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**Saint Xavier University and Service Employees International Union, Local 1.** Case 13–RC–092296

April 6, 2017

DECISION ON REVIEW

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS  
PEARCE AND MCFERRAN

In this case, we examine the standard that the Board should apply in determining whether nonteaching employees at religious colleges or universities have collective-bargaining rights under the National Labor Relations Act. After careful consideration of the applicable case law, as well as the positions of the parties and amicus, we have decided to adhere to the Board’s established precedent. Under that precedent, the Board will assert jurisdiction over the nonteaching employees of religious institutions or nonprofit religious organizations unless their actual duties and responsibilities require them to perform a specific role in fulfilling the religious mission of the institution. See, e.g., *Hanna Boys Center*, 284 NLRB 1080 (1987), *enfd.* 940 F.2d 1295 (9th Cir. 1991), *cert. denied* 504 U.S. 985 (1992). Applying that standard here, we find that the housekeeping employees at Saint Xavier University (the University) are covered by the Act. Accordingly, we will assert jurisdiction in this case.

Procedural History

The University is a private, nonprofit university offering undergraduate and graduate degrees at its campuses in Chicago and Orland Park, Illinois. On October 30, 2012, the Petitioner, Service Employees International Union, Local 1, petitioned to represent a unit of full-time and regular part-time housekeepers at the University. The University opposed the petition, contending that it is exempt from the jurisdiction of the Act because of its status as a religious educational institution. On November 28, 2012, the Regional Director issued his initial decision in this case, finding that it was appropriate for the Board to assert jurisdiction. The University sought Board review of the Regional Director’s decision. On January 3, 2013, the Region conducted an election and impounded the ballots.

On February 20, 2013, the Board granted the University’s request for review. On December 16, 2014, the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157, setting out a new test for determining when the Board should decline to exercise jurisdiction over faculty at self-identified religious colleges and universities. On February 12, 2015, the Board vacated

its February 20, 2013 order and issued a new order remanding the case to the Regional Director “for further appropriate action consistent with *Pacific Lutheran University*.”

On June 23, 2015, the Acting Regional Director issued a supplemental decision and order. Applying the test articulated in *Pacific Lutheran University*, the Acting Regional Director determined that the University’s housekeeping employees are covered by the Act.<sup>1</sup> The University requested review, contending that, under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (“*Catholic Bishop*”), and the test articulated by the United States Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) (“*Great Falls*”), it is completely exempt from the Board’s jurisdiction because of its status as a religious educational institution.

By order dated November 3, 2015, the Board granted the University’s request for review. The Board requested that the parties address whether it should adhere to current precedent pursuant to which it will assert jurisdiction over the nonteaching employees of religiously-affiliated organizations (*Hanna Boys Center*); extend the test articulated in *Pacific Lutheran University* to nonteaching employees; or take a different approach. Both the Petitioner and the University filed briefs on review.<sup>2</sup>

Facts

The University is an institution of higher learning, established in 1846 by the Sisters of Mercy, a Roman Catholic religious order.<sup>3</sup> The University retains its affiliation with the order through the Conference for Mercy Higher Education, the order’s corporate arm, which acts as the religious sponsor for the University and 15 other colleges and universities. The University is also listed in the official Catholic Directory, a listing of entities recognized as official ministries of the Roman Catholic Church.

The parties stipulated to the following facts regarding the petitioned-for housekeepers: offers of employment to housekeepers do not mention the Sisters of Mercy,

<sup>1</sup> The Acting Regional Director also rejected the University’s contention that the Board’s jurisdiction would violate the Religious Freedom Restoration Act. The University does not seek review of that determination.

<sup>2</sup> The Islamic Saudi Academy filed an amicus brief on review.

<sup>3</sup> It is undisputed that the University is a religious educational institution. The University’s mission statement declares as follows: “Saint Xavier University, a Catholic institution inspired by the heritage of the Sisters of Mercy, educates men and women to search for truth, to think critically, to communicate effectively, and to serve wisely and compassionately in support of human dignity and the common good.” See *St. Xavier University*, 364 NLRB No. 85, slip op. at 1 (2016).

Catholicism, God, or religion; there is no requirement that housekeepers be Catholic or adhere to any specific religion; in the course of their duties, the housekeepers are not required to abide by any specific tenets of the Sisters of Mercy, Catholicism, or any religion, but, as with all employees, are invited to attend and participate in any program or activities that recognize or celebrate the University's Catholic and Sisters of Mercy heritage; the job evaluations of housekeepers contain no reference to the Sisters of Mercy, Catholicism, or religion; and the housekeepers have never been instructed to disseminate the Catholic faith.

