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The Impact of Pacific Lutheran on Collective Bargaining at Catholic Colleges and Universities

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The Impact of Pacific Lutheran on Collective Bargaining at Catholic Colleges and Universities

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Introduction

In *Pacific Lutheran University*, the National Labor Relations Board (NLRB) modified the test for determining whether it can assert jurisdiction over faculty at religiously-affiliated universities and colleges for the purposes of resolving representation questions and investigating unfair labor practice charges. In doing so, the Board abandoned the "substantial religious character" test it had applied pursuant to the 1979 Supreme Court decision *Catholic Bishop of Chicago.*[3] In its place, the Board set forth a new test that permits jurisdiction over certain bargaining units of professors at religiously-affiliated colleges and universities without creating the risk of entanglement between government and religion.

In *Catholic Bishop,* the Supreme Court raised concerns about the potential for First Amendment infringement if the Board were to assert jurisdiction over lay teachers at a Catholic parochial school. Subsequently, in applying the *Catholic Bishop* decision, the Board developed a standard that asked whether the employer had a "substantial religious character" such that there would be a risk of significant First Amendment infringement should the Board assert jurisdiction. The D.C. Circuit twice rejected the Board's "substantial religious character" test, finding that the test itself raised First Amendment constitutional concerns.

The new test established in *Pacific Lutheran University*[4] relies entirely on a university's own public statements regarding its religious environment and the specific religious roles of faculty, putting to rest the specter of an intrusive, constitutionally problematic inquiry into whether a school is "sufficiently" religious. This development comes at a moment when faculty at colleges and universities across the country, including Catholic institutions, are taking collective action to demand investment in students and instruction, bringing the story of highly-

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[4] *Pacific Lutheran Univ.*, 361 NLRB No. 157 (2014). For purposes of disclosure, the authors assisted in representing the petitioners SEIU Local 925 before the NLRB in *Pacific Lutheran University*.

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educated, poorly-compensated professors into the global movement for fair pay and the right to form unions.

The *Pacific Lutheran* test meets that moment, offering a route to stability in an area of Board law that has been controversial for decades. Costly hearings and appeals under the previous *Catholic Bishop* doctrine had delayed union campaigns for years, and chilled organizing activity among faculty at religiously-affiliated colleges. On some Catholic campuses, sincere concerns with the doctrine had prompted attacks on faculty organizing efforts—attacks at odds with tenets of Catholic teaching that honor the rights of all working people to act collectively.

The new test does away with the source of principled opposition to faculty organizing pursuant to the National Labor Relations Act (NLRA). It creates a constitutionally sound, workable means of ensuring that the Board will not take jurisdiction of a unit that includes faculty members who are held out as performing specific religious functions. It also creates a pathway for lay faculty who work for a Catholic university or college to exercise their federal statutory rights. This can potentially impact not only the nearly 68,000 faculty who work at Catholic universities and colleges, but also the 90,000 additional faculty in this country who work for other religiously-affiliated universities or colleges.

Under the NLRA, also known as the Wagner Act, workers have a legal framework that allows them to act jointly and bargain collectively over the terms and conditions of their employment. When passed in 1935, the Act promoted stable, effective collective bargaining relationships, providing an alternative to the labor unrest of the early 20th century. "The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement."[5] While there might exist alternative routes to collective bargaining outside of federal labor law for these faculty, those paths face significant barriers of their own. For example, employers could voluntarily agree to recognize a representative of the employees' choosing for the purposes of collective bargaining if administered by a neutral, non-governmental third party rather than the NLRB; however Catholic universities and colleges have, by and large, chosen not to do so.[6]

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[5] *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

[6] In some states, depending on the statute, state labor law may cover employers who are clearly *not* covered by the NLRA. See, e.g. *Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161 (1985) (finding that New York State Labor Relations Board had jurisdiction over bargaining unit of teachers employed by an association of Catholic high schools).

In short, the new *Pacific Lutheran* test is an important step towards bringing the voices of these faculty into the conversation about fair working conditions in higher education. This paper lays out the history of *Catholic Bishop* and the NLRB's assertion of jurisdiction over units of teachers at religiously-affiliated schools, culminating in the Board's decision to revise its test in *Pacific Lutheran University*. We then explain why the *Pacific Lutheran* test is constitutionally sound and highlight comparisons from the employment non-discrimination context. We also explain why speculative fears about constitutional entanglement resulting from collective bargaining at Catholic universities and colleges misunderstand the purpose and nature of collective bargaining under the National Labor Relations Act.

