–66.

pealed, and in 2002, in *University of Great Falls v. NLRB*, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Board's decision.<sup>84</sup> The court held that the Board did not have jurisdiction over the university, and rejected the "substantial religious character" test in favor of a new standard.<sup>85</sup> The court's new test would exempt an institution from NLRB jurisdiction if the school met three conditions.<sup>86</sup> First, it must "hold[] itself out to students, faculty and community" as providing a religious educational environment.<sup>87</sup> Second, it must be "organized as a 'non-profit.'"<sup>88</sup> Third, the institution must be "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."<sup>89</sup>

The Board subsequently exercised jurisdiction over Carroll College, a private institution affiliated with the Synod of Lakes and Prairies of the United Presbyterian Church.<sup>90</sup> The college appealed the Board's decision, which, in 2009 in *Carroll College, Inc. v. NLRB*, the U.S. Court of Appeals

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<sup>84</sup> *Great Falls II*, 278 F.3d at 1337.

<sup>85</sup> *Id.* at 1347–48; see Nicholas Macri, Note, *Missing God in Some Things: The NLRB's Jurisdictional Test Fails to Grasp the Religious Nature of Catholic Colleges and Universities*, 55 B.C. L. REV. 609, 622 (2014) (characterizing the court's reasoning in rejecting the "substantial religious character" test); see also Stabile, *supra* note 11, at 1319 (noting that the probing nature of the "substantial religious character" test led the court to adopt a new test in *Great Falls*). In *Great Falls II*, the court characterized the "substantial religious character" test as precisely the sort of probing inquiry rejected in *Catholic Bishop*. See *Great Falls II*, 278 F.3d at 1341. As evidence of the "trolling," invasive nature of the NLRB's inquiry under the "substantial religious character" test, the court offered the Board's thorough questioning of *Great Falls*'s president regarding the school's religious mission and how it was implemented and maintained. See *id.* at 1342–43.

<sup>86</sup> *Great Falls II*, 278 F.3d at 1347; see also Stabile, *supra* note 11, at 1328 (describing the D.C. Circuit's "bright-line" *Great Falls* test); Macri, *supra* note 85, at 623 (describing the D.C. Circuit's approach in *Great Falls II*).

<sup>87</sup> *Great Falls II*, 278 F.3d at 1343 (quoting *Bayamon*, 793 F.2d at 403); see also Stabile, *supra* note 11, at 1328 (describing the requirements of the *Great Falls* test); Macri, *supra* note 85, at 623 (same).

<sup>88</sup> *Great Falls II*, 278 F.3d at 1343; see also Stabile, *supra* note 11, at 1328 (describing the requirements of the *Great Falls* test); Macri, *supra* note 85, at 623 (same).

<sup>89</sup> *Great Falls II*, 278 F.3d at 1343; see also Stabile, *supra* note 11, at 1328 (describing the requirements of the *Great Falls* test); Macri, *supra* note 85, at 623 (same). The court declined to fully adopt the third prong, as the University of *Great Falls* clearly satisfied it. See *id.* at 1343–44.

<sup>90</sup> *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 570 (D.C. Cir. 2009). The college had conceded jurisdiction under *Catholic Bishop*, and instead brought a challenge under the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb-1 (2012); see *Carroll Coll.*, 558 F.3d at 570. Nevertheless, the NLRB Regional Director concluded that the college was not exempt under the "substantial religious character" test, but also noted that it would fail to meet the first prong of the *Great Falls* standard. See *Carroll Coll.*, 558 F.3d at 573. The Regional Director found *Carroll*'s public statements "of principle and purpose" to be merely "aspirational" rather than demonstrative of an actual religious environment sufficient to exempt the school from NLRB jurisdiction. See *id.* The Regional Director also found no evidence of religious control or involvement in the operation of the school. See *id.*

for the District of Columbia Circuit reversed.<sup>91</sup> The court applied the *Great Falls* test, concluding that Carroll College clearly met its requirements.<sup>92</sup> The court rejected the nature of the Board's "skeptical inquiry" into the operations of the college, characterizing it as a "heightened standard" departing from *Great Falls*.<sup>93</sup>

#### D. Religious Educators: Contradictory Messages, Questions of Autonomy

Although courts have limited the NLRB's jurisdiction over schools controlled by religious organizations, these religious organizations ironically often possess traditional doctrines or official contemporary platforms that promote workers' rights.<sup>94</sup> Many of the major faiths in the United States have voiced strong support for the labor movement and the rights of workers.<sup>95</sup> The American Baptist Churches in the U.S.A., the United Methodist Church, the General Assembly of the Presbyterian Church, and the Central Conference of American Rabbis are among the faith organizations that have made official declarations of support for workers' right to unionize.<sup>96</sup>

<sup>91</sup> *Carroll Coll.*, 558 F.3d at 570, 572.

<sup>92</sup> *Id.* at 572, 574 (noting that it should have been readily apparent to the Board that the college was exempt from jurisdiction under *Catholic Bishop*); see also Stabile, *supra* note 11, at 1328 n.67 (characterizing the *Carroll College* court as "reiterat[ing]" the *Great Falls* test); Macri, *supra* note 85, at 624 n.94 (characterizing the *Carroll College* court as "reaffirm[ing]" the *Great Falls* approach). The court pointed to the college's charter documents, mission statement and statement of purpose, and formal written agreement with the Synod as evidence sufficient to satisfy the first prong of the *Great Falls* test. See *Carroll Coll.*, 558 F.3d at 572.

<sup>93</sup> *Carroll Coll.*, 558 F.3d at 573. In assessing whether the school holds itself out as providing a religious environment, the Board should not, the court stated, look any deeper than the institution's public statements and publicly available materials. See *id.* The court reasoned that a more probing inquiry "is tantamount to questioning the sincerity of the school's public representations about the significance of its religious affiliation." See *id.*

<sup>94</sup> See Kathryn Jean Lopez, *Keeping Faith with Labor: Can Unions and Churches Maintain Their Longtime Friendship?*, LABOR WATCH (July 2003), available at <http://www.catholiceducation.org/en/religion-and-philosophy/social-justice/keeping-faith-with-labor-can-unions-and-churches-maintain-their-longtime-friendship.html> [<http://perma.cc/HKZ9-KGZP>] (describing the strong historical ties between religious groups and the American labor movement); *What Faith Groups Say About Workers' Freedom to Choose a Union*, NAT'L INTERFAITH COMM. FOR WORKER JUST., <http://www.aflcio.org/content/download/2552/24720/Faith+Groups+on+Employee+Workers'+Freedom+to+Choose+a+Union.pdf> [<http://perma.cc/PF4G-HKUF>] [hereinafter *Workers' Freedom*] (listing official statements of eleven religious bodies in support of the labor movement and workers' rights).

<sup>95</sup> See Lopez, *supra* note 94 (noting "the longtime partnership between labor unions" and Protestant, Catholic, and Jewish faith leaders); *Workers' Freedom*, *supra* note 94 (listing official statements of eleven religious bodies in support of the labor movement and workers' rights).

<sup>96</sup> See *Workers' Freedom*, *supra* note 94. The American Baptist Churches in the U.S.A. Resolution of 1981 expressed clear support for workers' "right to organize." *Id.* The Social Principles of the United Methodist Church similarly stated support for the right to unionize and bargain collectively. *Id.* The General Assembly of the Presbyterian Church declared, in 1995, that "[a]ll workers . . . have the right to choose to organize for the purposes of collective bargaining." *Id.* The Central Conference of American Rabbis, at its 1993 Annual Convention, adopted a Resolution stating: "Jewish leaders, along with our Catholic and Protestant counterparts, have always sup-



Nowhere is this support for workers' rights more evident than the Catholic Church.<sup>97</sup> As early as 1891, Pope Leo XIII voiced support for labor unions, calling for the establishment of organizations to take the place of the previously eradicated labor guilds.<sup>98</sup> In 1986, the U.S. Conference of Catholic Bishops declared its full support for workers' right to unionize.<sup>99</sup> The Bishops even went so far as to state, notably: "All church institutions must also fully recognize the rights of employees to organize and bargain collectively with the institution through whatever association or organization they freely choose."<sup>100</sup>

Despite the Catholic Church's formal rhetoric, many of the notable challenges to NLRB jurisdiction over religious schools have come from organizations affiliated with or controlled by the Church.<sup>101</sup> This can, in part, be explained by the significant role the Church plays in education in America, with nearly three million students attending approximately 7000 Catholic schools

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ported the labor movement and the rights of employees to form unions for the purpose of engaging in collective bargaining and attaining fairness in the workplace." *Id.*

<sup>97</sup> See Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom from and Freedom for*, 49 VILL. L. REV. 77, 105 (2004) (noting the Catholic Church's longstanding support of workers' right to unionize and bargain collectively); Lopez, *supra* note 94 (describing the Catholic Church as "historically the most recognizable and organized church advocate of U.S. labor unions").

<sup>98</sup> See Pope Leo XIII, *Rerum Novarum (On the Condition of the Working Classes)* § 3 (1891), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html) [<http://perma.cc/WY8K-9CNS>] (calling for a replacement for the "workingmen's guilds" that had been abolished). Pope Leo XIII went on to praise the beneficial opportunities afforded by "workingmen's unions." *Id.* Nearly a century later, Pope John Paul II echoed these sentiments, calling unions "an indispensable element of social life, especially in modern industrialized societies," and "a mouthpiece for the struggle for social justice." See Pope John Paul II, *Laborem Exercens (On Human Work)* § 20 (1981), [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html) [<http://perma.cc/6E7Y-8GRL>].