#### Relevant Precedent

In *Catholic Bishop*, the Supreme Court held that the Board could not assert jurisdiction over lay teachers employed by a group of parochial schools to teach both religious and secular subjects because it would create “a significant risk that the First Amendment will be infringed.”<sup>4</sup> 440 U.S. at 502. The Court observed that “the *raison d’être* of parochial schools is the propagation of a religious faith,” and emphasized the “critical and unique role of the teacher in fulfilling th[at] mission.” Id. at 503 and 501, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (Douglas, J., concurring) and 617 (1971). The Court predicted that the Board would be unable to “avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining,” because “nearly everything that goes on in the school affects teachers and is therefore arguably a ‘condition of employment.’” Id. at 502–503. In the Court’s view, moreover, “the very process of inquiry leading to findings and conclusions” in Board proceedings involving the relationship between a religious school and its teachers risked intrusion on religious freedoms because such proceedings “will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools’ religious mission.” Id. at 502. In light of these factors, the Court saw “no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions

<sup>4</sup> The Court had granted certiorari to consider two questions: (a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the Act; and (b) if the Act authorizes such jurisdiction, does its exercise violate the Religion Clauses of the First Amendment? 440 U.S. at 490. As to the second question, the Court declined to rule directly on the constitutionality of Board jurisdiction, but instead invoked the doctrine of constitutional avoidance in which the federal courts will refrain from ruling legislation to be unconstitutional in the absence of “the affirmative intention of Congress clearly expressed” to enact the unconstitutional construction of the statute, when an alternative, permissible construction is available. Id. at 500.

that would follow.” Id. at 504. Accordingly, the Court held that, “in the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.” Id. at 507.

In *Hanna Boys Center*, supra, the Board found that neither the Supreme Court’s decision in *Catholic Bishop* nor the Religion Clauses of the First Amendment preclude the Board from asserting jurisdiction over nonteaching employees of religiously-affiliated organizations. The Board observed that the petitioned-for clerical employees and child-care workers, recreation assistants, cooks, and maintenance employees at Hanna Boys Center were not teachers and that there was no record evidence that their duties (save for those of the child-care workers) had any connection to the employer’s “possible religious mission.” 284 NLRB at 1083. Regarding the child care workers, the Board found that although Hanna Boys Center provided classroom instruction, including a moral guidance class taught by religious sisters, there was no indication in the record that the child-care workers were required to, or did in fact, involve themselves in religious or secular teaching. Id. In any case, the Board found that “[t]he child-care workers are clearly less involved in the religious inculcation of the entrants than the teachers are.” Id. The Board therefore found that the “sensitive first amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved. . . .” Id.<sup>5</sup>

In enforcing the Board’s Order, the Ninth Circuit agreed with the Board that *Catholic Bishop* did not create a blanket exemption from the Act’s coverage for religious institutions and that its holding was limited to “the employment relationship between church-operated schools and its teachers.” 940 F.2d 1295, 1301–1302 fn. 6. The court went on to find that the petitioned-for employees’ “pervasively secular” duties ensured that Board jurisdiction would not impermissibly interfere with the Establishment or Free Exercise clauses of the First Amendment. Id. at 1306.

<sup>5</sup> Since *Hanna Boys Center*, the Board has continued to assert jurisdiction over nonteaching employees at religious organizations where there is no evidence that the employees play a specific role in fulfilling the religious mission of the organization. See, e.g., *Catholic Social Services*, 355 NLRB 929, 929–930 (2010) (asserting jurisdiction over facility providing childcare services where an “ancillary” part of social services provided included “wholly secular education” to a small number of children); *Salvation Army*, 345 NLRB 550, 552 (2005) (asserting jurisdiction over resident advisors at facility providing prerelease services to prisoners and probationers).

In *Pacific Lutheran University*, 361 NLRB No. 157, the Board reexamined its standard for determining, in accordance with *Catholic Bishop*, when the Board should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities. The Board held that it will decline to assert jurisdiction over faculty members if the college or university demonstrates that: (1) it holds itself out as providing a religious educational environment and (2) it holds the faculty out “as performing a specific role in creating or maintaining” that environment. 361 NLRB No. 157, slip op. at 6.