Faculty Organizing Rights at Religiously-Affiliated Schools

NLRB v. Catholic Bishop and the Board's "Substantial Religious Character" Test

In *Catholic Bishop*, the Supreme Court considered "[w]hether *teachers* in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act."[7] The case concerned the Board's decision to exercise jurisdiction over units of lay teachers at two groups of Catholic high schools. In its decision, citing concerns stemming from the Religion Clauses of the First Amendment, the Supreme Court invoked its prudential policy of constitutional avoidance and determined that the NLRB should decline jurisdiction over questions of representation involving teachers at church-operated schools.[8]

The Court discussed two potential ways in which Board jurisdiction over teachers would present a risk of entanglement with the Religion Clauses of the First Amendment.[9] The Court first suggested that because the teachers could be terminated or disciplined for religious reasons, the Board's adjudication of unfair labor practice charges might require it to judge the religious good faith of the administrators in making such decisions. Second, because the teachers' jobs involved "the propagation of a religious faith," the Board's determination of which terms and conditions of employment were mandatory subjects of bargaining would involve the Board in religious matters. The Court held that it was "the *teacher's function* in a church school"—the "critical and unique role of the teacher in fulfilling the mission of a church operated school"—that led to the "danger that religious doctrine will become intertwined with secular instruction."[10]

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[7] *Catholic Bishop*, 440 U.S. at 491 (emphasis added).
[8] *Id.* at 507.
[9] *Id*. at 502–03. In Section III we argue that these hypothetical entanglement scenarios are belied by courts that have adjudicated employment discrimination claims against religiously-affiliated employers, and by actual collective bargaining experience.
[10] *Id*. at 501 (emphasis added).

The Court commented on the "substantial religious character" of the church-operated high schools in the case, but only by way of explaining why the parochial teachers' job functions were inherently concerned with religious instruction. The "admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith,"[11] was relevant because it explained why "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school" and therefore why the Board's exercise of jurisdiction would present constitutional problems.[12]

Subsequent decisions by the Board and the courts clarified the limited scope of the holding in *Catholic Bishop*. The doctrine has no application to employees other than teachers, and does not "exclude church-operated schools, as entire units, from the coverage of the NLRA."[13] And *Catholic Bishop* exempts from jurisdiction only teachers who are under an "obligation . . . to imbue and indoctrinate the student body with the tenets of a religious faith."[14]

When the Board began to apply *Catholic Bishop* to colleges and universities, it recognized that indoctrination is not inherent in the jobs of professors at religiously-affiliated institutions of higher education. It thus announced that it would apply *Catholic Bishop* to colleges and universities only on a "case-by-case basis."[15] In many early cases the Board continued to focus on the job functions of the petitioned-for unit of teachers.[16] Over time, the Board more frequently analyzed the "substantial religious character" of the school *as a whole*,[17] asking whether the entire "entity is . . . exempt from Board jurisdiction under *Catholic Bishop*."[18] That test involved the Board examining all relevant aspects of the school's organization and function, including "the purpose of the employer's operations, the role of unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction."[19]

The D.C. Circuit's Rejection of the NLRB Test in University of Great Falls

In 2002, the D.C. Circuit rejected the NLRB's "substantial religious character" test as excessively probing and wide-ranging. In *University of Great Falls*, the Board certified a unit of faculty at a Catholic university. The university then refused to bargain and challenged the

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[11] *Id.* at 503 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971)).
[12] *Id.* at 504.
[13] *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1301 (9th Cir. 1991).
[14] *NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 822 (2d Cir. 1980).
[15] *Trustee of St. Joseph's Coll.*, 282 NLRB 65, 68 n.10 (1986).
[16] *Livingstone Coll.*, 286 NLRB 1308, 1309 (1987) ("Of more significance is the fact that faculty members are not required to conform to AME doctrine or promote the ideals and objectives of the AME Church.").
[17] *Univ. of Great Falls*, 331 NLRB 1663, 1664 (2000), *rev'd*, 278 F.3d 1335 (D.C. Cir. 2002).
[18] *Carroll Coll.*, 345 NLRB 254, 257 (2005), *rev'd*, 558 F.3d 568 (D.C. Cir. 2009).
[19] *Univ. of Great Falls*, 331 NLRB at 1664–65.

Board's decision on a number of grounds before the D.C. Circuit, including that *Catholic Bishop* precluded the Board from asserting jurisdiction.[20] The D.C. Circuit agreed with the employer, finding that the Board's "substantial religious character" test itself was constitutionally problematic because it amounted to asking: "is [the school] sufficiently religious?"[21]

Building on then-Judge Stephen Breyer's 1986 First Circuit opinion in *Universidad Central de Bayamon*, the D.C. Circuit formulated instead a new three-pronged test: First, does the school hold itself out to students, faculty, and the community as providing a religious educational environment; second, is it a non-profit; and third, is it affiliated with, owned, operated, controlled, directly or indirectly, by a recognized religious organization or with an entity whose membership is determined at least in part with reference to religion.[22] The court believed that this bright-line test would ensure that the Board would not delve into "matters of religious doctrine or motive."[23]

In 2009, the NLRB found itself facing off with the D.C. Circuit again over the jurisdictional question in *Carroll College*.[24] In that case, the Board certified a unit of faculty at a college affiliated with the Presbyterian Church. On appeal before the D.C. Circuit, the employer abandoned its previous argument under the Religious Freedom Restoration Act and raised for the first time the argument that the Board did not have jurisdiction under *Catholic Bishop*. The court noted that it always retains the authority to address jurisdictional questions and applied its three-part test from *University of Great Falls*. In finding that the Board did not have jurisdiction over Carroll College, the court again criticized the Board's "substantial religious character" test, reiterating its fear that the Board would become involved in assessing the good faith of positions asserted by clergy-administrators,[25] or in "trolling through the beliefs of [schools], making determinations about [their] religious mission, and that mission's centrality to the 'primary purpose' of the [school]."[26]