<sup>99</sup> U.S. CATH. BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE ECONOMY ¶ 104 (1986), [http://www.usccb.org/upload/economic\\_justice\\_for\\_all.pdf](http://www.usccb.org/upload/economic_justice_for_all.pdf) [<http://perma.cc/XKL5-UMGV>] ("The Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions . . . . No one may deny the right to organize without attacking human dignity itself."); see also Brady, *supra* note 97, at 116 (noting the pastoral letter's focus on elevating the role and involvement of the employee in the "operation and management" of business organizations).

<sup>100</sup> See U.S. CATH. BISHOPS, *supra* note 99, ¶ 353. The Bishops, noting the availability of "new creative models of collaboration between labor and management," urged "church institutions to adopt new fruitful modes of cooperation" with employees. See *id.*

<sup>101</sup> See, e.g., *Catholic Bishop III*, 440 U.S. at 492 (schools challenging jurisdiction controlled by Catholic Bishop of Chicago and Diocese of Fort Wayne-South Bend); *Bayamon*, 793 F.2d at 399-400 (university challenging jurisdiction administratively controlled by the Dominican order of the Catholic Church); *Bishop Ford*, 623 F.2d at 823-24 (school challenging jurisdiction independently operated but largely controlled by Diocese of Brooklyn); *St. Joseph's Coll.*, 282 N.L.R.B. at 65 (college challenging jurisdiction largely controlled and supported by the Sisters of Mercy of Maine); *Notre Dame*, 245 N.L.R.B. at 386 (college challenging jurisdiction independently operated but affiliated with the Sisters of Notre Dame de Namur).

across the United States.<sup>102</sup> But the question remains: why do religious organizations, such as the Catholic Church, officially and strongly promote workers' rights while simultaneously resisting NLRB efforts to do the same?<sup>103</sup>

The dominant answer put forward by religious organizations themselves is the potential loss of autonomy over decisions central to faith, doctrine, and religious mission.<sup>104</sup> Specifically, these institutions are concerned that the subjects of collective bargaining could potentially reach to their core religious functions.<sup>105</sup> Yet some have suggested that religious institu-

<sup>102</sup> See *United States Catholic Elementary and Secondary Schools*, *supra* note 1; see also *FAQs: Catholic Higher Education*, ASS'N CATH. C. & U., <http://www.acunet.org/i4a/pages/index.cfm?pageid=3797#HowMany> [<http://perma.cc/FV8N-AZ6J>]. As of the 2011–12 academic year, there were 262 Catholic institutions of higher education in the United States enrolling 940,000 students. See *FAQs: Catholic Higher Education*, *supra*. In the 2014–15 academic year, there were 6568 Catholic elementary and secondary schools in the United States (5368 elementary; 1200 secondary) enrolling 1,939,574 students. See *United States Catholic Elementary and Secondary Schools*, *supra* note 1.

<sup>103</sup> See Brady, *supra* note 97, at 105 (pointing to the inconsistency between longstanding Church position on unionization and collective bargaining and Catholic employers' refusal to bargain collectively); Stabile, *supra* note 11, at 1331 (noting that Catholic social doctrine strongly supports collective bargaining among workers); Brian Fraga, *Unions, Yes. But When the Church Is Employer?*, OUR SUNDAY VISITOR (Apr. 6, 2011), <https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMid/13636/ArticleID/10096/Unions-yes-But-when-the-Church-is-employer.aspx> [<http://perma.cc/57P3-TQWN>] (“Despite Catholic teaching on workers’ rights to organize, U.S. Church leaders and institutions have often had a history of strained relationships with their employees . . .”); Clayton Sinyai, *Which Side Are We on?*, AMERICA MAG. (Jan. 19, 2015), <http://americamagazine.org/issue/which-side-are-we> [<http://perma.cc/V8MN-YSU4>] (quoting Brian Klisavage, President, Federation of Pittsburgh Diocesan Teachers, as stating: “How can the church support the rights of steelworkers and grape pickers when we don’t support the rights of our own?”).

<sup>104</sup> See Brady, *supra* note 97, at 105 (summarizing the entanglement and autonomy concerns cited by employers in resisting Board jurisdiction). Courts have seconded this answer in the context of parochial schools. See *Catholic Bishop III*, 440 U.S. at 502 (concluding that the resolution of unfair labor practices 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”); *Bishop Ford*, 623 F.2d at 822 (stating that the risk of entanglement issues in NLRB investigation of unfair labor practices is “real and not theoretical”); see also Brief for Respondents at 15, *Catholic Bishop III*, 440 U.S. 390 (No. 77-752), 1978 WL 207227 (arguing that Board jurisdiction over teachers at Catholic colleges and universities would result in the Board “directing or influencing religious matters” at the schools with “[t]he Church . . . shar[ing] its authority” with unions); Brief for Petitioners at 40, *Great Falls II*, 278 F.3d 1335 (No. 00-1415), 2001 WL 36037993 (arguing that those operating the university feel bound to do so in accordance with their religious obligations); Adelle M. Banks, *Religious College Presidents Agree on Common Threats to Their Schools*, CRUX (Feb. 4, 2015), <http://www.cruxnow.com/life/2015/02/04/religious-college-presidents-agree-on-calling-and-common-threats-to-their-schools> [<http://perma.cc/EV66-VAQN>] [hereinafter Statement of John Garvey] (statement of John Garvey, President, Catholic University of America, expressing concern that the federal government would exert control “over the people and the courses that are being taught at religious universities”); Open Letter from Charles J. Dougherty, Ph.D., President, Duquesne Univ. (June 22, 2012), <http://www.duq.edu/news/president-doughertys-letter-addressing-an-nlr-issue> [<http://perma.cc/M3E3-VGZK>] (warning that unionization could result in the loss of the university’s religious identity).

<sup>105</sup> See *Catholic Bishop III*, 440 U.S. at 502–03 (detailing the ways in which Board resolution of unfair labor practice complaints against church-operated schools is likely to veer into questions

tions use the autonomy concern only to mask the true reason they object to NLRB jurisdiction: they simply would rather not engage in mandatory collective bargaining with their employees.<sup>106</sup> Others argue that even if motivated by legitimate concerns, Catholic institutions have an obligation to bargain with employees.<sup>107</sup>

## II. UNDAUNTED EXPANSION: *PACIFIC LUTHERAN UNIVERSITY* CREATES A NEW LANDSCAPE OF UNCERTAINTY AND HYPOCRISY

The Board's 2014 decision in *Pacific Lutheran University* dramatically expanded its reach over religious schools.<sup>108</sup> Section A of this Part describes *Pacific Lutheran*.<sup>109</sup> Section B looks at the fallout from the decision.<sup>110</sup> Section C examines its implications for further expanded Board jurisdiction.<sup>111</sup>

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of religious doctrine and mission). In *Catholic Bishop*, the Court pointed to actual unfair labor complaints cited in the lower court's opinion to demonstrate the threat of entanglement: two instances in which teachers had not been offered contracts as a result of teaching in opposition to Church doctrine, and one instance in which a teacher's contract was not renewed following a lifestyle choice, marriage to a divorced Catholic, disapproved of by the Church. *See id.* (citing *Catholic Bishop II*, 559 F.2d at 1125). The Court noted that resolving claims such as these would necessarily involve questioning whether the actions of school administrators were legitimately motivated by their religious beliefs and the mission of the school. *See id.* at 502. The Court also expressed concern that the Board would be tasked with determining which subjects would fall under mandated bargaining, potentially reaching "nearly everything that goes on in the schools." *See id.* at 503 (quoting *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 547 P.2d 647, 650 (Or. Ct. App. 1976)). The Court invoked a 1975 opinion of the Pennsylvania Supreme Court in warning that mandatory collective bargaining would necessarily produce "encroachment upon the former autonomous position of management." *See id.* (quoting *Pa. Labor Relations Bd. v. State Coll. Area Sch. Dist.*, 337 A.2d 262, 267 (Pa. 1975)).

<sup>106</sup> *See* Brady, *supra* note 97, at 81 (conceding that not all religious employers resisting government interference "will use their freedom well"); David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27, 67 (1992) (anticipating that some religious employers "may be tempted to invoke the secular doctrine of the legal regime to avoid the higher internal obligations" of their faith); Beth Griffin, *Adjunct Faculty Want to Form Union at Catholic University, Two Colleges*, CATH. NEWS SERV. (Aug. 12, 2013), <http://www.catholicnews.com/services/englishnews/2013/adjunct-faculty-want-to-form-union-at-catholic-university-two-colleges.cfm> [<http://perma.cc/K6PR-BDLA>] (quoting Duquesne University professor asserting that the university's resistance is about preventing unionization rather than religious autonomy); Sinyai, *supra* note 103 (arguing that if Duquesne University is truly concerned about religious autonomy, the best solution would be "collective bargaining outside the N.L.R.B. framework").

<sup>107</sup> *See* Gregory, *supra* note 106, at 67 (arguing that religious organizations have an obligation to deal with their employees according to the teachings of their religion); Sinyai, *supra* note 103 (pointing to the inconsistency of Catholic universities contending that they are too religious for NLRB jurisdiction while failing to follow their own social teaching).

<sup>108</sup> *See* Pac. Lutheran Univ., 361 N.L.R.B. No. 157 at 5 (2014) (articulating new test focused on holding out of both institution as a whole and specific faculty).

<sup>109</sup> *See infra* notes 112–132 and accompanying text.

