

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

PACIFIC LUTHERAN UNIVERSITY,

Employer,

v.

SEIU LOCAL 925,

Petitioner.

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) Case No. 19-RC-102521
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**AMICUS BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY
IN SUPPORT OF EMPLOYER ON REVIEW OF A DECISION OF
THE REGIONAL DIRECTOR**

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

The Becket Fund successfully represented the petitioner in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), a unanimous Supreme Court decision that was the first Supreme Court decision to recognize the ministerial exception. The ministerial exception is based on a broad understanding of religious autonomy for religious organizations.

The Becket Fund is concerned that the Regional Director's intrusive inquiry into Pacific Lutheran University's religious decisions conflicts with the Free Exercise and Establishment Clauses, and that the Regional Director's application of the "substantial religious character" test discriminates among religions, in violation of *Larson v. Valente*, 456 U.S. 228 (1982).

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner SEIU Local 925 claims to represent non-tenured contingent faculty members of the Employer, Pacific Lutheran University. Op. at 15. The University argued to the Regional Director that the Supreme Court's decision in *Catholic*

Bishop prevented the Board from exercising jurisdiction. *Id.*

The Regional Director disagreed, deciding that the University is not “a religious institution” under *Catholic Bishop* and that therefore there is no bar to Board jurisdiction. Op. at 15, 16. In reaching this decision, the Regional Director applied the “substantial religious character” test, relying on findings that “the mission and purpose of the University is to educate students and that mission makes no mention of God, religion, or Lutheranism” and that “faculty are subject to no religious requirements.” Op. at 16.

The University requested Board review of the Regional Director’s decision. On September 23, 2013, the Board granted the University’s Request for Review of the Regional Director’s Decision and Direction of Election. The Board denied the University’s request for a stay of the election, which has since been conducted. On February 10, 2014, the Board issued a Notice and Invitation to File Briefs, calling for *amicus* briefs on certain questions posed by the Board.

INTRODUCTION AND SUMMARY OF ARGUMENT

A threshold question in this case is whether the Board may assert jurisdiction over Pacific Lutheran University, a religious university officially affiliated with the Evangelical Lutheran Church in America.

The Board has invited amicus briefs regarding several issues. This brief will address the following questions by the Board:

1. What is the test the Board should apply under *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), to determine whether self-identified “religiously affiliated educational institutions” are exempt from the Board’s jurisdiction?

2. What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under *Catholic Bishop*?

The appropriate test was first described in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985) (en banc) (Breyer, J.), and later implemented nearly verbatim in *University of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002). That test, which states that a religious school qualifies for the *Catholic Bishop* exemption if it holds itself out as a religious institution, is a non-profit, and is religiously affiliated, allows the Board to identify *bona fide* religious institutions without engaging in the type of intrusive inquiries *Catholic Bishop* and numerous subsequent Supreme Court cases expressly forbid. *Id.*

By contrast, applying the “substantial religious character” test triggers constitutional avoidance under *Catholic Bishop* by violating the Religion Clauses of the First Amendment in at least two different ways. First, the “substantial religious character” test requires government intrusion into the internal affairs of religious organizations. Supreme Court cases decided since *Catholic Bishop* have only served to re-emphasize that this kind of government intrusion is forbidden by the First Amendment, both because of the interference with the religious institution’s exercise of religion and because it entangles government in religious matters.

Second, the “substantial religious character” test violates the Religion Clauses’ prohibition on discrimination among religions, most notably under *Larson v. Valente*, 456 U.S. 228 (1982). By focusing on factors such as whether the University admits students that are not Lutheran, whether the University requires its staff to

be Lutheran or act in a religious way, or whether the University declares propagation of Lutheranism to be part of its mission, the Regional Director was discriminating among religions. By doing so the Regional Director imposed a preference for religious universities that restrict their students and faculty to co-religionists, or that view the public good of education as subordinated to the goal of religious propagation. In essence, the “substantial religious character” test decides which universities are “more religious” and gives them a special preference. Since the touchstone of the Religion Clauses is neutrality, this practice violates the First Amendment.

Finally, the Board should be aware that the “substantial religious character” test does more than simply raise a constitutional question, thus triggering constitutional avoidance under *Catholic Bishop*. Both intrusion into religious affairs and discrimination among religions are outright violations of the Free Exercise and Establishment Clauses. Thus were the Board to apply the “substantial religious character” test to the University, the Board and its officials would be exposed to liability for violating the University’s constitutional rights.