The NLRB's New Test in Pacific Lutheran University

In April 2013, a group of part-time and full-time contingent faculty at Pacific Lutheran University in Tacoma, Washington filed a petition for an election with the NLRB to be

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[20] The employer also argued that NLRB jurisdiction would violate the Religious Freedom Restoration Act (RFRA) and that the faculty were exempt managerial employees under *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).
[21] *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002).
[22] *Id.*
[23] *Id.* at 1345.
[24] The NLRB is bound by its own precedent and Supreme Court decisions, but not Court of Appeals decisions. At the time when the D.C. Circuit considered *Carroll College*, the Board had not changed its *Catholic Bishop* test.
[25] *Carroll College v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009).
[26] *Id.* at 572 (quoting *Univ. of Great Falls*, 278 F.3d at 1341–42).

represented by SEIU Local 925. This group sought to join the ranks of contingent faculty who were increasingly turning to collective bargaining and organizing a union as a way to fight for job security, fair pay, and a voice at their schools. Indeed, in the following three years, at least 11,000 contingent faculty all over the country have succeeded in organizing a union at their college or university.

When the Board decided that it would review the representation petition in the *Pacific Lutheran* case, it signaled its readiness to reconsider its "substantial religious character" test by inviting outside parties to file *amicus* briefs, to assist the Board in determining what the appropriate test should be under *Catholic Bishop*.[27] Ten amicus briefs addressing the appropriate *Catholic Bishop* jurisdictional test were submitted in response to the Board's invitation.

The resulting NLRB decision reflects a careful consideration of the many arguments that were presented. Importantly, the new jurisdiction test addresses the concern of the D.C. Circuit and *amici* regarding the constitutionally appropriate bounds on an inquiry into a religious school's environment while meeting the Board's statutory obligation to enforce the National Labor Relations Act. Under *Pacific Lutheran University*, the Board will decline jurisdiction over a unit of faculty members at a college or university if the institution both 1) "demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment," and 2) "holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment."[28]

The First Prong: Religious Educational Environment. In this threshold inquiry, the Board accepted the D.C. Circuit's concern that "corroboration of a university's claim that it is a religious institution cannot involve an inquiry into the good faith of the university's position or an examination of how the university implements its religious mission."[29] Rather, the Board will rely on the school's contemporary presentation of its religious environment, including mission statements, its website, and information given to students, faculty, and the public—as "an accurate, but nonintrusive, way for the Board to assess a university's assertion that it provides a religious educational environment."[30]

The *Pacific Lutheran* test reflects the Board's conviction, shared with the D.C. Circuit, that the jurisdictional carve-out must "err on the side of being over-inclusive and not excluding

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[27] The Board also requested amicus briefs addressing the other major higher education collective bargaining issue raised in its review of the case, the question of whether the faculty members were managerial employees under the Supreme Court case *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).
[28] *Pacific Lutheran Univ.*, 361 NLRB No. 157, slip op. at 5 (2014).
[29] *Id.* at 6.
[30] *Id.* at 6–7.

universities because they are not 'religious enough.'"[31] The test also incorporates the *Great Falls* holding requiring that the college or university to be organized as a non-profit.[32] However, the Board did not adopt the element of the D.C. Circuit's *Great Falls* test requiring the university be affiliated with, owned or operated by a recognized religious entity, reasoning that multidenominational or nondenominational colleges might also hold themselves out as providing a religious educational environment.[33]

The first prong removes the Board from the business of assessing the religious "character" or "environment" of the institution as a whole.[34] As this is now the threshold, rather than the entire, inquiry, the test is less vulnerable to the suggestion—made by some—that if a college or university is "sufficiently" religious then *all* its employees, regardless of their function, are not covered by the Act.[35]

The Second Prong: Specific Role in Creating or Maintaining the Religious Educational Environment. Once the threshold requirement is met, the Board will examine "whether the university holds out its petitioned-for faculty members as performing a specific role in creating and maintaining that environment."[36] The Board drew on language from *Catholic Bishop* in crafting this prong of the test, noting that "'the key role played by teachers in such a school system has been the predicate' for its concern about 'creating an impermissible risk of excessive governmental entanglement.'"[37] Only when the teachers in the unit play a "critical and unique role" in creating and maintaining the religious environment does the assertion of jurisdiction open the door to potential interference with management rights or conflict between management and the Board on religious matters. Absent those circumstances, "it is appropriate