<sup>110</sup> *See infra* notes 139–149 and accompanying text.

<sup>111</sup> *See infra* notes 150–161 and accompanying text.

### A. Pacific Lutheran University: *Expanding NLRB Jurisdiction Once Again*

In 2014, in *Pacific Lutheran University*, the Board issued a decision in which it asserted jurisdiction over a private university affiliated with the Evangelical Lutheran Church in America.<sup>112</sup> The challenge arose from the university's objection to a union petition for representation of a unit of contingent Pacific Lutheran faculty.<sup>113</sup> In its decision, the Board—which had never explicitly adopted the D.C. Circuit's test in *University of Great Falls v. NLRB*—announced a new standard, drawing largely from, but going beyond, *Great Falls*.<sup>114</sup> To qualify for jurisdictional exemption, “an institution of higher learning” must satisfy two criteria.<sup>115</sup> First, as in *Great Falls*, the institution must “hold[] itself out as providing a religious educational environment.”<sup>116</sup> But the Board added a second prong: that the college or university “holds out the petitioned-for faculty member's [sic] as performing a specific role in creating or maintaining the school's religious educational environment.”<sup>117</sup> This second requirement could be satisfied by evidence drawn from the public statements of the university to its own faculty or stu-

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<sup>112</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 1, 11.

<sup>113</sup> See *id.* at 1.

<sup>114</sup> See *id.* at 5 (characterizing the new test as “faithful to the holding of *Catholic Bishop*, sensitive to the concerns raised by the parties and amici, and consistent with our statutory duty”); see also *Univ. of Great Falls v. NLRB (Great Falls II)*, 278 F.3d 1335, 1343, 1347–48 (D.C. Cir. 2002) (laying out *Great Falls* test); *Catholic Soc. Servs.*, 355 N.L.R.B. No. 167, 1–2 (2010) (declining to apply *Great Falls* test to Catholic social-service agency whose primary purpose was not education); *Salvation Army*, 345 N.L.R.B. 550, 550 (2005) (declining to apply *Great Falls* test because institution, though religious, was not involved in education).

<sup>115</sup> *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 5. The Board's decision is explicitly limited to faculty of colleges and universities. *Id.* at 10 n.11; see also Berman, *supra* note 19 (noting that the Board's decision is limited to faculty members of colleges and universities).

<sup>116</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 5. The Board added that evidence of non-profit status “may be relevant in an examination of how a university holds itself out.” *Id.* at 7. The Board declined to adopt the third prong of the *Great Falls* test. *Id.*

<sup>117</sup> See *id.* The Board stated that once the first threshold requirement is met, “the focus of our inquiry into whether there is a ‘significant risk’ of infringement . . . must be on the faculty members themselves, rather than on the nature of the university as a whole.” *Id.* at 10 (quoting *NLRB v. Catholic Bishop of Chi. (Catholic Bishop III)*, 440 U.S. 490, 502 (1979)). The Board's rationale for this added requirement was based on *Catholic Bishop's* emphasis on the role of the teacher in furthering the religious mission of parochial schools. See *Catholic Bishop III*, 440 U.S. at 501 (describing “the critical and unique role of the teacher in fulfilling the mission of a church-operated school”); *Pac. Lutheran*, 361 N.L.R.B. No. 57 at 7–8. Where college or university faculty members occupy no such role in furthering the institution's religious mission, the Board reasoned, the First Amendment concerns raised in *Catholic Bishop* are not present and NLRB jurisdiction is appropriate. See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 8 (“By contrast, where faculty members are not expected to play such a role in effectuating the university's religious mission and are not under religious control or discipline, the same sensitive First Amendment concerns of excessive entanglement . . . are not implicated.”). Such faculty members, the Board stated, “are indistinguishable from faculty at colleges and universities which do not identify themselves as religious institutions and which are indisputably subject to the Board's jurisdiction.” *Id.*

dents, potential faculty or students, or to the public at large.<sup>118</sup> In extending the “holding out” principle to the role of faculty, the Board sought to avoid invasive inquiries into institutional operations.<sup>119</sup> The Board also reasoned that the “holding out” requirement would incorporate the “market check” principle, for universities will be discouraged from overstating the religious requirements placed on faculty so as not to discourage potential applicants for employment.<sup>120</sup>

Applying this new test, the Board found that Pacific Lutheran failed to meet the test’s second prong.<sup>121</sup> Although the Board found that the university as a whole held itself out as providing a religious educational environment, it found that the university did not hold out the particular unit of contingent faculty seeking union representation as playing a role in that religious environment.<sup>122</sup> In support of this conclusion, the Board noted how the university did not consider religion in hiring or evaluating contingent faculty members, how faculty members testified that religion was not discussed in the hiring process, and how the university issued statements encouraging diversity.<sup>123</sup>

Two NLRB Members dissented from the Board’s decision in *Pacific Lutheran*, both arguing for application of the *Great Falls* test and against its

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<sup>118</sup> *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 8–9 (stating that jurisdiction will be applied where the institution “‘holds out’ its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university’s religious purpose or mission”). The Board stated that it would not scrutinize “faculty members’ actual performance of their duties,” but also would not find sufficient only “[g]eneralized statements that faculty members are expected to, for example, support the goals or mission of the university.” *See id.* at 8. The Board further clarified that university statements of “commitment to diversity and academic freedom” would fall in favor of exercising jurisdiction, as they reinforce the signal that religion would not affect “faculty members’ job duties or responsibilities.” *See id.* Examples of appropriate sources of evidence listed by the Board include “job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students.” *Id.* at 9. The Board pledged not to “look behind these documents,” but rather to take them at face value. *See id.*

<sup>119</sup> *See id.* at 10 (characterizing the “holding out” requirement as avoiding judging the institution’s beliefs, asking it to explain those beliefs, or pressuring it to modify its practices).

<sup>120</sup> *See id.* at 9 (noting that, akin to prospective students picking a college, potential employees could be either discouraged or attracted by overt university statements about the religious responsibilities of faculty). In *Great Falls*, the D.C. Circuit articulated the same principle regarding the effect on potential applicants of universities’ religious statements. *See Great Falls II*, 278 F.3d at 1344.

<sup>121</sup> *See Pac. Lutheran*, 361 N.L.R.B. No. 157 at 12.

<sup>122</sup> *See id.* at 13 (concluding that the university does not “hold [faculty] out as performing any religious function in creating or maintaining its religious educational environment”).

<sup>123</sup> *Id.* at 14 (finding “nothing” in university documents that would indicate to existing or potential faculty or the university community that contingent faculty fill a religious role). The Board did note that employment contracts contained a requirement that faculty members “be committed to the mission and objectives of the University.” *Id.* at 13. The Board dismissed this provision, however, as the “type of representation [that] does not communicate the message that employees are expected to perform a specific religious function and is not specifically linked to any job duties to be performed by the faculty.” *Id.* at 13 n.25.

extension to specific faculty members.<sup>124</sup> Member Johnson, in his dissent, first reemphasized the constitutional avoidance principles articulated in *Catholic Bishop*.<sup>125</sup> He then expressed support for the first prong of the Board's new test—whether the institution holds itself out as providing a religious educational environment—adopted from *Great Falls*.<sup>126</sup> Member Johnson opposed, however, the second prong, pointing to U.S. Supreme Court precedent warning against governmental line-drawing between the religious and the secular, and against the resulting burden on the institution to conform to those categorizations.<sup>127</sup> To Member Johnson, the majority misjudged the university's embrace of academic freedom and diversity, failing to appreciate the degree to which widely held secular values can overlap with important religious principles.<sup>128</sup> Member Johnson went on to criticize the majority's test as being overly subjective and demonstrating a lack of

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<sup>124</sup> See *id.* at 27 (Miscimarra, Member, concurring in part and dissenting in part) (favoring the *Great Falls* standard and stating that the Board lacks jurisdiction over Pacific Lutheran under that standard); *id.* at 28 (Johnson, Member, dissenting) (expressing lack of support for new test and expressing preference for the *Great Falls* standard).

<sup>125</sup> See *Catholic Bishop III*, 434 U.S. at 507 (declining, given the lack of explicit congressional intent to include parochial school teachers in NLRB jurisdiction, to choose an interpretation of the NLRA that would require the Court to decide constitutional questions); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 29 (Johnson, Member, dissenting) (noting that, despite its importance, the NLRA is outweighed by the First Amendment and citing *Catholic Bishop's* avoidance “warning”). Member Johnson summarized the Board's limitations after *Catholic Bishop*: “We are commanded, in any situation in which the rights protected by the Act could be interpreted as violating the Constitution, to determine whether there is a possible construction of the Act that would avoid such problems.” *Id.*

<sup>126</sup> See *Great Falls II*, 278 F.3d at 1343 (exempting an institution from Board jurisdiction based in part on whether “it . . . ‘holds itself out to students, faculty and community’ as providing a religious educational environment” (quoting *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 403 (1st Cir. 1985) (en banc)); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 30 (Johnson, Member, dissenting) (arguing that the first prong of the new test is helpful in establishing that the school is in fact “a *bona fide* religious institution” and that jurisdiction would therefore raise First Amendment concerns).