ARGUMENT

I. The Board should adopt the *Great Falls* standard and reject the “substantial religious character” test.

This case, along with the parallel cases now pending before the Board, present a stark choice to the Board. The Board can either adopt the *Great Falls* standard articulated by the D.C. Circuit, or it can continue to apply the “substantial religious character” test, as did the Regional Director here. A Board decision applying the

Great Falls standard is likely to result in a finding for the University. A Board decision applying the “substantial religious character” test against the University would have a high probability of triggering Supreme Court review.

A. The Board should adopt the *Great Falls* standard.

What is the best way to implement *Catholic Bishop*’s command? The *Great Falls* standard is one that both complies with the Constitution and is easily administrable.

The U.S. Supreme Court in *Catholic Bishop* considered “whether teachers in schools operated by a church to teach both religious and secular subjects are within the [Board’s] jurisdiction” under the National Labor Relations Act. 440 U.S. at 491. The Court noted that the Board’s policy had been to decline jurisdiction over religious institutions only when the Board deemed them “completely religious, not just religiously associated.” *Id.* at 498. Under the “completely religious” standard, the Board had asserted jurisdiction over church-operated schools if they included any component the Board found secular—for example, if a school “perform[ed] in part the secular function” of education alongside “religious instruction.” *Id.* at 495, n. 7 (quoting *Cardinal Timothy Manning, A Corp. Sole*, 223 NLRB 1218 (1976)).

The Court held that the Board’s policy of separating out “completely religious” institutions from those merely “religiously associated” raised “serious constitutional questions” under the Religion Clauses. *Id.* at 501. It noted that teachers at religious schools played a “critical and unique role . . . in fulfilling” the school’s religious mission. *Id.* And because “[r]eligious authority necessarily pervades the school

system,” the teacher’s secular functions could not be separated from the religious ones without the Board becoming excessively entangled in the school’s religious affairs. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)).

Similarly, the Court held that the Board’s inquiry into unfair labor practices against a church-operated school posed “a significant risk” that it would become inappropriately involved in religious matters, as schools had responded to past such attempts by stating “that their challenged actions were mandated by their religious creeds.” *Id.* at 502. The Board would also likely become entangled in religious matters every time it inquired into the “terms and conditions of employment” because “nearly everything that goes on in the schools affects teachers and is therefore arguably a ‘condition of employment’” *Id.* at 503. (quoting *Springfield Educ. Assn. v. Springfield Sch. Dist. No. 19*, 24 Or.App. 751, 759 (1976) (internal quotations omitted)).

Because the Board’s “very process of inquiry” would “impinge on rights guaranteed by the Religion Clauses, and there was no “clear expression” of congressional intent to bring teachers at religious schools within Board jurisdiction, the Court declined to construe the NLRA to permit jurisdiction. *Id.* at 502, 507.

Despite the Court’s holding in *Catholic Bishop*, the Board continued engaging in fact-specific inquiries into the religious character of church-operated schools, using a “pervasively sectarian” test to determine which schools qualified for the *Catholic Bishop* exemption. Its approach was rejected by the First Circuit in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985) (en banc). “Writing for

half of an equally-divided en banc court, then-Judge Breyer concluded that” *Catholic Bishop* applies to all religious schools, even if a school’s primary function is to “provide its students with a secular education.” *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (quoting *Bayamon*, 793 F.2d at 398-99). To determine whether a school qualified for an exemption from Board jurisdiction, Judge Breyer enunciated a three-part test that was later adopted almost verbatim by the D.C. Circuit in *Great Falls*.

Specifically, the *Great Falls* court evaluated the Board’s new “substantial religious character” test—which considered factors such “as the *involvement* of the religious institution in the daily operation of the school, the *degree to which the school has a religious mission* and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty”—and held that the test was identical to the “completely religious” test rejected by the Supreme Court in *Catholic Bishop*. *Id.* at 1339 (quoting *In re Univ. of Great Falls*, 331 NLRB 1663, at 2 (2000)) (emphasis original). Both tests involved the “sort of intrusive inquiry . . . into the ‘religious mission’” of a university that *Catholic Bishop* held raised serious constitutional questions under the Religion Clauses. *Great Falls*, 278 F.3d at 1341. Indeed, the “very process of inquiry leading to findings and conclusions’ . . . implicated First Amendment concerns.” *Id.* (quoting *Catholic Bishop*, 440 U.S. at 502).