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[31] *Id.* at 7 (citing *Univ. of Great Falls,* 278 F.3d at 1343 (2002)).
[32] Under a line of cases distinct from *Catholic Bishop*, the NLRB has declined jurisdiction over all employees of some churches and religious organizations based on its conclusion that those organizations are not engaged in commercial activity. *See, e.g., Riverside Church*, 309 NLRB 806 (1992) (declining jurisdiction over service and maintenance employees at church); *cf. The First Church of Christ, Scientist*, 194 NLRB 1006 (1972) (asserting jurisdiction over electricians and carpenters employed by church for magazine publishing operation exceeding $1 million). As a general matter, the NLRB has long asserted jurisdiction over non-profit entities that meet its discretionary standards for commercial activity. For private, non-profit colleges and universities, that threshold is a gross annual revenue of $1 million. 29 C.F.R. § 103.1 (2014). The private non-profit higher education sector takes in over $160 billion in net revenues annually. Data from the Integrated Postsecondary Education Data System, National Center for Education Statistics, http://nces.ed.gov/ipeds/.
[33] *Pacific Lutheran Univ.*, slip op. at 7.
[34] *Id.* 10 (quoting *Univ. of Great Falls*, 278 F.3d at 1346 (stating that limiting the *Catholic Bishop* exception to religious institutions "with hard-nosed proselytizing" might violate the Establishment Clause command not to prefer some religions to others)).
[35] *See Saint Xavier Univ.*, No. 13-RC-092296 (NLRB). The employer has argued that *Catholic Bishop* precludes Board jurisdiction over a unit of housekeepers, despite stipulations that housekeepers have no religious functions. After *Pacific Lutheran*, the case was remanded by the Board to the Regional Director and is currently pending.
[36] *Pacific Lutheran Univ.*, slip op. at 7.
[37] *Id.* at 7 (citing *NLRB v. Catholic Bishop*¸440 U.S. 490, 501 (1979)).

for the Board to assert jurisdiction for the same reasons that it is appropriate to assert jurisdiction over employees at other types of religious organizations, that is, because assertion of the Board's jurisdiction does not raise concerns under either the Free Exercise Clause or the Establishment Clause of the First Amendment."[38]

The Board acknowledged that an examination of the actual functions of the faculty members in the petitioned-for unit could itself raise First Amendment concerns. Accordingly, in order to avoid "'trolling' through a university's operation to determine whether and how it is fulfilling its religious mission" it simply will "decline jurisdiction if the university 'holds out' its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university's religious purpose or mission."[39] The Board will not inquire into the university's beliefs or how effectively it inculcates those beliefs. Nor will it require or even allow an inquiry into the faculty member's actual performance of duties.[40]

The Board was clear, however, that the religious function must be specific. Generalized statements that faculty support the goals or mission of the university are not enough; nor are generally held commitments to diversity or academic freedom. The Board can consider how the employer holds out faculty functions in public-facing statements including employment contracts, statements to accrediting bodies, and statements to students and current faculty. If those and other sources show that faculty members are expected to perform specific religious functions, the Board will decline jurisdiction.[41]

The Dissent. The dissenting Board members in *Pacific Lutheran University* criticized the Board's new test as still involving the Board in "trolling through religious beliefs," and argued that the Board should end its inquiry after conducting a test similar to the D.C. Circuit's *Great Falls* test.[42] They objected to the second prong of the test, which Member Johnson claimed "amounts to an analysis of what is 'religious' as opposed to what is 'secular,' thereby placing the Board in the untenable position of deciding what can, and what cannot, be deemed a sufficiently religious role or a sufficiently religious function."[43] Moreover, assuming the test itself were not problematic, to the extent that an unfair labor charge involves an employer decision made for

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[38] *Id.* at 8.
[39] *Id.*
[40] *Id.* at 8-9.
[41] *Id.*
[42] *Id.* at 26 (Miscimarra, dissenting); *id.* at 30 (Johnson, dissenting).
[43] *Id.* at 31 (Johnson, dissenting). Seattle University, in its recent request for review to the Board in one of six pending *Catholic Bishop* cases that were remanded after *Pacific Lutheran*, also objected to the second prong of the test, warning that it would result in "unavoidable entanglement problems." Brief for Appellant at 11, *Seattle Univ.*, No. 19-RC-122863 (NLRB Mar. 17, 2015).

religious reasons, the Board's inquiry would necessarily examine the validity of the church doctrine.[44] Member Johnson suggested that jurisdiction is particularly problematic in this case because Lutheranism is one of the "religions that believe fundamentally that *there is no role for a civil institution like the Board in solving their disputes*," and there can be no avoiding excessive entanglement when the Board gets involved.[45]

The dissent's line of reasoning suggests two extraordinary propositions: First, any court effort to delineate the scope of religious exemptions across our labor and employment laws that involves an inquiry into the religious function of the employee—even if based upon on objective representations made by the employer itself—risks improper government intrusion; and second, Board jurisdiction over *any* employees of a bona fide religion, particularly those employers whose religious doctrine requires internal dispute resolution, risks Constitutional problems.[46] As described in Section III, courts have not endorsed the logic supporting either of these propositions.

Neither the *Pacific Lutheran* Test Nor Collective Bargaining at Catholic Universities and Colleges Risks Infringement of the Religion Clauses

Under the *Pacific Lutheran* test, the Board will decline jurisdiction over teachers at religiously-affiliated schools who perform specific religious functions. The limited inquiry that the Board engages in to determine whether the school holds its faculty out as performing a religious function does not run afoul of the First Amendment, as cases from the employment anti-discrimination context demonstrate. For the majority of faculty at Catholic universities and colleges who do not perform specific religious functions, collective bargaining can proceed without risking the speculative constitutional concerns described in *Catholic Bishop*, as demonstrated by actual bargaining experience between unions and religiously-affiliated employers. This is so because the Board's role in enforcing the NLRA is geared towards protecting the collective bargaining process rather than prescribing the substance of agreements reached through that process.