The *Pacific Lutheran* Board emphasized that in crafting the new test for faculty members, it had endeavored to “be faithful to the holding of *Catholic Bishop*” and “avoid the potential for unconstitutional entanglement while, to the extent constitutionally permissible, vindicating the rights of employees to engage in collective bargaining.” *Id.*, slip op. at 5. The Board recognized, for example, that an examination of the *actual* functions performed by teachers at a religious educational institution “could result in the type of intrusive inquiry into a university’s religious beliefs and practices that was rejected by the Supreme Court in *Catholic Bishop*.” *Id.*, slip op. at 6. To avoid that risk, the Board held that it would “rely on the institutions own statements” about its religious mission and whether its teachers are required to perform religious functions as part of their duties “without questioning the institution’s good faith or otherwise second-guessing those statements.” *Id.*, slip op. at 9.

The Board, however, rejected the suggestion of Pacific Lutheran University and amici that it should adopt the even more restrictive test formulated by the District of Columbia Circuit in *Great Falls*, supra, 278 F.3d 1335. Under that test, the Board has no jurisdiction over 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. 278 F.3d at 1343. The Board observed that, although the *Great Falls* test avoids any intrusive inquiry into a university’s religious beliefs or actual practices, it sweeps too broadly because its exclusive reliance on the religious nature of an educational institution, without considering the petitioned-for employees’ role in supporting the institution’s religious mission, “could deny the protections of the Act to faculty members who teach in completely nonreligious educational environments if the college or university is able to point to any statement suggesting the school’s . . . connection to religion, no matter how tenuous that connec-

tion may be.” 361 NLRB No. 157, slip op. at 6. The Board concluded “[t]his approach goes too far in subordinating Section 7 rights and ignores federal labor policy as embodied in the Act.” *Id.*

Notably, in *Pacific Lutheran* the Board acknowledged its long history of asserting jurisdiction over nonteaching employees at religious institutions citing, in support, *Hanna Boys Center* and other cases. *Id.*, slip op. at 8 fn. 11. The Board further made clear that its decision was “limited to addressing the requirements for units of faculty members at colleges and universities.” *Id.*

#### Positions of the parties

The University contends that it is completely exempt from the Act’s jurisdiction under *Catholic Bishop* because of its status as a religious educational institution. The University additionally contends that, in determining whether an employer is exempt from the Act’s coverage as a religious educational institution, the Board should apply the three-part test articulated by the District of Columbia Circuit in *Great Falls* and that it is exempt under that test.

The University argues that application of the test in either *Hanna Boys Center* or *Pacific Lutheran University* to determine the jurisdictional question in this case would create an unacceptable risk of conflict with the Religion Clauses of the First Amendment because they require the Board to engage in the type of intrusive inquiry that *Catholic Bishop* sought to avoid and they fail to address the entanglement problems related to the Board’s role in enforcing the Act against a religious college or university.

Finally, the University argues that the Acting Regional Director ignored the Board’s longstanding practice of declining to assert jurisdiction over the secular employees of nonprofit, religious organizations, where the employees provide vital services toward the mission of the religious organization.<sup>6</sup> Emphasizing the centrality of cleanliness to Catholicism, the University contends that the petitioned-for employees in this case provide vital services toward the religious mission of the University,

<sup>6</sup> The Board has declined to assert jurisdiction over the secular employees of churches and similar institutions where the petitioned-for secular employees are those “without whom the employer could not accomplish their religious mission.” *St. Edmunds High School*, 337 NLRB 1260, 1260 (2002) (custodial/maintenance employees performing work at religious schools, church, and other religious buildings), citing *Riverside Church*, 309 NLRB 806 (1992); *Faith Center—WHCT Channel 18*, 261 NLRB 106 (1982). The Board has limited this exemption to churches and their direct extensions. *Faith Center—WHCT Channel 18*, 261 NLRB at 108 (exempting broadcasting employees of a church that largely propagated its religious message through a radio station, finding its “purpose and function indistinguishable from that of ‘conventional’ churches”).

and the Board should therefore decline to assert jurisdiction over them.<sup>7</sup>

In its brief on review, the Petitioner contends that the Board should apply *Hanna Boys Center* to determine whether non-teaching employees of colleges and universities are covered by the Act. The Petitioner contends that under *Hanna Boys Center*, the petitioned-for housekeeping employees are plainly covered by the Act. The Petitioner additionally contends that application of the test articulated in *Pacific Lutheran University* would result in the Board exercising jurisdiction over the employees. Finally, the Petitioner points out that the Board declined to adopt the *Great Falls* test in *Pacific Lutheran University*.

