Seattle University *and* Service Employees International Union, Local 925. Case 19–RC–122863

August 23, 2016

DECISION ON REVIEW AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

In *Pacific Lutheran University*, 361 NLRB No. 157 (2014), we announced the test we would apply in determining, consistent with the First Amendment, when nontenure eligible (contingent) faculty have bargaining rights under the National Labor Relations Act at self-identified religious colleges or universities. Here, we apply the *Pacific Lutheran* test to address a narrower issue: whether, at a self-identified religious university that is *not* exempt from the Board's jurisdiction, we should exclude teachers of religion or theology from an otherwise appropriate faculty bargaining unit because the university "holds out [these] faculty members as performing a specific role in creating or maintaining the school's religious educational environment." 361 NLRB No. 157, slip op. at 5.

The Regional Director determined that a unit comprising most of the contingent faculty at Seattle University constituted an appropriate bargaining unit.[1] The University seeks Board review, contending that, as a religious institution, its contingent faculty is not covered by the National Labor Relations Act. Alternatively, the University contends that, even if the contingent faculty generally is covered by the Act, the Board should exclude from the unit those faculty who teach at the University's School of Theology and Ministry and all other faculty who teach Catholic theology.

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

Background

Seattle University is a private, nonprofit university offering undergraduate and graduate degrees at its campuses near Tacoma and Seattle, Washington. The University was founded in 1891 by the Society of Jesus (more commonly known as the Jesuits), and it holds itself out as a religious educational institution. Its vision statement states that the University "will be the premier independent university of the Northwest in academic quality, Jesuit Catholic inspiration, and service to society." The University is organized into five colleges—Arts and Sciences, Science and Engineering, Education, Nursing, and Matteo Ricci[3]—and three schools—Business and Economics, Law, and Theology and Ministry.

The College of Arts and Sciences includes the Department of Theology and Religious Studies. The department offers a wide variety of classes, ranging in 2011 through 2013 from "History of Catholic Theology" and "Liberation Catholicism" to "Between the Bible and the Quran" and "Death of God." At the time of the election,

[1] The Petitioner filed a petition on February 20, 2014, seeking to represent a bargaining unit comprising all nontenure eligible faculty at the University other than those teaching nursing and law. On April 17, 2014, the Regional Director issued his initial decision in this case, in which he found that the petitioned-for unit was an appropriate bargaining unit. From May 14 to June 2, 2014, the Regional Director conducted a mail-ballot election, after which he impounded the ballots. Meanwhile, the University had sought Board review of the Regional Director's decision. On December 16, 2014, the Board issued its decision in *Pacific Lutheran*, supra, after which it issued an order remanding the instant case to the Regional Director for further action consistent with that decision. On March 3, 2015, the Regional Director issued a supplemental decision in which he found that it was unnecessary to reopen the record and reaffirmed his earlier decision. The University again sought review. On June 12, 2015, the Board granted review of that decision and remanded the case for the reopening of the record, after which the Regional Director conducted an additional hearing. On August 17, 2015, the Regional Director issued a second supplemental decision in which he again asserted the Board's jurisdiction over the University and found the petitioned-for unit appropriate. The University sought review of that decision, as well. The Petitioner filed an opposition.

The University initially contended that the contingent faculty were also exempt from the coverage of the National Labor Relations Act as managerial employees. The Regional Director rejected that contention and the University does not seek review of that determination.

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

[3] Matteo Ricci College offers a Bachelor in the Humanities degree on an accelerated basis to qualified students from five Seattle-area Catholic high schools.

about five contingent faculty were teaching classes in the department.

The School of Theology and Ministry is operated in conjunction with the Archdiocese of Seattle and 12 other Christian religious denominations. The School does not train Catholic priests, but offers degrees in divinity and ministry, including a doctor of ministry. Between 2011 and 2013 course offerings included a wide variety of subjects, including "Sacramental Liturgical Theology" and "Survey of Interfaith Communities." At the time of the election, about seven contingent faculty were teaching in the School of Theology and Ministry.

The University requires all undergraduates to take two theology courses. Approximately two of the credit hours must contain "a component on the Catholic tradition." The University's Provost testified that the instructor of coursework in the Catholic tradition must have "expertise in Catholic theology." The Provost further testified that he was not aware of any faculty member teaching a course in the Catholic tradition who was not either a Jesuit or a member of the Department of Religious Studies or the Theology School. The course description pertaining to Catholic tradition courses states that students will "reflect on questions of meaning, spirituality, ethics, values and justice" through "knowledge of Jesuit, Catholic intellectual traditions and understanding of diverse religious traditions."