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[44] *Id.* at 34 (citing *NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 822 (2d Cir. 1980) (quoting *Catholic Bishop of Chicago v. NLRB*¸ 559 F.2nd 1112 (7th Cir. 1977))).

[45] *Id.* at 34 (noting that *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694 (2012) involved a Lutheran school that fired a "called teacher" for failing to abide by internal dispute mechanism, and citing other Lutheran doctrinal documents). The record in *Pacific Lutheran University* does not indicate that the employer claimed that resolving university employment disputes outside of internal processes would violate church doctrine.

[46] *See id.* at 34 n.11 (Johnson, dissenting) (acknowledging that line of reasoning would lead to conclusion that Board jurisdiction over any employees of a bona fide religion would raise significant risk of Constitutional concerns, but declining to reach this question).

The Pacific Lutheran Test is Validated by Hosanna-Tabor and Other Court Decisions Concerning Employment Discrimination

Courts have rejected the categorical view that the First Amendment prohibits courts from even inquiring into the religious function of employees or adjudicating any disputes that involve employer religious objections.[47] First, with regard to court inquiry into the religious function of employees, the "ministerial exception" cases in the employment non-discrimination context provide salient comparisons. Second, courts have not endorsed the position that First Amendment concerns preclude adjudicating claims altogether when the employer offers a religious reason for an adverse employment action.

Religious Function and the "Ministerial Exception." Under non-discrimination laws like Title VII and the Age Discrimination in Employment Act (ADEA), employers cannot discriminate against individuals because of certain characteristics such as race, color, religion, sex, national origin, or age. However, courts have determined that the First Amendment precludes these laws from being enforced with regard to the employment relationship between ministers and their churches, both because that would interfere with the Free Exercise Clause which protects a religious group's right to shape its faith and mission through its religious messengers, and the Establishment Clause which prohibits the government from getting involved in ecclesiastical decisions.

In explaining the *Pacific Lutheran* test, the Board observed that it was adopting an approach similar to the Supreme Court's approach in its most recent decision on the scope of the "ministerial exception."[48] In *Hosanna-Tabor*, a "called teacher" at an elementary school operated by a church was terminated after she took disability leave. The Equal Employment Opportunity Commission (EEOC) brought suit claiming that her termination was in retaliation for exercising her rights under the Americans with Disabilities Act. The employer maintained that the teacher was a "minister" and that her termination was for a religious reason.

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[47] *See Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986) (finding that Ohio Civil Rights Commission's investigation into a sex-discrimination claim brought by teacher against church-operated school does not violate constitutional rights, given that employer will have opportunity to raise constitutional concerns in state-court judicial review); *Herx v. Diocese of Fort Wayne-South Bend*, 772 F.3d 1085, 1091 (2014) (denying employer Catholic school's collateral-order request for Seventh Circuit to review district court's decision to allow plaintiff's Title VII claim to proceed to a jury trial, noting that neither "Title VII [religious] exemptions or the First Amendment more generally provides an immunity *from trial*, as opposed to an ordinary defense to liability."

[48] *Pacific Lutheran Univ.*, slip op. at 10–11; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694 (2012).

In concluding that the suit was barred by the ministerial exception, the Court did not simply take the employer at its word that the teacher in question was a "minister."[49] Rather, the Court inquired into the specific "religious functions that she performed for the church." [50] Her job description made clear she had "ministerial responsibilities"; that she had undergone a significant amount of religious training and a "formal process of commissioning"; that she held herself out as a minister; and that her job duties "reflected a role in conveying the Church's message and carrying out its mission."[51]

Hosanna-Tabor demonstrates that making a determination as to whether a teacher performs a religious function based on objective facts does not improperly entangle the Board or the courts with the employer's religious beliefs. In *Pacific Lutheran,* the Board similarly concluded that "an examination of employee's roles is permitted when the question presented is whether employees of a religious organization are exempt from Federal law."[52] Indeed, the majority of circuit courts analyzing whether the ministerial exception applies in a given case have, at a minimum, looked at whether or not the employee performs a religious function.[53]

Adjudication of Religious Reasons. Courts are capable of making principled accommodations to adjudicate the underlying discrimination charges against religiously-affiliated employers without prompting concerns of First Amendment infringement. In *Dayton Christian School*, the Supreme Court did not enjoin the Ohio Civil Rights Commission from adjudicating charges against a church-operated school under the state sex discrimination law. The Court found that "the Commission violates no constitutional rights by merely investigating the circumstances of [plaintiff's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."[54]