The court further held that the *Bayamon*-based three-part test was the appropriate test. According to this approach, the Board was barred from exercising jurisdiction over a school that:

- (a) holds itself out to the public as a religious institution;
- (b) is nonprofit; and
- (c) is religiously affiliated in some way.

Id. at 1347.

This three-part test works well. It avoids the “constitutional infirmities” of the Board’s “substantial religious character” test. *Id.* at 1344; *see also infra*. It does not involve intrusive inquiries into religious beliefs, nor does it question the centrality of those beliefs or their importance to the school’s religious mission. *Id.* “At the same time . . . it is a test that provides . . . assurance” that the institutions receiving the exemption are “*bona fide* religious institutions.” *Id.*

As the D.C. Circuit explained, in the context of a religious university, the first factor requires the institution to hold itself out as “providing a religious educational environment”—which is helpful as a proxy for sincerity because religious identification will attract some potential students but repel others. *Id.* There is a price to be paid for proclaiming an institution’s religiosity. Here, for example, the University’s very name proclaims its religious image – Pacific *Lutheran* University.

The second factor, the non-profit requirement, is helpful in several ways. First and foremost, it ensures that the institution is organized for religious charitable purposes. Second, it is an easy line to administer, and one that other government

agencies, *e.g.* the IRS, use to make similar determinations. For example, the University here is organized as a non-profit, a fact easily ascertainable from existing state records.

The third factor looks to whether the institution “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.” *Id.* In most cases, such a determination is easy to make, resulting in an easily administrable test. Again, this case provides a perfect example: Pacific Lutheran University indisputably has several different close relationships with the Evangelical Lutheran Church in America, including ownership and control.¹

These three factors are enough to decide the jurisdictional question in the vast majority of cases. By contrast, “[t]o probe further into” a school’s “beliefs is to needlessly engage” in the type of “trolling” the Supreme Court has held violates the Religion Clauses. *Id.* at 1345.

B. Post-*Catholic Bishop* caselaw demonstrates that the “substantial religious character” test violates the Religion Clauses.

The Supreme Court has decided a number of cases since *Catholic Bishop* was decided in 1979 that directly contradict use of the “substantial religious character” test. The cases tend to show that the “substantial religious character” test does not

¹ This factor could be constitutionally problematic were it applied to the detriment of an independent or interdenominational religious institution, for example an independent Protestant seminary affiliated with no single denomination. But that is not the case before the Board.

just trigger constitutional avoidance, but also results in direct constitutional violations because it requires government intrusion and entanglement in religious affairs, and because it results in discrimination among religions.

1. The “substantial religious character” test requires government intrusion into and entanglement with the internal affairs of religious organizations.

A number of Supreme Court cases decided since *Catholic Bishop* demonstrate that the need for constitutional avoidance is even greater than it was in 1979.

Just two years ago the Court decided *Hosanna-Tabor*. *Hosanna-Tabor* involved a claim against Hosanna-Tabor Evangelical Lutheran Church and School, a church-operated school affiliated with the Lutheran Church-Missouri Synod. 132 S.Ct. 694. A teacher at the school, Cheryl Perich, alleged that her employment was terminated in violation of the Americans with Disabilities Act. *Id.* at 701. Similar to its holding in *Catholic Bishop* about “the critical and unique role of the teacher in fulfilling the mission of a church-operated school,” 440 U.S. at 493, the Court in *Hosanna-Tabor* held that Perich qualified as a minister even though her work included a combination of religious and secular duties. *Id.* at 700. The Court dismissed Perich’s suit, stating that it was barred by the ministerial exception. *Id.* at 710.

As the Court explained,

Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.

Id. at 702, 706.

In the context of this case, *Hosanna-Tabor* prohibits any Board interference with internal church decisions, such as how a religious university describes its mission or whether it subjects faculty to religious requirements. As such, *Hosanna-Tabor* demonstrates that the “substantial religious character” test cannot be applied because it threatens to “interfere [] with the internal governance” of a religious institution. *Id.* The *Great Falls* test does not run this risk.