#### Analysis

We have carefully considered the contentions of the parties and amicus, as well as the views of our dissenting colleague, and we have decided to adhere to the Board's established precedent in *Hanna Boys Center* to determine whether non-teaching employees at religious colleges or universities have collective-bargaining rights under the Act. For the reasons explained below, we do not believe that standard creates an unacceptable risk of conflict with the Religion Clauses of the First Amendment.

First, we reaffirm the Board's longstanding position that the holding of *Catholic Bishop* is limited to the teaching employees of religious schools, who play a "critical and unique role" in creating and sustaining a religious environment, and that the Court did not intend to create a categorical exemption from the Act's coverage for religious institutions. We also reaffirm the Board's view that the *Great Falls* test goes too far in subordinating Section 7 rights.<sup>8</sup> *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 6.

Second, as referenced above, the Board in *Pacific Lutheran University* expressly limited its decision to "units of faculty members at colleges and universities," 361 NLRB No. 157, slip op. at 8 fn. 11, noting that it "has long asserted jurisdiction over secular employees of non-profit religious organizations other than schools, as well as over nonteaching employees at religious institutions that have an educational component as part of their mission[.]" *Id.* The *Pacific Lutheran University* Board

clearly did not intend for its decision to extend to non-teaching employees, such as the housekeepers at issue in this case.

Moreover, extending *Pacific Lutheran University's* test for whether to assert jurisdiction to non-teaching employees would move beyond the concerns that motivated the test. As discussed above, in *Pacific Lutheran University*, the Board was concerned that an examination of the actual functions performed by teachers at a religious educational institution "could result in the type of intrusive inquiry into a university's religious beliefs and practices that was rejected by the Supreme Court in *Catholic Bishop*." *Id.*, slip op. at 6. Therefore, to "be faithful to the holding of *Catholic Bishop*" and avoid even the potential for unconstitutional entanglement, the Board held that it would not examine the actual duties of the petitioned-for teachers and would instead "rely on the institutions own statements" about whether its teachers are required to perform religious functions as part of their duties "without questioning the institution's good faith or otherwise second-guessing those statements." *Id.*, slip op. at 9.

As the Board observed in *Pacific Lutheran University*, the Court's concerns in *Catholic Bishop* about "creat[ing] an impermissible risk of excessive government entanglement" stemmed from "[t]he key role played by teachers" in creating and sustaining the religious educational environment. 361 NLRB No. 157, slip op. at 7, citing *Catholic Bishop*, 440 U.S. at 501. See also *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 822, 823 (2d Cir. 1980) (observing that "[t]he entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith"). In contrast, where the petitioned-for employees are non-teaching employees who do not play a similar role in carrying out the religious mission of the school, the sensitive First Amendment concerns of excessive entanglement are not implicated and the process of inquiring into the actual duties and responsibilities of such employees will not "impinge on rights guaranteed by the Religion Clauses." *Catholic Bishop*, 440 U.S. at 502. The Board and the circuit courts have repeatedly relied on this educator/non-educator distinction in determining that the Board properly asserted jurisdiction over non-teaching employees at religiously-affiliated organizations. See, e.g., *Catholic Social Services*, 355 NLRB at 929; *Salvation Army*, 345 NLRB at 550; *NLRB v. Salvation Army of Massachusetts Dorchester Day Care Center*, 763 F.2d 1, 6 (1st Cir. 1985); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302, 305 (3d Cir. 1982); *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349, 1353 (9th Cir.

<sup>7</sup> In its amicus brief, the Islamic Saudi Academy similarly argues that the *Pacific Lutheran University* test errs in presuming the existence of a sharp distinction between the religious and secular activities of a religious school, and that, in fact, non-teachers can play a specific role in a school's religious educational environment.

<sup>8</sup> Our dissenting colleague states that he would apply the *Great Falls* test in this and any future case involving religiously affiliated schools or universities. But he acknowledges that the Board rejected that approach in *Pacific Lutheran University*.

1981); *NLRB v. St. Louis Christian Home*, 663 F.2d 60, 64 (8th Cir. 1981).

In sum, we adhere to existing precedent. Under that precedent, we will assert jurisdiction over nonteaching employees of religiously-affiliated colleges and universities, unless it has been demonstrated that their actual duties and responsibilities require them to perform a specific role in fulfilling the religious mission of the institution.