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[49] The Court's majority did not adopt the argument proposed by Justice Thomas, writing separately, that the Religion Clauses require courts to "defer to a religious organization's good-faith understanding of who qualifies as a minister. *Hosanna-Tabor,* 132 S.Ct. at 710.
[50] *Id.* at 708.
[51] *Id.* at 707–08.
[52] *Pacific Lutheran Univ.*, slip op. at 10–11. The *Pacific Lutheran* test is arguably more deferential than the *Hosanna-Tabor* approach, in that the Board has decided to look only to whether the employer "holds out" the employee as performing a specific religious function.
[53] *See, e.g., Petruska v. Gannon Univ.*, 462 F.3d 294, 304 (3d Cir. 2006) ("In evaluating whether a particular employee is subject to the ministerial exception, other circuits have concluded that the focus should be on the 'function of the position.' . . . [W]e agree that a focus on the function of an employee's position is the proper one."); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003) ("In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position."); *Starkman v. Evans*, 198 F.3d 173, 175–76 (5th Cir. 1999) ("To determine whether Ms. Starkman qualifies as a 'spiritual leader' for purposes of the ministerial exception, this court will examine the employment duties and requirements of the plaintiff as well as her actual role at the church."); *see also Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurrence) ("[C]ourts should focus on the function performed by persons who work for religious bodies.").
[54] *Dayton Christian Sch.*, 477 U.S. 619, 628 (1986).

The majority of circuit courts have found that the ADEA, as applied to religious institutions and to lay teachers more specifically, does not pose a serious risk of excessive entanglement.[55] For example, the Second Circuit recognized that the pretext inquiry used in ADEA cases is not inherently intrusive, as it "normally focuses upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination," none of which requires an examination of religious doctrine.[56] The Third Circuit has similarly concluded that "when the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement."[57] The Board too can make principled accommodations to adjudicate unfair labor practice cases in the same manner.

Long Bargaining Experience Between Unions and Religiously-Affiliated Employers Suggests Constitutional Infringement Risks Are Speculative and Unlikely to Materialize

If faculty have no specific religious roles in their employment, like janitorial staff or cafeteria workers, collective bargaining with a Catholic university or college is fundamentally no different than bargaining with any other religiously-affiliated non-university employer for First Amendment purposes. To the extent that the dissenting criticism of the majority opinion in *Pacific Lutheran* suggests that mandatory collective bargaining with religiously-affiliated employers, *in general*, would result in inevitable First Amendment infringement, the actual experiences from bargaining relationships do not support that conjecture. While many examples could be cited, the ones below, based on collective bargaining relationships involving affiliates of the Service Employees International Union, underscore how infrequently religious issues actually arise at the bargaining table.

In the Washington, D.C. metro area, SEIU Local 500 organized the majority of adjunct faculty, representing professors at schools including George Washington University, American University, and Georgetown University, which is a Jesuit Catholic university. At Georgetown, adjunct faculty organized their union without delays or opposition, pursuant to the University's Just Employment Policy, a 2005 document that affirms its commitment to "fair and competitive

[55] *See DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 169 (2d Cir. 1993) (citing cases).
[56] *Id.* at 171; *see also Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1168–69 (1985) (holding that New York State Board could proceed with resolving unfair labor practice charges involving a unilateral decision to discharge 226 teachers by Catholic school association so long as the State Board's inquiry does not raise the "recurrent questioning of whether a particular church actually holds a particular belief").
[57] *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 324, 330 (3rd Cir. 1993) (ADEA applies "so long as the plaintiff does not challenge the validity of the doctrine or practice and asks no more than whether the proffered religious reason actually motivated the employment action").

compensation packages" and "the right to freely associate and organize."[58] Consistent with Georgetown's identity as a Catholic and Jesuit institution, the Just Employment Policy specifically states that "the University will respect the rights of employees to vote for or against union representation without intimidation, unjust pressure, undue delay or hindrance in accordance with applicable law."[59]

Georgetown faculty reached their first contract in October 2014. They negotiated the same subjects as faculty at secular schools, including: course rates, job security, evaluations, professional development, labor-management committees, and participation in the academic community. Indeed, Local 500's previous experience in bargaining with faculty units at other universities enabled the union to make proposals that anticipated and accommodated the kinds of concerns that Georgetown might raise. No religious issues arose during bargaining.

Religiously-affiliated colleges and universities are often major employers in their metropolitan areas.[60] Across New England and the Mid-Atlantic, SEIU Local 32BJ represents 1,500 non-teaching staff, including cleaners, cafeteria workers, and security guards at over a dozen such schools including Boston College, St. John's University, Fordham University, Duquesne University, Villanova University, Georgetown University, and Catholic University. Local 32BJ also represents workers at secular colleges and universities in the same geographic areas. The workers Local 32BJ represents perform the same functions—cleaning, preparing and serving food, and providing security services—whether they work at religiously-affiliated universities or purely secular universities.[61] These workers have bargained, both with universities and with contractors, over the same issues whether the schools are secular or maintain a religious affiliation, including: wages, benefits, hours of work, just cause protection, layoff and recall rights, grievance and arbitration systems, and seniority.