<sup>127</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 30–31 (Johnson, Member, dissenting) (opposing second prong of *Pacific Lutheran* test and invoking Supreme Court disapproval of probing inquiries into religious views of institution); see, e.g., *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (describing inquiring into a school's religious beliefs to determine whether it is “pervasively sectarian” as “offensive”); *Hernandez v. Comm’r*, 490 U.S. 680, 694 (1989) (calling “pervasive monitoring” of institutions for religious or sectarian character a “central danger against which [the Court has] held the Establishment Clause guards” (quoting *Aguilar v. Felton*, 473 U.S. 402, 413 (1985))); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (calling it a “significant burden” to force a religious institution to anticipate “on pain of substantial liability . . . which of its activities a secular court will consider religious”); *New York v. Cathedral Acad.*, 434 U.S. 125, 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 . . .”).

<sup>128</sup> *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 32 (Johnson, Member, dissenting) (pointing to possibility of “religious and secular parallelism”).

appreciation for the nuances of religious education, characterizing it as a “repackaged” version of the “substantial religious character” test.<sup>129</sup>

Member Johnson then argued for the Board to adopt a standard essentially identical to the *Great Falls* test.<sup>130</sup> Under the application of this test to the facts of Pacific Lutheran University, Member Johnson concluded that the Board should have declined to exercise jurisdiction.<sup>131</sup> He also argued, though, that even under the majority’s test, the university should be exempt, given the unique nature of the Lutheran educational mission and the role of faculty therein.<sup>132</sup>

### B. *The Pacific Lutheran Fallout*

In the wake of the Board’s decision in *Pacific Lutheran*, NLRB officials have taken a newly expansive view of Board jurisdiction over religious schools.<sup>133</sup> On March 3, 2015, the NLRB Regional Director for Region 19 issued a decision in the case of Seattle University, a Jesuit Catholic institution.<sup>134</sup> A unit of non-tenure-track, contingent faculty employed by the university was seeking union representation.<sup>135</sup> After the Regional Director ordered a representation election, which thereby recognized Board jurisdiction over the university, the university appealed for lack of jurisdic-

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<sup>129</sup> *Id.* (criticizing oversimplified view of the religious versus the secular in the context of education).

<sup>130</sup> *Id.* at 35. The only difference between the test articulated in *Great Falls* and that recommended by Member Johnson is the latter’s full endorsement of the third prong (affiliation with a religious organization), while the *Great Falls* court declined to fully adopt it. See *Great Falls II*, 278 F.3d at 1343–44 (no need to reach third prong of test in that case); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 35 (Johnson, Member, dissenting) (stating that third prong will ensure only “bona fide” religious schools escape jurisdiction).

<sup>131</sup> *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 35 (Johnson, Member, dissenting) (arguing that Pacific Lutheran satisfies *Great Falls* test).

<sup>132</sup> *Id.* at 36 (arguing that Pacific Lutheran holds out its faculty as occupying a significant role in school’s religious mission).

<sup>133</sup> See *Manhattan Coll.*, No. 02-RC-023543, 2015 NLRB Reg. Dir. Dec. LEXIS 172, at \*4 (N.L.R.B. Aug. 26, 2015) (finding adjunct faculty at Catholic university fail second prong of *Pacific Lutheran* test); *Duquesne Univ.*, No. 06-RC-080933, 2015 NLRB Reg. Dir. Dec. LEXIS 104, at \*3 (N.L.R.B. June 5, 2015) (same); *Saint Xavier Univ.*, No. 13-RC-022025, 2015 NLRB Reg. Dir. Dec. LEXIS 97, at \*33 (N.L.R.B. June 1, 2015) (same); *Seattle Univ.*, No. 19-RC-122863, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*1 (N.L.R.B. Mar. 3, 2015) (same).

<sup>134</sup> See *Seattle Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*1; *About Seattle University*, SEATTLE U., <http://www.seattleu.edu/about> [<http://perma.cc/H93F-MLCK>] (“Seattle University . . . is a Jesuit Catholic university . . .”). The term “Jesuit” refers to the Society of Jesus, a Catholic order closely associated with education. See *One Mission, Many Ministries*, SOC’Y JESUS, <http://jesuits.org/whatwedo> [<http://perma.cc/77HL-DTY6>] (describing education as “a cornerstone of the Society of Jesus”).

<sup>135</sup> See *Seattle Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*2.

tion.<sup>136</sup> The Board then remanded the case for further review in light of the *Pacific Lutheran* decision.<sup>137</sup>

Applying the new *Pacific Lutheran* test, the Regional Director found that, although the university met the first requirement, the faculty unit in question was not beyond the scope of NLRB jurisdiction.<sup>138</sup> In his analysis, the Regional Director examined the statements made to the faculty in question during the hiring process and in the course of employment.<sup>139</sup> Finding a lack of religious requirements imposed on contingent faculty, with the exception of a “generalized” statement requiring religious respect in the faculty handbook, the Regional Director concluded that the faculty members were not held out as performing a religious function.<sup>140</sup>

Then, in the span of less than three months, NLRB Regional Directors found jurisdiction appropriate at three Roman Catholic colleges and universities.<sup>141</sup> On June 1, 2015, the Regional Director for Region 13 issued a decision in the case of Saint Xavier University, also a Roman Catholic university, and similarly concluded that the university failed the second prong of the *Pacific Lutheran* test as applied to adjunct faculty.<sup>142</sup> And on June 5, 2015, the Regional Director for Region 6 reached the same conclusion regarding adjunct faculty at Duquesne University, another Catholic university.<sup>143</sup> Manhattan College, also a Roman Catholic university, followed on

<sup>136</sup> See *id.* at \*1–2.

<sup>137</sup> See Seattle Univ., No. 19-RC-122863, 2015 WL 456610, at \*1 (N.L.R.B. Feb. 3, 2015) (remanding to Regional Director “for further appropriate action consistent with *Pacific Lutheran University*”).

<sup>138</sup> See *Seattle Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*9–10 (concluding that the university failed to establish “that its faculty serve a specific role in creating or maintaining the university’s religious educational environment.”).

<sup>139</sup> See *id.* at \*4–6.

<sup>140</sup> See *id.* at \*9–10. The “generalized” faculty handbook statement read: “[E]ach member of the faculty is expected to show respect for the religious dimension of human life.” *Id.* at \*9. The Regional Director compared this with a similar statement in the *Pacific Lutheran University* handbook, and found the Seattle statement “significantly weaker.” See *id.* The Regional Director also noted that the faculty handbook’s “specific responsibilities” section does not mention religion, but requires faculty to “maintain competence as teachers and an understanding of current developments in their disciplines.” See *id.* at \*9–10. The Regional Director did not note, however, that “specific responsibilities” also include “primary responsibility for course and curriculum development” and “participat[ion] in University governance through faculty and committee activities.” See *id.* at 30.

<sup>141</sup> *Manhattan Coll.*, 2015 NLRB Reg. Dir. Dec. LEXIS 172, at \*4; *Duquesne Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 104, at \*3; *Saint Xavier Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 97, at \*33.

<sup>142</sup> See *Saint Xavier Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 97, at \*33. The exception to this category of faculty was those teaching at the university’s Pastoral Ministry Institute, which offered specialized religious coursework. See *id.* at \*32–33.

<sup>143</sup> See *Duquesne Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 104, at \*3.



August 26, 2015, after the Region 2 Regional Director found that it, too, failed the second prong of the *Pacific Lutheran* test for adjunct faculty.<sup>144</sup>

### C. How Far Does the Board Intend to Go?

The NLRB's decision in *Pacific Lutheran University* created new confusion and perpetuated old uncertainty over a number of critical factors for religious educational institutions in the United States.<sup>145</sup> It is still unclear, for example, to which schools *Catholic Bishop* applies.<sup>146</sup> And it is unclear whether the Board intends to further expand its jurisdiction beyond institutions resembling Pacific Lutheran University—and, if so, how far the Board intends to go.<sup>147</sup>

On the latter question, the Regional Directors' decisions in *Seattle University*, *Saint Xavier University*, *Duquesne University*, and *Manhattan College* clarified, somewhat, the expected scope of Board jurisdiction in the wake of *Pacific Lutheran*.<sup>148</sup> If adjunct faculty at these universities are subject to NLRB jurisdiction, it would appear that similar decisions will be reached at other religious colleges and universities; unless the institution can point to a more specific religious requirement expressed to prospective or employed faculty, the outcome will likely be the same.<sup>149</sup>

<sup>144</sup> See *Manhattan Coll.*, 2015 NLRB Reg. Dir. Dec. LEXIS 172, at \*4.

<sup>145</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 5 (articulating new test focused on whether a college or university holds out faculty members as performing a specific role in the institution's religious environment); Mary Kay Klimesh et al., *Education Unions Ignore NLRB's Call for "Timeout,"* SEYFARTH SHAW (June 3, 2014), <http://www.seyfarth.com/publications/OMM060314-LE2> [<http://perma.cc/R4H5-GF2F>] (“For now, religious schools can do little more than sit and wait for the ultimate decision from the Board on [jurisdiction over religious schools].”).

<sup>146</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 5 n.4 (stating that *Catholic Bishop* dealt only to teachers at parochial schools, and that its reasoning was then extended to faculty of colleges and universities); Stabile, *supra* note 11, at 1328–29 (noting that there are two different schools of thought as to the “extent to which *Catholic Bishop* should be read to apply to religious colleges and universities”).

<sup>147</sup> See Klimesh et al., *supra* note 12 (“Although most of the education cases involve colleges and universities, the principles presented in them have the potential for impacting primary and secondary schools . . .”); *Statement Following the NLRB Ruling Regarding Pacific Lutheran University*, ASS'N CATH. C. & U. (Dec. 22, 2014), <http://www.accunet.org/files/Religious%20Liberty/NLRB-PLU-statement-final.pdf> [<http://perma.cc/VLE3-TUDF>] (“Because the Board [in *Pacific Lutheran University*] stated that it would apply this new standard to other pending cases, its decision is likely to affect a number of [Catholic colleges and universities].”).