In *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion), public school parents filed suit alleging the unconstitutionality of Chapter 2 of the Education Consolidation and Improvement Act of 1981, which provides for funding for educational materials and equipment to public and private elementary and secondary schools to implement “secular, neutral, and nonideological” programs. 530 U.S. at 801-2. Plaintiffs claimed that Chapter 2 violated the Establishment Clause because it included private schools that were religious. *Id.* at 804.

In holding that Chapter 2 did not violate the Establishment Clause, the plurality paid special attention to the dissent’s suggestion that the constitutionality of a school aid program be determined by looking at various factors, including whether the school is “pervasively sectarian.” *Id.* at 826. The plurality found this suggestion “profoundly troubling”:

The inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only *unnecessary but also offensive*. It is well established, in numerous other contexts, that *courts should refrain from trolling through a person’s or institution’s religious beliefs*.

Id. at 828 (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 887 (1993)) (emphasis added).

Thus the “substantial religious character” test, which *requires* trolling through an institution’s religious beliefs, is not just “unnecessary” but “offensive.” It does not just trigger constitutional avoidance, but works an independent constitutional violation.

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) counsels a similar result. *Amos* involved two affiliate organizations of The Church of Jesus Christ of Latter-day Saints, the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB) and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (COP). 483 U.S. 327. The affiliates operated Deseret Gymnasium, a non-profit facility.

An engineer for the Gymnasium was fired by the affiliates when he failed to obtain a certificate from the Church authorizing him to attend the Church’s religious temples. *Id.* at 330. He filed a class-action lawsuit alleging that CPB and COP violated the Civil Rights Act of 1964 because they dismissed him for religious reasons, even though he was a nonreligious employee. *Id.* at 331. The affiliates invoked Title VII’s religious organization exception, arguing that the Act exempts religious organizations from the Act’s ban on religious discrimination. *Id.* In response, the engineer argued that the exemption violated the Establishment Clause because it permitted religious employers to discriminate on religious grounds for nonreligious jobs. *Id.*

In holding that the religious exemption did not violate the Establishment Clause, the Court noted the difficulty civil courts would have distinguishing a

religious organization's secular activities from its religious ones. "The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.* at 336. And as Justice Brennan noted in his concurring opinion, a church should be exempted from "a case-by-case determination whether its nature is religious or secular." *Id.* at 340 (Brennan, J., concurring in the judgment).

Here, the "substantial religious character" test is precisely the type of case-by-case determination *Amos* made clear is constitutionally prohibited and therefore cannot be used. By contrast, the *Great Falls* test allows for an uncomplicated inquiry that identifies *bona fide* religious institutions without inappropriately intruding into religious affairs, or entangling government with religion.

In sum, Supreme Court cases that have been decided since *Catholic Bishop* provide even more reason than was present in 1979 to construe the National Labor Relations Act to preclude any use of the "substantial religious character" test. Government bodies, including the Board, simply should not be in the inquisition business.

2. The "substantial religious character" test discriminates among religions under *Larson v. Valente*.

The Free Exercise and Establishment Clauses prohibit the government from making "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency"). The First Amendment

thus prohibits “discrimination . . . [among religious institutions] expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]” *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (applying *Larson* to invalidate distinction between “sectarian” and “pervasively sectarian” universities).

The “substantial religious character” test does just that: It determines the religiosity of various religiously-affiliated employers and treats the “more religious” employers better than the “less religious” ones. By preferring religious employers that exclude non-believers from their students and faculty to those that do not limit themselves to co-religionists, the “substantial religious character” test violates the First Amendment. Similarly, by preferring universities that have as their chief end the propagation of religion to universities that do not embrace this goal, the “substantial religious character” test discriminates among religions. These preferences cannot be squared with the First Amendment and must therefore be rejected.

CONCLUSION

The Supreme Court has consistently held that government interference in religious decisions and government discrimination among religions are prohibited by the Religion Clauses. The Board should thus apply the non-intrusive *Great Falls* standard to determine Board jurisdiction over Pacific Lutheran University and reject the “substantial religious character” test.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on March 28, 2014, a true and correct copy of the foregoing document was served upon the following persons, by electronic mail, at the addresses below:

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