Similarly in the health care industry where religious organizations have traditionally been active, SEIU locals that represent health care workers have long bargained with religiously-affiliated employers around the same topics typically discussed in negotiations with secular

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[58] Georgetown University, *Just Employment Policy*, http://publicaffairs.georgetown.edu/acbp/just-employment-policy.html.
[59] *Id.*
[60] In the District of Columbia, for instance, Jesuit-affiliated Georgetown University is the largest non-governmental employer, and Catholic University is the sixth. DISTRICT OF COLUMBIA 2015 COMPREHENSIVE ANNUAL FINANCIAL REPORT, 196, *available at* http://app.dc.gov/pdf/FY_2015_DC_CAFR.pdf.
[61] One illustration of the irrationality of a rule that would exempt religious universities as a whole from the Board's jurisdiction comes from the fact that many universities contract out the work of cleaners, food service workers, and security guards. The job functions of those workers do not change whether they are employed by the university itself or by private contractors; nor should the workers' rights to form a union.

health care employers, including: pay, benefits, staff development, scheduling and hours, health and safety, and labor-management committees.

As these snapshots illustrate, bargaining typically involves a core set of practical subjects that are not inherently religious, such as wages and benefits, hours or scheduling, job stability, and dispute resolution procedures. The precise scope of bargaining and the specific content of bargaining proposals differ across bargaining relationships, but many employers—not just religiously-affiliated employers—have "restrictions on bargaining due to outside influences" that must be factored into bargaining as part of the employer's bottom-line.[62] Experience does not support the proposition that the concerns of religious employers are uniquely immune to resolution at the bargaining table.

On rare occasions when religious concerns are raised, they have been resolved in bargaining. For example, SEIU Local 1199-United Healthcare Workers East, which represents health care workers in the Northeast, reached a resolution with a religiously-affiliated hospital regarding contraceptive coverage for its employees. The union offered to make accommodations in the health care plan so long as the plan complied with state and federal laws. The employer, after getting advice through an internal ethics process, reached an agreement with the union to offer an employee health care plan that comported with its religious beliefs.

In 2009, representatives from the U.S. Conference of Catholic Bishops, the Catholic Health Care sector, and labor jointly issued a document titled *Respecting the Just Rights of Workers, Guidance and Options for Catholic Health Care and Unions*. The document, which established models for effective relationships between unions and Catholic employers, describes a process for reaching consensus that underscores the spirit and potential of collective bargaining: "Participants respected [] differing perspectives and did not abandon strong convictions and positions in these areas. Nonetheless, we worked diligently and persistently to find agreement on other practical alternatives that all the participants could support."[63]

The examples from SEIU's experience are not unique; collective bargaining with religiously-affiliated employers is well-established.[64] Concerns about collective bargaining's

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[62] *Boston Med. Ctr. Corp.*, 330 NLRB 152, 164 (1999) ("e.g. contracts an employer may have with other concerns that require the employer to conduct its business in a specific manner, or specifications in a contract that limit what an employer may or may not do.").

[63] *Respecting the Just Rights of Workers: Guidance and Options for Catholic Health Care and Unions*, 4 (June 22, 2009) (on file with author). The guidance document also recognizes there can be no "one size fits all solution" for the diversity of local issues and experiences that employers and employees face, and invites Catholic Health Care employers and unions to explore other approaches tailored to issues at the local level.

[64] *See, e.g.*, The Catholic Labor Network, http://www.catholiclabor.org.

intrusive impact are "needlessly pessimistic" and "gives little credit to the intelligence and ingenuity of the parties."[65]

The National Labor Relations Act Creates a Framework for Mutual Agreement

The NLRA created the National Labor Relations Board not to drive towards substantive standards or outcomes in employment relationships, but to maintain the integrity and legitimacy of the collective bargaining framework. In *Boston Medical Center*, the Board described exactly why speculative fear regarding collective bargaining's "intrusion"—in that case, into areas involving academic freedom—is misplaced: "This argument puts the proverbial cart before the horse. The contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts: what can be bargained about, what the parties wish to bargain about or concentrate on, and what the parties are free to bargain about, may change. But such problems have not proven to be insurmountable in the administration of the Act."[66]

Three principles in federal labor law significantly limit the possibility that collective bargaining could intrude on employers' ability to make religious or ecclesiastical decisions. First, mandatory topics of bargaining—contrary to the *Catholic Bishop* Court's conjecture—are not unlimited in scope. The Board and the courts have interpreted mandatory topics to exclude those decisions that "lie at the core of entrepreneurial control," or involve "a change in the scope and direction of the enterprise" even if the decision necessitates terminating employment.[67]

Clearly, employer prerogatives that implicate constitutional rights are extremely important, and the Board is capable of recognizing those situations when they occur. In *Peerless Publications*, the Board affirmed that "protection of the editorial integrity of a newspaper lies at the core of publishing control" and found that the employer newspaper was free to implement a journalist code of ethics despite its clear impact on the terms and conditions of employment, so long as those rules were tailored to the protection of the "core purpose of the institution."[68] The

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[65] *See Boston Med. Ctr. Corp.*, 330 NLRB 152, 165 (1999) (asserting jurisdiction over medical interns, residents and fellows as employees and rejecting the contention that collective bargaining would improperly intrude into areas involving academic freedom).
[66] *Boston Med. Ctr. Corp.*, 330 NLRB at 164 (1999).
[67] *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). The Supreme Court gave considerable deference to employers' interests and solidified a more narrow interpretation of "terms and conditions of employment," motivated by the concern that "management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."
[68] *Peerless Publ'ns*, 283 NLRB 334, 335 (1987) (citing *Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550, 562 (D.C. Cir. 1980)). When faced with a conflict between the employer's freedom to make decisions regarding the basic direction of the enterprise and the employees' right to bargain over decisions that impact the terms and conditions of employment, the Board has sought to strike a balance that takes into account the relative importance of the proposed actions to the parties.