#### Application to the petitioned-for employees

Applying *Hanna Boys Center*, we find that the Board has jurisdiction in this proceeding. The parties stipulated, and we find, that the housekeepers do not have any teaching role or perform any specific religious duties or functions, but are confined to the secular role of providing cleaning services to the University.

Thus, because the petitioned-for housekeeping employees provide wholly secular services and there is no indication that they are expected to perform a specific role in furthering the religious mission of the University, the exercise of jurisdiction over the employees will not create “serious constitutional questions” of the type the Supreme Court sought to avoid in *Catholic Bishop*, 440 U.S. at 501. Accordingly, we find that the petitioned-for employees are covered by the Act.

#### ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. April 6, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting.

The issue in this case is whether the Board should decline jurisdiction over Saint Xavier University (University) as the employer of the petitioned-for unit of housekeepers to avoid potentially interfering with rights protected by the Religion Clauses of the First Amendment.<sup>1</sup> I believe the Board should decline jurisdiction. In my view, the majority errs in holding that when a petitioner

<sup>1</sup> As my colleagues note, it is undisputed that the University is a religiously affiliated institution.

seeks an election in a bargaining unit of non-teaching employees, the exemption from the Board’s jurisdiction accorded to religiously affiliated schools and universities only applies if those employees have duties and responsibilities that require them to perform a specific role in fulfilling the religious mission of the institution. This standard, which my colleagues adopt and apply, entails the very type of inquiry that impermissibly risks entangling the Board in matters of religion.

It was to avoid such risks that the Supreme Court, in *NLRB v. Catholic Bishop of Chicago*,<sup>2</sup> gave the National Labor Relations Act (NLRA or Act) a limiting construction depriving the Board of jurisdiction where its exercise would raise First Amendment concerns. Thus, I cannot join my colleagues’ decision. Instead, when the Board must determine whether to assert jurisdiction over any employees—teachers or otherwise—employed by a school or university that claims to be religiously affiliated, I would apply the test—discussed below—articulated by the Court of Appeals for the D.C. Circuit in *University of Great Falls v. NLRB*.<sup>3</sup> Applying that test here, I would find that the Board is precluded from asserting jurisdiction. Accordingly, I would dismiss the election petition.

#### Discussion

As explained in my separate opinions in *Seattle University*,<sup>4</sup> *Saint Xavier University*,<sup>5</sup> and *Pacific Lutheran University*,<sup>6</sup> the determination of whether the Board can exercise jurisdiction over a religious school or university is governed by *NLRB v. Catholic Bishop of Chicago*, supra. In *Catholic Bishop*, the Supreme Court rejected the Board’s assertion of jurisdiction over lay teachers at church-operated schools, which the Board had attempted to justify on the basis that the schools were ““religiously associated”” rather than ““completely religious.””<sup>7</sup> The Supreme Court held that the Board was precluded from exercising jurisdiction over teachers in church-operated schools based on “abundant evidence” that doing so “would implicate the guarantees of the Religion Clauses.”<sup>8</sup> The Court rejected the Board’s decision to exercise jurisdiction over these teachers, a decision the Board

<sup>2</sup> 440 U.S. 490 (1979).

<sup>3</sup> 278 F.3d 1335 (D.C. Cir. 2002).

<sup>4</sup> 364 NLRB No. 84, slip op. at 3–6 (2016) (Member Miscimarra, dissenting).

<sup>5</sup> 364 NLRB No. 85, slip op. at 3–6 (2016) (Member Miscimarra, dissenting).

<sup>6</sup> 361 NLRB No. 157, slip op. at 26–27 (2014) (Member Miscimarra, concurring in part and dissenting in part).

<sup>7</sup> 440 U.S. at 493 (quoting *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249, 250 (1975)).

<sup>8</sup> Id. at 507.

based on its conclusion that the teachers only taught “secular subjects.”<sup>9</sup> Even when the subject taught is secular, the Court explained, “a teacher’s handling of [the] subject” at a church-operated school holds the “potential for involving some aspect of faith or morals.”<sup>10</sup>

Significantly, the Supreme Court in *Catholic Bishop* did not merely find fault with the Board’s conclusion that because the teachers taught “secular” subjects, the Board could exercise jurisdiction over them without impinging on rights guaranteed by the First Amendment. The Court held that the rights protected by the First Amendment’s Religion Clauses were put at risk by “the very process of inquiry” undertaken by the Board in determining whether particular subjects, practices, or institutions were sufficiently “secular” to permit the Board to exercise jurisdiction.<sup>11</sup> The Court did not question the Board’s motives, but it made clear that “[g]ood intentions by government” were not enough to “avoid entanglement with the religious mission of the school.”<sup>12</sup>