<sup>148</sup> See *Manhattan Coll.*, 2015 NLRB Reg. Dir. Dec. LEXIS 172, at \*4 (finding adjunct faculty at Catholic university fail second prong of *Pacific Lutheran* test); *Duquesne Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 104, at \*3 (same); *Saint Xavier Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 97, at \*33 (same); *Seattle Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*2 (same).

<sup>149</sup> See *Manhattan Coll.*, 2015 NLRB Reg. Dir. Dec. LEXIS 172, at \*30–36 (describing lack of religious requirements for attaining and maintaining employment as a faculty member); *Duquesne Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 104, at \*26–29 (describing lack of religious requirements for attaining and maintaining employment as adjunct faculty); *Saint Xavier Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 97, at \*28–33 (describing lack of religious requirements for

But beyond religious colleges and universities, another question remains unanswered, one with potentially vast implications not considered in decades: will the Board assert jurisdiction over employees of religious elementary and secondary schools?<sup>150</sup> Since *Catholic Bishop*, the Board's jurisdictional expansion has been almost exclusively limited to religious colleges and universities.<sup>151</sup> *Pacific Lutheran*, on its face, explicitly applies only to colleges and universities.<sup>152</sup> But the decision, and its new role-specific test, opens the door to broader jurisdiction claims potentially beyond higher education.<sup>153</sup> If it is no longer the nature of the school, but the role of the specific employee that determines the Board's jurisdiction, the de facto blanket exemption for elementary and secondary schools could be lifted.<sup>154</sup>

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attaining and maintaining employment as adjunct faculty); *Seattle Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*25–27 (describing lack of religious requirements for attaining and maintaining employment as a faculty member); Jose A. Olivieri, *Is Pacific Lutheran Standard a Hail Mary for Adjuncts?*, LAW360 (Aug. 5, 2015), <http://www.law360.com/articles/685780/is-pacific-lutheran-standard-a-hail-mary-for-adjuncts> [http://perma.cc/7BWU-25BK] (pointing to the fact-intensive nature of several of the Regional Directors' decisions and suggesting that to escape jurisdiction colleges and universities will need to show religious requirements beyond what is seen in these employment relationships).

<sup>150</sup> See Berman, *supra* note 19 (pointing out that *Pacific Lutheran* left open the question of whether the reasoning will be extended to elementary and high schools); Klimesh et al., *supra* note 12 (“Although most of the education cases involve colleges and universities, the principles presented in them have the potential for impacting primary and secondary schools . . .”).

<sup>151</sup> See *Bishop Ford*, 623 F.2d at 822 (declining to exercise jurisdiction over Catholic high school in spite of the fact that Diocese no longer directly controlled the school); *Jewish Day Sch. of Greater Wash.*, 283 N.L.R.B. 757, 761–62 (1987) (declining to exercise jurisdiction over Jewish K–12 school); Brady, *supra* note 97, at 78–79 (“The only area of significant disagreement is whether the NLRA applies to church-affiliated colleges and universities.”). But see *Islamic Saudi Acad. Employer*, No. 05-RC-080474, 2012 WL 3561042, at \*1 (N.L.R.B. Aug. 17, 2012) (ordering representation election for non-teaching unit of employees), *vacated*, *Islamic Saudi Acad. Employer (Islamic Saudi Acad. II)*, No. 05-RC-080474, 2015 WL 849084, at \*1 (N.L.R.B. Feb. 26, 2015), *remanded to Islamic Saudi Acad. Employer (Islamic Saudi Acad. III)*, No. 05-RC-080474, 2015 NLRB Reg. Dir. Dec. LEXIS 176, at \*26–27 (N.L.R.B. Sept. 1, 2015).

<sup>152</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 11 (stating the revised standard will be applied “when a college or university argues that the Board cannot exercise jurisdiction over a petitioned-for unit of faculty members because the university is a religious one” (emphasis added)).

<sup>153</sup> See *id.* at 8 (emphasizing that the focus of the new test is how specific faculty members are held out in relation to the institution's religious environment); Klimesh et al., *supra* note 12 (noting that the reasoning of the *Pacific Lutheran* decision could be extended to elementary and high schools).

<sup>154</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 7 (“We find that the focus of our inquiry into whether there is a ‘significant risk’ of infringement under *Catholic Bishop* must be on the faculty members themselves, rather than on the nature of the university as a whole.” (emphasis added) (citation omitted) (quoting *Catholic Bishop III*, 440 U.S. at 502)); Klimesh et al., *supra* note 12 (noting that the reasoning of the *Pacific Lutheran* decision could be extended to elementary and high schools). On September 1, 2015, though, the Regional Director for Region 5 declined to exercise jurisdiction over teachers at an Islamic K–12 school, though he did find jurisdiction was appropriate for non-teaching employees. See *Islamic Saudi Acad. III*, 2015 NLRB Reg. Dir. Dec. LEXIS 176, at \*26–27. This decision was based, however, on the school's extensive religious requirements imposed on faculty and expressed before and after hiring; unless parochial schools

### III. BREAKING THE CYCLE: VOLUNTARY NEGOTIATION AS AN ALTERNATIVE TO UNCONSTITUTIONAL AND PROBLEMATIC BOARD EXPANSION

The NLRB's *Pacific Lutheran University* decision was only the latest step in a decades-long cycle in which the Board has expanded its jurisdiction over religious educational institutions, only to have the courts step in and draw it back.<sup>155</sup> This pattern highlights the fundamental tension underlying NLRB jurisdiction over religious schools: the NLRB strives to properly carry out its mission, as defined in the NLRA, in an area in which the employers in question are afforded particularly strong constitutional protections.<sup>156</sup> It is highly likely that the Board's *Pacific Lutheran University* standard will be challenged in the courts, where it may well be struck down or narrowed.<sup>157</sup> Regardless of the outcome of such a challenge, the test—and the resulting Board jurisdiction—is likely unconstitutional when applied to religious schools.<sup>158</sup> Section A of this Part points out *Pacific Lutheran's* dubious constitutional footing, for both colleges and universities and, especially, elementary

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have similar requirements, *Islamic Saudi Academy* should likely not be read to foreclose the possibility of expanded Board jurisdiction. See *id.* at \*17–22 (discussing the numerous ways in which religion doctrine is woven into the job performance and hiring of teachers and pointing to example where teacher was disciplined for nonconformity).

<sup>155</sup> See *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, 327–28 (2014) (Johnson, Member, dissenting) (“In the years since [*Catholic Bishop*], the Board has occasionally attempted to push back against the Court’s decision, narrowly construing it in order to once more advance Board jurisdiction over religious schools. The courts of appeals, however, have refused to go along . . . .”); e.g., *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 573 (D.C. Cir. 2009) (applying *Great Falls* test to private college affiliated with Presbyterian Church and concluding jurisdiction was not appropriate); *Univ. of Great Falls v. NLRB (Great Falls II)*, 278 F.3d 1335, 1347–48 (D.C. Cir. 2002) (replacing the “substantial religious character” standard with new, less intrusive test); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 403 (1st Cir. 1985) (en banc) (applying *Catholic Bishop* to Catholic college and reversing order of Board jurisdiction). See generally *Nat’l Labor Relations Bd. v. Catholic Bishop of Chi. (Catholic Bishop III)*, 440 U.S. 490 (1979) (holding that the NLRB does not have jurisdiction over teachers in church-operated schools).

<sup>156</sup> See *Catholic Bishop III*, 440 U.S. at 499 (stating that, despite the “broad scope” of the NLRA, the Constitution generally, and First Amendment specifically, are limits on the Board’s power); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 3 (“[W]e [the Board] are charged with protecting workers’ exercise of their rights under the Act to the fullest permissible extent . . . .”); *id.* at 29 (Johnson, Member, dissenting) (“[W]hile the [NLRA] is of paramount importance in almost every other scenario—it is dwarfed by the First Amendment’s protection of religion.”).

<sup>157</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 38 (Johnson, Member, dissenting) (predicting that “the courts will have to, once again, reintroduce the Board to the doctrine of constitutional avoidance” after the *Pacific Lutheran* decision); see also *id.* at 26–27 (Miscimarra, Member, concurring in part and dissenting in part) (noting the difficulty of departures from the *Great Falls* test surviving review by the D.C. Circuit); Berman, *supra* note 19 (predicting that the *Pacific Lutheran* decision will be reviewed by federal courts of appeal, and perhaps the U.S. Supreme Court); Olivieri, *supra* note 149 (predicting that *Pacific Lutheran* will be “rejected by the courts”).

<sup>158</sup> See *infra* notes 161–191 and accompanying text.

and high schools.<sup>159</sup> Section B then proposes an alternative way forward that could benefit both employees and religious educational institutions: voluntary bargaining outside of the NLRB framework.<sup>160</sup>

### A. The Dubious Footing of Pacific Lutheran

The Board's *Pacific Lutheran* test is highly likely to be challenged in the courts.<sup>161</sup> There, the standard may well suffer the same fate as the Board's previous "substantial religious character" test and be narrowed or rejected outright.<sup>162</sup> Unfair labor practice decisions by the Board can be appealed to the U.S. Court of Appeals for the District of Columbia Circuit, which is the same court that, in 2002 in *University of Great Falls v. NLRB*, rejected the "substantial religious character" test in favor of a new, less intrusive test.<sup>163</sup> It also the court that, just six years ago, affirmed the latter standard in *Carroll College, Inc. v. NLRB*.<sup>164</sup> Therefore, the D.C. Circuit is unlikely to be receptive to yet another departure from the test it put forward in *Great Falls*.<sup>165</sup> Or, as a dissenting NLRB Member wrote in *Pacific Lu-*

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<sup>159</sup> See *infra* notes 161–191 and accompanying text.