Discussion

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court stated that the National Labor Relations Act must be construed to exclude teachers in church-operated schools because to do otherwise "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." 440 U.S. at 502. The Court concluded that the Board's assertion of jurisdiction over teachers in church-operated schools would "give[] rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id*. at 503 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971)). For the Board to engage in such inquiry would violate the First Amendment. Id. at 504.[4]

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

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

Id., slip op. at 5. The threshold showing is designed to be a "minimal" burden on the university, as its self-presentation in its mission statements, course catalogues, or website references will suffice to satisfy the requirement that the school "holds itself out as providing a religious educational environment." Id., slip op. at 6–7.

In the second step of the test, the Board considers how the university deals with and holds out the faculty in the petitioned-for unit. Again, seeking to avoid intrusive inquiry into the religious tenets of the institution, the Board looks primarily at the school's own statements, particularly job advertisements and descriptions, employment contracts, employee handbooks, and similar documents. Id., slip op. at 8–9. The test boils down to "whether a reasonable prospective applicant [for a faculty position] would conclude that performance of [her] faculty responsibilities would require furtherance of the college or university's religious mission." Id., slip op. at 9.

Applying this test, the Regional Director found that Seattle University holds itself out as providing a religious educational environment, and therefore met the threshold test of *Pacific Lutheran University*. But the Regional Director further found that the University did not meet its burden of demonstrating that it holds out the petitioned-for faculty as performing a specific religious function.

As stated, we deny review of the Regional Director's determination that, as a group, the petitioned-for unit of contingent faculty generally do not play a "role in creating or maintaining the University's religious educational environment." Uncontested evidence shows that the vast majority of contingent faculty are not hired to advance the religious goals of the institution. For example, calculus teachers are hired based on their ability to teach calculus. They are not required to be Catholic or to take any part in any religious activities on or off campus; religion is not mentioned in their employment contracts.[5]

[4] In *Catholic Bishop of Chicago*, the Board had asserted jurisdiction over bargaining units of lay teachers at Catholic high schools operated by the Catholic Bishop of Chicago and the Diocese of Ft. Wayne-South Bend. The history of the Board's treatment of faculty at religiously affiliated universities is summarized in *Pacific Lutheran*. 361 NLRB No. 157, slip op. at 3–5.

[5] Our dissenting colleague points to language in *Catholic Bishop of Chicago* to the effect that a teacher's handling of secular subjects may involve some aspect of faith or religious doctrine. See 440 U.S. at 501-

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

It is undisputed that those particular faculty teach courses with religious content. Undergraduates may take those courses, including some incorporating Catholic teachings and traditions, to fulfill core academic requirements. Faculty within the Department of Theology and Religious Studies have expertise in Catholic theology, other faith-based traditions, or other aspects of the religious experience. The same holds true of faculty in the School of Theology and Ministry, which, as stated, confers degrees in divinity and ministry. In *Pacific Lutheran University*, we cited "integrating the institution's religious teachings into coursework" as a prime example of serving a religious function that would lead the Board to decline jurisdiction over faculty. Id. at 9. Asserting Board jurisdiction over faculty members who teach courses in these subjects at a religiously affiliated university would give rise to the First Amendment concerns of excessive government entanglement that the Court addressed in *Catholic Bishop of Chicago*, 440 U.S. at 501–503. *Pacific Lutheran University*, 361 NLRB No. 167, slip op. at 7; *Saint Xavier University*, 364 NLRB 85 (2016), slip op. at 3.[6]

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

ORDER

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

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

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

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

My colleagues and I are not permitted to write from a clean slate regarding this issue. It is governed by *NLRB v. Catholic Bishop of Chicago*,[1] where the Supreme Court rejected the Board's assertion of jurisdiction over "lay teachers" at church-operated schools, which the Board had attempted to justify on the basis that the schools were "'religiously associated'" rather than

502. But the schools at issue were high schools operated by the Catholic Bishop of Chicago and by the Catholic Diocese of Fort Wayne-South Bend. Some of the schools were deemed "minor seminaries," operated directly by an arm of the Catholic Church for the training of future priests and other Christian leaders. Id. at 492–493. In the words of that decision, "Religious authority necessarily pervades the school system." Id. at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)). Seattle University, by contrast, is not an arm of the Church and does not hold itself out to potential students as a path to the priesthood. And as shown above, few of the contingent faculty are subject to any kind of religious authority. Of the nine contingent faculty who testified at the hearings, none testified that she had ever been informed that part of her job was performing a religious role.

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

The dissent asserts that, on remand, the Regional Director erred by not permitting the University to offer additional evidence of its overall religious purpose. But as the Regional Director pointed out, by that stage of the proceeding, it was undisputed that the University had established that it holds itself out as providing a religious educational environment, i.e., the University had satisfied its burden under step one of the *Pacific Lutheran University* test. Accordingly, the sole issue to be addressed at the remand hearing was whether the University holds out its non-tenured faculty as performing a role in creating or maintaining that environment. The Regional Director reasonably determined the relevance of evidence by that standard.