In subsequent cases, reviewing courts rejected the Board’s continued efforts to assert jurisdiction over religious schools and universities in violation of the principles established in *Catholic Bishop*.<sup>13</sup> Of particular note, in striking down the Board’s then-applied “substantial religious character” test, the D.C. Circuit in *University of Great Falls* criticized the Board for adopting a test under which it “troll[ed] through a person’s or institution’s religious beliefs,”<sup>14</sup> asking if they were “sufficiently religious?”<sup>15</sup> To steer clear of such constitutionally in-

firm inquiries, the court in *Great Falls* adopted a “bright-line test” that would “allow the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands.”<sup>16</sup> Under this test, “an institution is exempt from [the Board’s jurisdiction] . . . [if] the institution (1) holds itself out to the public as a religious institution; (2) is non-profit; and (3) is religiously affiliated.”<sup>17</sup>

In 2014, the Board decided *Pacific Lutheran University*, supra. There, the Board abandoned the “substantial religious character” test rejected by the D.C. Circuit in *University of Great Falls*. Rather than adopt the *Great Falls* test, however, a Board majority adopted a new test for determining whether the Board should exercise jurisdiction over faculty members at religiously affiliated schools or universities. Under the *Pacific Lutheran* majority standard, the Board will assert jurisdiction 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.”<sup>18</sup> I relevantly dissented in *Pacific Lutheran*, as did former Member Johnson, because the jurisdictional standards the majority adopted “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.”<sup>19</sup> I concluded that the Board should adopt the understandable and straightforward three-part test articulated by the D.C. Circuit in *Great Falls*.<sup>20</sup>

My colleagues have decided not to apply *Pacific Lutheran* here. However, I believe the standard they adopt instead is just as constitutionally infirm as the *Pacific Lutheran* standard. The majority states they “will assert jurisdiction over non-teaching employees of religiously-affiliated colleges and universities, unless it has been

<sup>9</sup> Id. at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) (emphasis omitted)).

<sup>10</sup> Id. (quoting *Lemon v. Kurtzman*, supra) (emphasis added).

<sup>11</sup> Id. (emphasis added).

<sup>12</sup> Id.

<sup>13</sup> See *University of Great Falls*, 278 F.3d at 1335 (invalidating the Board’s post-*Catholic Bishop* standard, under which the Board declined jurisdiction only over schools it deemed to have a “substantial religious character”); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 398 (1st Cir. 1985) (en banc) (denying enforcement of Board order against a church-operated college “that [sought] primarily to provide its students with a secular education, but which also maintain[ed] a subsidiary religious mission”); *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980) (reversing Board’s determination that a religious school was outside the scope of *Catholic Bishop* merely because it was operated by a private corporation rather than a religious order, finding that First Amendment concerns are implicated in both circumstances). See also *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 27–35 (Member Johnson, dissenting), for a comprehensive analysis of *Catholic Bishop* and these related cases.

<sup>14</sup> 278 F.3d at 1341–1342 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

<sup>15</sup> 278 F.3d at 1343 (emphasis in original). The Board’s impermissible “trolling” in *Great Falls* included an examination of curriculum subject matter, university policies, the religious background of students,

whether the university’s president and administrators were required to be members of the Catholic faith, whether faculty members were or were not required to teach Church doctrine, and whether students were required to take courses involving Catholicism. Id. at 1340.

<sup>16</sup> Id. at 1345.

<sup>17</sup> Id. at 1347.

<sup>18</sup> 361 NLRB No. 157, slip op. at 5.

<sup>19</sup> 361 NLRB No. 157, slip op. at 26 (Member Miscimarra, concurring in part and dissenting in part); see also id., slip op. at 27–38 (Member Johnson, dissenting).

<sup>20</sup> Id., slip op. at 26–27.

demonstrated that their actual duties and responsibilities require them to perform a specific role in fulfilling the religious mission of the institution.” Like the flawed test adopted by the majority in *Pacific Lutheran*, the test my colleagues adopt today is also contrary to the teaching of *Catholic Bishop* and *Great Falls* because it requires the Board to conduct an inquiry to determine whether the “duties and responsibilities” of employees in the petitioned-for unit are sufficiently secular to permit the Board to assert jurisdiction.