<sup>160</sup> See *infra* notes 192–212 and accompanying text.

<sup>161</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 38 (Johnson, Member, dissenting) (predicting that "the courts will have to, once again, reintroduce the Board to the doctrine of constitutional avoidance" after the *Pacific Lutheran* decision); *Statement Following the NLRB Ruling Regarding Pacific Lutheran University*, *supra* note 147 ("The courts may ultimately determine the standard for NLRB's jurisdiction over religiously affiliated institutions.").

<sup>162</sup> See *Carroll Coll.*, 558 F.3d at 573 (rejecting Board's application of "heightened standard" of inquiry more searching than *Great Falls* test); *Great Falls II*, 278 F.3d at 1341–43 (D.C. Cir. 2002) (rejecting "substantial religious character" test and proposing new, less intrusive three-part inquiry); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 26–27 (Miscimarra, Member, concurring in part and dissenting in part) (noting the difficulty of departures from the *Great Falls* test surviving review by the D.C. Circuit).

<sup>163</sup> 29 U.S.C. § 160(f) (2012) (giving one aggrieved by a Board decision concerning an unfair labor practice the ability to seek "review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia" (emphasis added)); see *Great Falls II*, 278 F.3d at 1341–43 (rejecting "substantial religious character" test and proposing new, less intrusive three-part inquiry).

<sup>164</sup> See *Carroll Coll.*, 558 F.3d at 573 (rejecting Board's application of "heightened standard" of inquiry more searching than *Great Falls* test).

<sup>165</sup> See *id.* (noting how the Board's new test went further than what the D.C. Circuit deemed permissible in *Great Falls*); *Great Falls II*, 278 F.3d at 1341–43 (rejecting "substantial religious character" test and proposing new, less intrusive three-part inquiry); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 26 (Miscimarra, Member, concurring in part and dissenting in part) ("[T]he D.C. Circuit [has already] addressed the very question presented here . . ."). It is also worth noting that if a challenge were to reach the U.S. Supreme Court, it would be reviewed in part by the author of the decision that inspired the *Great Falls* test: then-Judge, now Justice, Stephen Breyer. See *Great Falls II*, 278 F.3d at 1343 (noting that the new three-part test is "drawn partially from Judge Breyer's controlling opinion in *Bayamon*"); *Bayamon*, 793 F.2d at 403.

theran, “even if one disagreed with *Great Falls*, any attempt by the Board to chart a different path appears predestined to futility.”<sup>166</sup>

Regardless of the circuit hearing the challenge, the *Pacific Lutheran* test is unlikely to survive judicial review.<sup>167</sup> First, whichever federal court will hear it is likely to be bound by the same principles of constitutional avoidance and deference to Supreme Court precedent, rather than administrative interpretation, invoked by the court in *Great Falls*.<sup>168</sup> But second, and more importantly, *Pacific Lutheran* would likely be struck down as unconstitutional.<sup>169</sup>

Applying the entanglement test from the U.S. Supreme Court’s 1971 decision in *Lemon v. Kurtzman* to the facts of *Pacific Lutheran*, the Board’s new test does not fare well.<sup>170</sup> The NLRA passes the first part of the *Lemon* test because the law is clearly secular in purpose and even in its primary effects.<sup>171</sup> But, the application of the *Pacific Lutheran* test fails the final part of the test because in looking beyond the religious nature of the school itself, it creates an unconstitutional entanglement with religion.<sup>172</sup> The *Pacific Lutheran* test allows for NLRB actions and investigations against religious institutions, even if certain faculty members are deemed tangential to their religious mission.<sup>173</sup> To find entanglement, the *Lemon* test inquires as to

<sup>166</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 27 (Miscimarra, Member, concurring in part and dissenting in part).

<sup>167</sup> See *id.* at 26 (“[The *Pacific Lutheran* test] entail[s] an inquiry likely to produce an unacceptable risk of conflict with the Religion Clauses of the First Amendment.”).

<sup>168</sup> See *Great Falls II*, 278 F.3d at 1340–41 (citing the court’s obligation to follow the *Catholic Bishop* Court’s avoidance of interpretation that would threaten constitutionality of the statute and its deferral to the Court, rather than the NLRB, on matters of constitutional concern).

<sup>169</sup> See *infra* notes 172–191 and accompanying text.

<sup>170</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 606–07 (1971) (describing program of state aid reimbursement to religious schools). Despite the lack of clarity in prevailing Supreme Court establishment clause jurisprudence, *Lemon* remains one of—if not the—most influential standards for assessing potential Establishment Clause violations. See Gey, *supra* note 51, at 764 (chronicling the lack of prevailing Establishment Clause standard but including *Lemon* as one of the remaining tests in use); Rassbach, *supra* note 51, at 492–93 (acknowledging “lack of clarity” on establishment clause jurisprudence but characterizing *Lemon* as one of two competing standards).

<sup>171</sup> See 29 U.S.C. § 151 (2012) (stating the NLRA’s purpose as ensuring the “free flow of commerce”); *Investigative Charges*, *supra* note 38 (stating that the Board receives between 20,000 and 30,000 unfair labor practice complaints annually, a very small proportion of which likely involve religious employers).

<sup>172</sup> See *Lemon*, 403 U.S. at 613; *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 5.

<sup>173</sup> See, e.g., Manhattan Coll., No. 02-RC-023543, 2015 NLRB Reg. Dir. Dec. LEXIS 172, at \*4 (N.L.R.B. Aug. 26, 2015) (finding school holds itself out, but not faculty, as providing religious environment); Duquesne Univ., No. 06-RC-080933, 2015 NLRB Reg. Dir. Dec. LEXIS 104, at \*3 (N.L.R.B. June 5, 2015) (finding school holds itself out, but not faculty, as providing religious environment); Saint Xavier Univ., No. 13-RC-022025, 2015 NLRB Reg. Dir. Dec. LEXIS 97, at \*33 (N.L.R.B. June 1, 2015) (finding school holds itself out, but not faculty, as providing religious environment); Seattle Univ., No. 19-RC-122863, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*2 (N.L.R.B. Mar. 3, 2015) (finding school holds itself out, but not faculty, as providing reli-

“the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>174</sup> The first and third factors here cut in favor of unconstitutionality: these are overtly religious institutions, and the relationship is one where, conceivably, government investigators could be routinely, aggressively questioning religious educators about the contours and sincerity of their faith.<sup>175</sup>

Looking beyond *Lemon* to more recent cases, *Pacific Lutheran* fares no better.<sup>176</sup> In 2000, in *Mitchell v. Helms*, the U.S. Supreme Court, in the context of a parochial school, warned courts against the “offensive” act of probing the beliefs of religious organizations.<sup>177</sup> Moreover, the sampling of other situations courts have deemed unacceptable all are reminiscent of NLRB Board oversight at religious educational institutions.<sup>178</sup>

gious environment); see also *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 12 (finding school holds itself out, but not faculty, as providing religious environment).

<sup>174</sup> See *Lemon*, 403 U.S. at 615 (describing the factors in assessing excessive entanglement).

<sup>175</sup> See *Catholic Bishop III*, 440 U.S. at 502 (stating that the resolution of unfair labor practice complaints at parochial schools by the NLRB “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”); e.g., *Manhattan Coll.*, 2015 NLRB Reg. Dir. Dec. LEXIS 172, at \*15 (describing testimony of Brother Jack Curran, the college’s vice president of mission); *Seattle Univ.*, 2015 NLRB Reg. Dir. Dec. LEXIS 39, at \*2 (describing the testimony of the university president, a Catholic priest); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 12 (describing relationship between university and church); see also John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. REV. 1167, 1178–79 (2003) (describing the Catholic Bishop Court’s concern that government actors would judge religious institutions’ beliefs based on subjective, preconceived notions or favor secular practices over religious).

<sup>176</sup> See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000); *Hernandez v. Comm’r*, 490 U.S. 680, 694 (1989); *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969).

<sup>177</sup> *Mitchell*, 530 U.S. at 828 (warning that “courts should refrain from trolling through a[n] . . . institution’s religious beliefs”).

<sup>178</sup> See *Hernandez*, 490 U.S. at 694 (calling “pervasive monitoring” of institutions for religious or sectarian character a “central danger against which [the Court has] held the Establishment Clause guards” (quoting *Aguilar v. Felton*, 473 U.S. 402, 413 (1985))); *Catholic Bishop III*, 440 U.S. at 502 (stating that the resolution of unfair labor practice complaints at parochial schools by the NLRB “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”); *Cathedral Acad.*, 434 U.S. at 133 (“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 . . .”); *Presbyterian Church*, 393 U.S. at 450 (noting that the First Amendment prohibits civil courts from resolving “core” religious questions, such as doctrinal issues and their “importance” to the faith); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 33 (“Many of the questions typically arising in cases under the [NLRA] will thrust the Board into the prohibited role of arbiting [sic] issues of religious doctrine.”); *Investigative Charges*, *supra* note 38 (describing information-gathering investigation after a charge has been filed, which can include NLRB officials taking affidavits).