Board later explained that this "core purpose of the institution" exception to the employer's obligation to bargain was due in part to the recognition that "editorial control and the ability to shield that control from outside influences are within the First Amendment's zone of protection and therefore entitled to special consideration."[69]

Second, even if religious issues were incidentally raised during the course of bargaining over mandatory subjects, such as contraceptive coverage in a health care plan or paid leave for religious holidays, the employer is under no obligation to agree to union proposals.[70] The employer need only bargain in good faith, and can insist on its position to the point of impasse.[71] If the parties reach a bona fide impasse, the employer can implement its final offer and the union has no recourse under the law.[72] Additionally, all employers may bargain for "management rights clauses" which are express agreements that the employer retains the unilateral ability to make decisions over certain topics.[73] For example, one collective bargaining agreement between the Lay Faculty Association and the Catholic High School Association in New York specified that "there are certain areas of Canon Law, ecclesiastical decrees and religious obligations that cannot be the subject of negotiations."[74] Thus, in practice, collective bargaining does not encroach on managerial prerogatives.

Third, the Board "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[75] The Board's enforcement role is focused on protecting those rights that are integral to the effective functioning of the collective bargaining process. As the Supreme Court has stated: "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited

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[69] *Virginia Mason Hosp.*, 357 NLRB No. 53, slip op. at 20 (2011) (citing *Newspaper Guild*, 636 F.2d at 560).
[70] *See H. K. Porter Co.*, 397 U.S. at 102 (1970) ("[W]hile the Board does have power under the National Labor Relations Act, 61 Stat. 136, as amended, to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement."); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 412 (1952) ("Certainly the Board lacks power to compel concessions as to the substantive terms of labor agreements.").
[71] *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) ("[A]n impasse may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.'") (quoting *Charles D. Bonanno Linen Serv., Inc.*, 243 NLRB 1093, 1094 (1979)).
[72] *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 238 (1996) ("[T]he Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions.")
[73] *See Am. Nat'l Ins.*, 343 U.S. 395 (1952) (declining to find employer had not bargained in good faith when it insisted on a management functions clause over work scheduling, a mandatory topic of bargaining).
[74] *Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1163 (2d Cir. 1985).
[75] *Am. Nat'l Ins. Co.*, 343 U.S. at 404 (1952); *see also supra*, note 64.

representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."[76]

Collective bargaining is a flexible framework for a practice that is shaped by the industry in question and the prerogatives of the parties who sit at the table—not by the government. There is a dearth of cases or data to warrant reliance on the speculation that collective bargaining will in fact intrude into the constitutional arena. Thus, the Board is right to craft a test that strictly limits exemptions under *Catholic Bishop*. In other First Amendment contexts, the Supreme Court has declined to create exceptions to the application of a rule or law based on attenuated or speculative claims of infringement.[77] For example, in *Associated Press v. NLRB*, the Court rejected the employer news agency's claim that application of the NLRA intruded on the freedom of the press—namely, the freedom to hire and fire employees who edit the news so as to maintain an unbiased and impartial news agency. Noting that the employer had failed to show that this consideration was, in fact, the reason for discharging a union activist, the Court observed, "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances."[78]

Conclusion

The contours of the NLRB's *Pacific Lutheran* jurisdictional test will continue to be refined as the Board applies it in different cases, and the standard itself may eventually be tested in federal appellate courts. At least six faculty representation cases raising the *Catholic Bishop* jurisdictional question are pending before the NLRB.[79] As of February 2016, the Board had not yet issued a decision reviewing any of the Regional Directors' decisions applying the new jurisdictional test to a religiously-affiliated university or college.

A careful examination of our federal labor and employment laws as well as specific experiences in bargaining with religiously-affiliated employers will show that collective rights for employees do not come at the cost of the religious freedom of their employers. To the contrary: "[i]f there is anything we have learned in the long history of this Act, it is that unionism

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[76] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Congress also amended the NLRA to make this point clear: ". . . but such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).
[77] *See Assoc. Press v. NLRB*, 301 U.S. 103 (1937); *see also Univ. of Pa.*, 493 US 182 (1990) (finding that EEOC subpoena process requiring peer review tenure materials from employer university in a race or sex discrimination case did not infringe First Amendment rights, where infringement was attenuated and speculative).
[78] *Assoc. Press*, 301 U.S. at 132 (1937).
[79] *See Carroll Coll.*, No. 19-RC-165133 (NLRB); *Seattle Univ.*, No. 19-RC-122863 (NLRB); *Saint Xavier Univ.*, No. 13-RC-22025 (NLRB); *Manhattan Coll.*, No. 02-RC-23543 (NLRB); *Duquesne Univ.*, No. 06-RC-80933 (NLRB); *Loyola Univ. Chicago*, No. 13-RC-164618 (NLRB).

and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy."[80]

[80] *Boston Med. Ctr. Corp.*, 330 NLRB 152, 165 (1999).

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