The majority gleans the test they adopt and apply in the instant case from *Hanna Boys Center*.<sup>21</sup> In *Hanna Boys Center*, the Board considered whether to direct an election in a petitioned-for unit that included clerical employees, recreation assistants, cooks, cooks helpers, and child-care workers at a Catholic residential facility for boys.<sup>22</sup> The record was devoid of evidence regarding the duties of the clerical employees, recreation assistants, cooks, and cooks helpers. Accordingly, in deciding whether to assert jurisdiction over the facility, the Board focused on the religious nature, or lack thereof, of the child-care workers’ job functions. Among other considerations, the panel majority observed that (i) the child-care workers “‘shepherd’ the boys from their cottages to chapel, supervise the boys in their cottages, and make sure the boys do their housekeeping chores and homework (which may include work from the moral guidance course), see that the boys say their prayers, and select a boy to say the evening prayer”; (ii) the child-care workers’ job responsibilities included the teaching of “values: ethical principles, religious observances”; (iii) there was “no indication” that child-care workers were “required to, or do in fact, involve themselves in the religious or secular teaching of” the boys; and (iv) the child-care worker was more akin to a “‘dormitory monitor,’ an authority figure to supervise the [boys] when they are not in class.”<sup>23</sup> Leaving no doubt that they had made the very type of religious/secular determination the Supreme Court sought to preclude when it limited the Board’s

jurisdiction in *Catholic Bishop*, the panel majority members in *Hanna Boys Center* concluded that the child-care workers were “clearly less involved in the religious inculcation of the [boys] than the teachers [were].”<sup>24</sup>

My colleagues make the same kind of “religious versus secular” determination in the instant case. They base their decision to assert jurisdiction on the following facts: (i) offers of employment to housekeepers do not mention the Sisters of Mercy (the Roman Catholic religious order that founded the University), Catholicism, God, or religion; (ii) there is no requirement that housekeepers be Catholic or adhere to any specific religion; (iii) in the course of their duties housekeepers are not required to abide by any specific tenets of the Sisters of Mercy, Catholicism, or any religion, but, as with all employees, are invited to attend and participate in any programs or activities that recognize or celebrate the Employer’s Catholic and Mercy heritage; (iv) the job evaluations of housekeepers contain no reference to the Sisters of Mercy, Catholicism, or religion; and (v) housekeepers have never been instructed to disseminate the Catholic faith. Based on these facts, my colleagues conclude that the petitioned-for housekeepers “do not . . . perform any specific religious duties or functions, but are confined to the secular role of providing cleaning services.”

The soundness or otherwise of my colleagues’ conclusion is not the issue here. Rather, it is the nature of the facts they rely on to reach their conclusion that vitiates the test they have adopted today. The inquiry my colleagues conduct resembles the “trolling” in religious waters that prompted the D.C. Circuit in *Great Falls* to reject the Board’s “substantial religious character” test. In *Great Falls*, the court faulted the Board’s inquiry into whether university officials were required to be members of the Catholic faith and whether faculty members were or were not required to teach Catholic doctrine.<sup>25</sup> Here, my colleagues have considered whether housekeepers must be Catholic, whether they must adhere to the tenets of Catholicism, and whether they are expected to disseminate the Catholic faith. Although I do not disagree with the majority’s conclusion that the housekeepers “are confined to the secular role of providing cleaning services to the University,” it is not this conclusion that implicates the concerns animating the Supreme Court’s decision in *Catholic Bishop*. Rather, it is “the very process of inquiry”<sup>26</sup> my colleagues undertake to reach this conclusion that implicates those concerns. Because the jurisdictional test they adopt today compels such an inquiry,

<sup>21</sup> 284 NLRB 1080 (1987), *enfd.* 940 F.2d 1295 (9th Cir. 1991), *cert. denied* 405 U.S. 985 (1992). I say that my colleagues “glean” their test from *Hanna Boys Center* because the majority opinion in that case—authored by two members of a three-member panel over the dissent of Chairman Dotson—does not state a test for determining when jurisdiction should be asserted over nonteaching employees of religiously affiliated institutions.

Chairman Dotson would have declined jurisdiction in *Hanna Boys Center* on the ground that in his view, the Board should “decline to assert jurisdiction over nonprofit, charitable institutions unless it has been demonstrated that such institutions have a substantial impact on interstate commerce.” 284 NLRB at 1083. He did not pass on the applicability of *Catholic Bishop*. *Id.*

<sup>22</sup> 284 NLRB at 1080.