Given the “unique and central role” of the teacher in the parochial school system, parochial schools would satisfy both the first and second prong of the *Pacific Lutheran* test.<sup>179</sup> If the Board exercised jurisdiction over parochial schools, however, the constitutional infirmities seen with college and university oversight would grow graver still, and the Board’s decision to exercise jurisdiction would be reversed by the courts.<sup>180</sup> First, NLRB jurisdiction over parochial schools was the exact scenario reviewed by the Court in *Catholic Bishop*, so the precedent is directly on point.<sup>181</sup> Second, all of the entanglement concerns present with religious colleges and universities grow stronger with parochial schools, whose primary purpose can fairly be seen as religious inculcation.<sup>182</sup> This impacts the *Lemon* analysis, as it deepens the religious nature of the “character and purposes of the institutions” with which the government will be interacting.<sup>183</sup>

Beyond the entanglement issue, the *Pacific Lutheran* test may also infringe upon religious schools’ First Amendment rights to freely exercise their religion.<sup>184</sup> By compelling religious schools to alter the way in which they fulfill their religious mission, the government is interfering with the

<sup>179</sup> See *Catholic Bishop III*, 440 U.S. at 501 (describing “the critical and unique role of the teacher in fulfilling the mission of a church-operated school”); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 5 (describing the significant role of faculty in satisfying the test to avoid NLRB jurisdiction).

<sup>180</sup> See *supra* notes 181–190 and accompanying text (arguing that *Pacific Lutheran* is even more clearly unconstitutional when applied to parochial schools and that, regardless, parochial schools could satisfy its test).

<sup>181</sup> See *Catholic Bishop III*, 440 U.S. at 492–93 (describing the schools at issue); Lewis Univ., 265 N.L.R.B. 1239, 1239 (1982) (stating that “*Catholic Bishop* applies only to parochial elementary and secondary schools”). Although the Court used the term “church-operated schools” in its holding, in 1980 in *NLRB v. Bishop Ford Cent. Catholic High School*, the U.S. Court of Appeals for the Second Circuit held that *Catholic Bishop*’s reasoning applied to religiously affiliated parochial schools regardless of direct diocesan control. See 623 F.2d 818, 822 (2d. Cir. 1980).

<sup>182</sup> See *Catholic Bishop III*, 440 U.S. at 501 (observing, of the parochial schools at issue, that “[r]eligious authority necessarily pervades the school system” (quoting *Lemon*, 403 U.S. at 617)); *Private Schools in the United States: A Statistical Profile, 1993–94*, NAT’L CTR. FOR EDUC. STAT., <http://nces.ed.gov/pubs/ps/97459ch2.asp> [<http://perma.cc/C4UR-T28J>] (“The most important goal of [Catholic parochial] schools, as rated by their principals, was religious development.”); see also SOC’Y OF JESUS, THE CHARACTERISTICS OF JESUIT EDUCATION 19, [http://www.sjweb.info/documents/education/characteristics\\_en.pdf](http://www.sjweb.info/documents/education/characteristics_en.pdf) [<http://perma.cc/JD55-UERD>] (“Jesuit education . . . remains an instrument to help students know God better . . . . The aim of Jesuit education is the formation of principled, value-oriented persons for others after the example of Jesus Christ. *Teaching in a Jesuit school, therefore, is a ministry.*” (emphasis added)).

<sup>183</sup> See *Lemon*, 403 U.S. at 615 (describing the factors in assessing excessive entanglement).

<sup>184</sup> See *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (calling it a “significant burden” to force a religious institution to anticipate “on pain of substantial liability . . . which of its activities a secular court will consider religious”); *Great Falls II*, 278 F.3d at 1346 (warning against exempting only those religious schools “with hard-nosed proselytizing . . . [and] no academic freedom”).

schools' free exercise of their religious beliefs.<sup>185</sup> The *Pacific Lutheran* test raises the very likely prospect of religious institutions proactively altering their practices in response to the threat of litigation and NLRB jurisdiction.<sup>186</sup> A prime possible victim of this urge is the freedom typically afforded faculty at religiously affiliated colleges and universities—a critical component, for many faiths, of engaging with the wider world in service of God.<sup>187</sup> It is not hard to imagine an institution now making more overt statements in the hiring process and placing more heavy-handed restrictions and requirements on faculty.<sup>188</sup> This danger also highlights the Board's simplistic assessment of and shallow appreciation for the history of religious education.<sup>189</sup> The *Pacific Lutheran* test, as applied to Pacific Lutheran University and other religious colleges and universities, blatantly fails to acknowledge the unique connection between religious mission and education.<sup>190</sup> To dismiss academic freedom as a sign of secularism betrays the perils of passing judgment on the complicated, often nuanced way a religious institution chooses to carry out its mission.<sup>191</sup>

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<sup>185</sup> See *Corp. of the Presiding Bishop*, 483 U.S. at 336; *Great Falls*, 278 F.3d at 1346 (cautioning that limiting the *Catholic Bishop* exception to only the most rigidly religious institutions may suppress schools' ability to freely express their religion).

<sup>186</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 31 (Johnson, Member, dissenting) ("Requiring a university's public expressions to demonstrate performance of a 'specific religious function' by the faculty will likely consequently warp the expression of the university's religious mission itself.>").

<sup>187</sup> See *Great Falls II*, 278 F.3d at 1347 (declining to affirm Board jurisdiction over university despite fact that university "espouse[s] belief in academic freedom."); *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 37 (Johnson, Member, dissenting) (arguing that academic freedom is an important doctrinal "religious commitment" of Lutheran education); *St. Joseph's Coll.*, 282 N.L.R.B. 65, 66, 68 (1986) (declining to affirm Board jurisdiction over college despite its subscription to formal statement of academic freedom adopted by the American Association of University Professors); Brief for Petitioners, *supra* note 104, at 31 ("Academic freedom exists within and as a part of the University's Catholic mission.>").

<sup>188</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 14 (finding "nothing" in university documents that would indicate to existing or potential faculty or the university community that contingent faculty fill a religious role); *id.* at 31 (Johnson, Member, dissenting) ("The Board should . . . avoid creating a test that will act as a harmful mutagen to a religious university's expressions of its own religion.>").

<sup>189</sup> See *Great Falls II*, 278 F.3d at 1346 (warning against exempting only those religious schools "with hard-nosed proselytizing . . . [and] no academic freedom" and suggesting that doing so may itself "violat[e] . . . the most basic command of the Establishment Clause").

<sup>190</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 36 (Johnson, Member, dissenting) (contending that "that academic freedom has been a fundamental principle of the Lutheran faith since its inception"); Brief for Petitioners, *supra* note 104, at 11 (statement of Dr. Frederick Gilliard, former President, Univ. of Great Falls) ("Catholic universities have an extra dimension to them . . . . We are at once engaged in intellectual inquiry, but we are also involved in moral development . . . . I see academic freedom, Roman Catholicism and higher education all melded into one.>").

<sup>191</sup> See *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 31 (Johnson, Member, dissenting) ("The majority . . . errs fundamentally . . . by assuming a false dichotomy between 'religious' and 'secular' instruction."); Brief for Petitioners, *supra* note 104, at 11 (arguing that "[t]he Regional Direc-



*B. Cut Out the Middleman: Voluntary Negotiation  
Outside the NLRB Framework*

Despite the constitutional questions surrounding Board jurisdiction over religious educational institutions, employees of these institutions still deserve the same rights to collective bargaining and the same protections against unfair labor practices that the NLRB provides to other American workers.<sup>192</sup> Most faiths, including the Catholic Church, support the goals of fair treatment of workers and access to union representation.<sup>193</sup> In order to resolve this conflict, religious educational institutions should create voluntary bargaining agreements outside of the NLRB framework.<sup>194</sup>

Although many religiously affiliated institutions have resisted NLRB jurisdiction, some have voluntarily allowed representation elections to go forward unopposed.<sup>195</sup> Georgetown University, for example, remained neutral in the lead-up to a representation election for its adjunct faculty.<sup>196</sup> This

tor confused ecumenism and a tolerance for academic freedom with a lack of religious mission” and stating that “[a]s the Sisters [of Mercy] . . . see it, the Sisters’ religious mission and the Sisters’ charge to the University are enhanced by academic freedom”). It is not difficult to imagine even parochial elementary or secondary schools reacting to potential Board jurisdiction by imposing more rigid religious requirements on both potential and current faculty. See Olivieri, *supra* note 149 (pointing to the fact-intensive nature of several of the Regional Directors’ decisions and suggesting that to escape jurisdiction colleges and universities will need to show religious requirements beyond what is seen in these employment relationships). The recent *Islamic Saudi Academy* decision seems to confirm that the more evidence of restrictions on faculty members, the better. See *Islamic Saudi Acad. (Islamic Saudi Acad. III)*, No. 05-RC-080474, 2015 NLRB Reg. Dir. Dec. LEXIS 176, at \*26–27 (N.L.R.B. 2015).

<sup>192</sup> 29 U.S.C. §§ 151, 157–58 (2012) (detailing purpose of the NLRB and listing prohibited unfair labor practices); see *Pac. Lutheran*, 361 N.L.R.B. No. 157 at 3 (“[The Board is] charged with protecting workers’ exercise of their rights under the Act to the fullest permissible extent . . .”).

<sup>193</sup> See Brady, *supra* note 97, at 105 (“The Catholic Church has long supported the right of workers to unionize and bargain collectively with their employers.”); Lopez, *supra* note 94 (“[T]he Catholic Church is historically the most recognizable and organized church advocate of U.S. labor unions . . .”); *Workers’ Freedom*, *supra* note 94 (listing official statements of eleven religious bodies in support of the labor movement and workers’ rights).