[1] 440 U.S. 490 (1979).

"'completely religious.'"[2] The Supreme Court held that the Board could not exercise jurisdiction over teachers in church-operated schools based on "abundant evidence" that doing so "would implicate the guarantees of the Religion Clauses."[3]

Significantly, the Supreme Court in *Catholic Bishop* did not merely find fault with the Board's "conclusions" regarding whether asserting jurisdiction over teachers at religiously affiliated institutions risked impinging on First Amendment guarantees.[4] The Court held that these constitutional concerns were raised by "the very process of inquiry" undertaken by the Board in determining whether and when particular subjects, practices or institutions were sufficiently "secular" to permit the Board to exercise jurisdiction.[5] The Court made clear that "[g]ood intentions by government" were not enough to "avoid entanglement with the religious mission of the school."[6] Most importantly, in language that my colleagues disregard here, the Court indicated that the Board could not properly exercise jurisdiction based on a conclusion that certain teachers only taught "'secular subjects.'"[7] According to the Court, even when the subject taught is secular, "'a teacher's handling of [the] subject'" still holds the "'potential for involving some aspect of faith or morals.'"[8] The Court's conclusion here leaves no room for interpretation: "'Whether the subject is "remedial reading," "advanced reading," or simply "reading," *a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists*.'"[9]

The Regional Director found it was appropriate for the Board to exercise jurisdiction over Seattle University, notwithstanding his findings that it is a private, nonprofit university affiliated with the Catholic Church and the Society of Jesus, more commonly known as the Jesuits.[10] As described by the Regional Director:

> The University is a nonprofit. It is one of the 28 U.S. Jesuit Colleges and Universities, listed in the registry of U.S. Catholic universities maintained by the Catholic Church. The University's vision statement, displayed prominently in a number of locations on its campus and website, asserts that the University "will be the premier independent university of the Northwest in academic quality, Jesuit Catholic inspiration, and service to society." The University's webpage frequently features banners on Jesuit or Catholic events. There was extensive testimony at both hearings about how the University's mission and vision statements and Jesuit Catholic identity pervade the University in all its operations.[11]

The Regional Director applied the test articulated in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), where a Board majority stated that jurisdiction will be asserted over faculty members at religiously affiliated universities "unless the university or college demonstrates, as a threshold matter, that it *holds itself out as providing a religious educational environment*, and that it *holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment*."[12]

My colleagues deny review of the Regional Director's finding that the Board should exercise jurisdiction over most of the contingent faculty at Seattle University. Adhering to and applying the test announced in *Pacific Lutheran*, however, they grant review and reverse the Regional Director's assertion of jurisdiction over "those faculty who teach in the University's Department of Theology and Religious Studies and in its School of Theology and Ministry." In other words, my colleagues draw the precise distinction—between faculty members who teach "religious" subjects, on the one hand, and those who teach "secular" subjects, on the other—that the Supreme Court rejected as entailing the type of "inquiry" that, by itself, may impermissibly "impinge on rights guaranteed by the Religion Clauses."[13]

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

[3] Id. at 507.

[4] Id. at 502.

[5] Id.

[6] Id.

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

[8] Id. (quoting *Lemon v. Kurtzman*, supra).

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

[10] Regional Director's Second Supplemental Decision and Order (Second Supp. Dec.), Aug. 17, 2015, at 3.

[11] Second Supp. Dec. at 3–4.

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

[13] *Catholic Bishop*, 440 U.S. at 502; see text accompanying fns. 4–9, supra. My colleagues exclude from the petitioned-for unit the contingent faculty in the Department of Theology and Religious Studies (Department) and the School of Theology and Ministry (School) on the grounds that "those particular faculty teach courses with religious content." However, this is just the type of "finely spun judicial distinction[]" that then-Judge Breyer warned, in *Universidad Central de Ba-*

For three reasons, I would grant Seattle University's request for review in its entirety.