<sup>23</sup> *Id.* at 1083.

<sup>24</sup> *Id.*

<sup>25</sup> 278 F.3d at 1340.

<sup>26</sup> *Catholic Bishop*, 440 U.S. at 502.

the test must be rejected, as must any standard that “attempts to distinguish between the ‘religious’ and ‘secular.’”<sup>27</sup>

Finally, although this case might look like an easy one—most would view housekeeping as a secular activity—cases involving nonteaching employees may present facts that lead the Board into even deeper entanglements with an institution’s religious mission. Indeed, the facts of *Hanna Boys Center* itself illustrate this danger. The child-care workers’ job functions did include duties that touched on matters of religion: they shepherded the boys to chapel, saw to it that the boys completed their homework for their moral guidance course, and made sure the boys said their prayers. The majority’s test requires the Board to sift through facts like these and decide whether they render a petitioned-for unit of non-teaching employees “sufficiently religious”<sup>28</sup> to warrant declining jurisdiction. Accordingly, inherent in the *Hanna Boys* test is at least the “potential for involving some aspect of faith or morals” in the Board’s inquiry, an outcome the Supreme Court deemed unacceptable in *Catholic Bishop*.<sup>29</sup>

For the same reasons discussed in my separate opinion in *Pacific Lutheran*, I believe the Board should apply the *Great Falls* test in this and any future case involving nonteaching employees at religiously affiliated schools or universities. The *Great Falls* test does not provide for scrutiny into the duties of employees to determine whether those duties are “religious enough” to warrant exclusion from the Board’s jurisdiction. I believe this aspect of *Great Falls* is correct because such scrutiny would contravene *Catholic Bishop*. Rather, as *Great Falls* makes clear, when evaluating the potential exemption applicable to a religiously affiliated school or university, the institution itself is the appropriate focus—specifically, whether the institution holds itself out to the public as a religious institution, is nonprofit, and is religiously affiliated.<sup>30</sup> In addition to the soundness of the test from a constitutional perspective, I believe application of the *Great Falls* standard in all cases involving religiously affiliated institutions—regardless of the faculty or non-faculty status of the petitioned-for employees in any particular case—has the additional benefit of yielding understandable and predictable results. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679, 684–686 (1981) (rejecting a standard governing potential bargaining obligations when “[a]n employer would have difficulty determining beforehand whether it

was faced with a situation requiring bargaining or one that [was] . . . sufficiently compelling to obviate the duty to bargain,” and when “[a] union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer’s decision, or whether, in doing so, it would trigger sanctions from the Board”).

#### Conclusion

I believe the *Great Falls* test, when applied here, compels a conclusion that the Board should not exercise jurisdiction over the University with respect to the petitioned-for housekeepers. First, the University holds itself out to the public as a religious institution. As the Regional Director found, the University “consistently identifies itself as a Catholic institution and publicly describes those values as inspiring the education it provides.” This Catholic identity is reflected in the University’s website, publicly available programs, publications, registration as a Catholic university, and in the Catholic iconography in many of its classrooms. Second, the University is organized as a nonprofit. Third, the University is religiously affiliated, as shown by the following facts. It is recognized as a Catholic institution located within the Archdiocese of Chicago. Its only corporate member is the corporate arm of the Institute of the Sisters of Mercy of the Americas known as the Council for Mercy Higher Education (CMHE), and the CMHE is “the corporate member who links the University to the Church and makes it an officially recognized member of the Church.” The University is managed by an independent Board of Trustees numbering no fewer than 25 and no more than 30, and five trustees are Sisters of Mercy. Finally, the University is guided by the *Ex Corde Ecclesiae*, the Apostolic Constitution of Pope John Paul II on Catholic Universities.<sup>31</sup>

Accordingly, for the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. April 6, 2017

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Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD

<sup>27</sup> *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 31 (Member Johnson, dissenting).

<sup>28</sup> *University of Great Falls*, 278 F.3d at 1343.

<sup>29</sup> 440 U.S. at 501 (emphasis added).

<sup>30</sup> 278 F.3d at 1347.

<sup>31</sup> These facts concerning the third prong of the *Great Falls* test are derived from the Regional Director’s statement of facts in related Case 13–RC–22025. The parties agreed to include the transcripts, exhibits, and post-hearing briefs in that case as part of the record herein.