<sup>194</sup> See Sinyai, *supra* note 103 (arguing in favor of and offering examples of voluntary labor agreements between Catholic educational employers and lay teachers); *infra* notes 195–212 and accompanying text.

<sup>195</sup> See Joseph J. Fahey, *Adjunct Unions at Catholic Affiliated Colleges and Universities: A Background Paper* 3 (Catholic Scholars for Worker Justice, Nov. 1, 2013), <http://www.catholicscholarsforworkerjustice.org/2013%2011-1-%20Adjunct%20Background%20Paper%20-%20FAHEY.pdf> [<http://perma.cc/H2QG-PS79>] (listing Georgetown University, Le Moyne College, and St. Francis College as three institutions whose leaders did not oppose adjunct faculty unionization); Sinyai, *supra* note 103 (“Not every Catholic university has responded [negatively] to the organizing wave among our nation’s adjunct faculty.”).

<sup>196</sup> See Griffin, *supra* note 106; Sinyai, *supra* note 103. The university’s provost, in a statement issued following the vote, cited Georgetown’s “Just Employment Policy” and stated that “the university respects employees’ rights to freely associate and organize.” See Griffin, *supra* note 106 (quoting statement of Robert M. Groves, Provost, Georgetown University).

course may be admirable, but it does nothing to remedy the perceived threat of loss of autonomy feared by religious educators and administrators.<sup>197</sup>

Alternatively, some schools have proactively and independently pursued bargaining agreements with faculty without NLRB involvement.<sup>198</sup> These agreements typically contain express provisions—known as the “Bishop’s clause”—granting the employer the ability to terminate the employee for matters directly related to religious concerns.<sup>199</sup> These clauses preserve the autonomy of school leaders over matters central to the religious mission of the institution while still giving employees access to a formal bargaining scheme.<sup>200</sup> Rather than involve the Board in bargaining matters, both sides can agree to a neutral arbiter.<sup>201</sup> Furthermore, members of the Board have looked favorably upon alternative dispute resolutions.<sup>202</sup>

The voluntary negotiation approach does have its own disadvantages.<sup>203</sup> First, given the recent boldness of the Board in expanding jurisdiction and the recent success of faculty units in gaining union representation, many college and university faculty would likely prefer to follow that path.<sup>204</sup> Second, and more significant, voluntary bargaining necessarily concentrates power on the side of the institution: if the employer withdraws from bargaining, the employees have no legal recourse.<sup>205</sup>

<sup>197</sup> See Brady, *supra* note 97, at 105 (“[T]he reasons that Catholic employers have given in litigation . . . have tended to draw upon the entanglement and concerns raised in [*Catholic Bishop*]. Church employers, litigants argue, will lose autonomy over religious matters and government will become entangled in religious doctrine and practices.”); see also Statement of John Garvey, *supra* note 104 (“[The government is] telling religious schools who their faculty can be and what the terms and conditions of employment, that is to say, what they can teach . . . . That the government ought to have some say over the people and the courses that are being taught at religious universities—that’s a big deal for religious freedom.”).

<sup>198</sup> See Sinyai, *supra* note 103 (detailing the example of the Diocese of Pittsburgh, where the Bishop worked with a variety of interested parties to establish a bargaining system outside the NLRB).

<sup>199</sup> See *id.* (“In the Pittsburgh contract, the clause states that ‘the Diocesan Bishop shall maintain the sole prerogative to dismiss a teacher for public immorality, public scandal or public rejection of teachings, doctrine or laws of the Catholic Church.’”).

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

<sup>202</sup> See IBM Corp., 341 N.L.R.B. 1288, 1310 (2004) (Liebman & Walsh, Members, dissenting) (noting the potential of alternative dispute resolution mechanisms to bring elements of “fairness and due process” to non-union workplaces).

<sup>203</sup> See Stabile, *supra* note 11, at 1325 (noting the disadvantages of voluntary bargaining with religious employers); Griffin, *supra* note 106 (noting perception of inevitability among those pushing for representation for adjuncts at religious colleges and universities).

<sup>204</sup> See Griffin, *supra* note 106 (noting the “consensus” among union organizers seeking representation for adjunct faculty at religious colleges and universities that the institutions will inevitably negotiate, whether motivated by religious doctrine or mandated by the NLRB).

<sup>205</sup> See Stabile, *supra* note 11, at 1325 (“[Without NLRB jurisdiction], [teachers] may not avail themselves of the protection afforded by federal labor law. They can only request a school’s administration to recognize their union and engage in collective bargaining with the union, with

Despite those drawbacks, voluntary bargaining offers faculty the ability to work constructively with school leaders on a variety of important, but non-religious, aspects of their working terms and conditions.<sup>206</sup> It also allows both employer and employee to formally acknowledge the unique status of religious educational institutions and those who teach at them.<sup>207</sup> This proposed alternative is admittedly a better fit for parochial schools than for colleges and universities, for a variety of reasons.<sup>208</sup> Board jurisdiction over religious elementary and secondary schools is far less likely to survive judicial scrutiny than at religious institutions of higher education, so for parochial school teachers this may be the only option.<sup>209</sup>

Voluntary bargaining offers religious institutions at all levels the opportunity to bring their employment practices in line with their rhetoric.<sup>210</sup> Given the clear, formal support across faith bodies for workers' rights, those institutions—particularly colleges and universities—that resist bargaining with employees expose their institutions to charges of hypocrisy.<sup>211</sup> This is a

no recourse if the employer refuses.”). This scenario played out among parochial school teachers in Boston in 2004 and New York in 2009. *See id.*

<sup>206</sup> *See Pac. Lutheran*, 361 N.L.R.B. No. 157 at 27 (Miscimarra, Member, concurring in part and dissenting in part) (“[E]ven if one disagreed with *Great Falls*, any attempt by the Board to chart a different path appears predestined to futility.”); Sinyai, *supra* note 103 (“[The Bishop of Pittsburgh] crafted a system of labor relations preserving all the just rights workers enjoyed under the National Labor Relations Act without being subject to it.”); *supra* notes 163–165 and accompanying text (noting the difficulty the *Pacific Lutheran* test is likely to face before the D.C. Circuit).

<sup>207</sup> *See* Sinyai, *supra* note 103 (quoting Catholic teachers’ union president whose members did not object to Bishop’s-clause contracts because they understood the inherent restrictions upon teachers at Catholic schools upon seeking employment there).

<sup>208</sup> *See* *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (acknowledging that “[m]any church-related colleges and universities are characterized by a high degree of academic freedom”); Griffin, *supra* note 106 (noting perception of inevitability among those pushing for representation for adjuncts at religious colleges and universities); *supra* notes 181–190 and accompanying text (arguing that *Pacific Lutheran* is even more clearly unconstitutional when applied to parochial schools and that, regardless, parochial schools could satisfy its test).

<sup>209</sup> *See* Griffin, *supra* note 106 (noting perception of inevitability among those pushing for representation for adjuncts at religious colleges and universities); *supra* notes 181–190 and accompanying text (arguing that *Pacific Lutheran* is even more clearly unconstitutional when applied to parochial schools and that, regardless, parochial schools could satisfy its test).

<sup>210</sup> *See* Brady, *supra* note 97, at 105 (pointing to the inconsistency between longstanding Church position on unionization and collective bargaining and Catholic employers’ refusal to bargain collectively); Sinyai, *supra* note 103 (noting that a Catholic institution of higher education following Church doctrine on workers’ rights “helps to evangelize the world,” while one that refuses to do so “runs the risk of scandalizing the faithful by suggesting these principles do not count”).

<sup>211</sup> *See* Griffin, *supra* note 106 (citing speculation that university resistance to unionization is motivated by economic, not religious, concerns); Sinyai, *supra* note 103 (quoting Brian Klisavage, President, Federation of Pittsburgh Diocesan Teachers, as stating: “How can the church support the rights of steelworkers and grape pickers when we don’t support the rights of our own?”);

chance for these institutions to fulfill their religious missions while also practicing what they preach.<sup>212</sup>

### CONCLUSION

The National Labor Relations Board has an important mandate: protecting the rights of workers' through access to collective bargaining and the enforcement of unfair labor complaints. This charge meets an oft-competing mission, however, when exercised over religiously affiliated educators, who are guaranteed the protections of the religion clauses of the First Amendment. With its 2014 decision in *Pacific Lutheran University*, the NLRB appears poised to continue to expand its jurisdiction—certainly over religious colleges and universities, and perhaps over other levels of educational institutions such as parochial schools. To do so would be regrettable. First, the *Pacific Lutheran* test is likely unconstitutional because it creates an unneeded government entanglement with religion. Second, Board jurisdiction would be inappropriate as exercised over religious elementary and secondary schools. In order to avoid NLRB jurisdiction while still giving employees a productive system for bargaining, religious schools should adopt voluntary bargaining agreements. Voluntary bargaining gives religious schools an opportunity to practice what they preach while maintaining autonomy over what is really at issue in all of these cases: the religious mission and identity of the school in question.

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*Workers' Freedom*, *supra* note 94 (listing official statements of eleven religious bodies in support of the labor movement and workers' rights).

<sup>212</sup> See Sinyai, *supra* note 103 (stating that, if a university is truly concerned with loss of religious autonomy, the clear solution is "collective bargaining outside the N.L.R.B. framework").