First, the instant case vividly illustrates the First Amendment problems created by the Board majority test in *Pacific Lutheran*, and the distinction my colleagues draw between secular faculty (who my colleagues find are subject to Board jurisdiction) and "faculty [who] teach courses with religious content" (who my colleagues find are exempt from Board jurisdiction) is forbidden by the main teaching of *Catholic Bishop*, where the Supreme Court emphasized that the "very process of inquiry" associated with this type of evaluation raises First Amendment concerns,[14] that the Board could not appropriately focus selectively on "'secular'" subjects,[15] and that "'[w]hether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists.'"[16] Lengthy reflection is not needed to recognize that it will often be impossible to determine whether faculty members at religiously affiliated schools who ostensibly teach "secular" subjects nonetheless perform "a specific role in creating or maintaining the school's religious educational environment."[17] However, under *Pacific Lutheran*, it now appears that the Board majority will scrutinize the content of courses to determine, for example, (i) whether an ethics course encompasses religious teachings and examples from the Bible, the Koran and other "religious" works, or whether the course focuses exclusively on "non-religious" philosophers, scholars and commentators (with the Board determining what qualifies particular authorities as "religious" or "non-religious" when addressing ethical questions); (ii) whether a logic course deals exclusively with "non-religious" symbolic logic and logical fallacies, or whether the course includes the study of religious teachings that appear to be "illogical" (e.g., the story in the Gospel of John where Jesus feeds a crowd of 5,000 with five loaves and two fish);[18] or (iii) whether a music composition course teaches choral and instrumental writing based exclusively on secular music, or whether the course includes the great religious works of Handel, Bach, Liszt, Tchaikovsky, Mozart, Haydn, and others.[19]

yamon v. NLRB, would raise church/state entanglement concerns and contravene *Catholic Bishop*. 793 F.2d 383, 402–403 (1st Cir. 1985) (en banc) ("[W]e cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board 'entanglement' as they are administered. To order the Board to exclude priests from the bargaining unit [or] to approve its having separated the seminary from the rest of the school . . . is to tread the path that *Catholic Bishop* forecloses. These ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely what the Supreme Court in *Catholic Bishop* sought to avoid."). As explained in the text, I believe the better approach is to apply the test set forth by the D.C. Circuit in *University of Great Falls v. NLRB*, supra, without regard to the religious or secular nature of the courses taught by the petitioned-for unit faculty.

[14] 440 U.S. at 502.

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

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

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

[18] John 6:1–14, Holy Bible, New International Version (2011) (https://www.biblegateway.com/passage/?search=John+6:1-14) (last viewed July 19, 2016).

[19] It appears clear that no limiting principle would obviate the need for the Board to closely examine individual topics and subtopics when making religious/secular and exempt/nonexempt determinations regarding particular faculty members and departments under the test articulated in *Pacific Lutheran*. These determinations could be quite challenging. For example, when applying *Pacific Lutheran*, what should the Board conclude with regard to the instructor of a music composition course that devotes substantial time to studying the Saint-Saëns Requiem, Op. 54 (1878), a Catholic mass written by Camille Saint-Saëns, who is widely regarded as an atheist and who maintained that "art and science would take the place of religion"? See Jane Stuart Smith, *The Gift of Music*, p. 144 (1995); see also Wikipedia, List of atheists in music (https://en.m.wikipedia.org/wiki/List_of_atheists_in_music) (last viewed July 19, 2016); http://www.allaboutheaven.org/sources/733/190/saint-saens (last viewed July 19, 2016) (Saint-Saëns "was fascinated by spirituality, but had no time for religion."). Obviously, the Board has no expertise regarding these types of matters; and even if it were otherwise permissible to address such matters, it is almost certain that the courts will not give deference to Board findings as to whether a particular course,

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

Third, even if one applies *Pacific Lutheran*, I believe a substantial issue is raised by the Regional Director's denial of the University's request for special permission to appeal the Hearing Officer's ruling sustaining the Petitioner's objection to the introduction of evidence concerning the University's religious purpose, and limiting testimony and other evidence to the second prong of the *Pacific Lutheran* test. In this regard, I believe that substantial questions exist as to whether the Hearing Officer's ruling incorrectly limited the scope of the Board's June 12, 2015 remand Order,[21] and whether the ruling prejudiced the University by denying it the opportunity to present evidence relevant to the *Pacific Lutheran* standard.[22]

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

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

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

treatise, or musical composition is sufficiently "religious" to warrant a determination that the faculty member who provides relevant instruction is exempt on First Amendment grounds.

[20] 278 F.3d at 1343.

[21] The Board's June 12, 2015 Order granted the University's request for review of the Regional Director's supplemental decision and remanded this case "to the Regional Director to reopen the record to permit the parties to adduce additional evidence in light of the Board's decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014)."

[22] Although the Regional Director found, based on evidence introduced at the initial hearing in this case—which took place *before* the Board issued its decision in *Pacific Lutheran*—that the University met its burden under prong one of the *Pacific Lutheran* standard by establishing that it holds itself out as providing a religious educational environment, evidence relating to the University's overall religious purpose may also be relevant to its burden of establishing, under the second prong of the *Pacific Lutheran* standard, that it holds its faculty members out "as performing a specific role in creating or maintaining [its] religious purpose or mission." *Pacific Lutheran University*, supra, slip op. at 8.