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Expanding the Power of Big Labor: The NLRB's Growing Intrusion into Higher Education

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Chairman Roe, Chairwoman Foxx , Ranking Member Andrews, Ranking Member Hinojosa, and Members of the Subcommittees:

Thank you for the opportunity to discuss with you today the issue of National Labor Relations Board jurisdiction over religiously-affiliated colleges and universities. I am the vice dean and a law professor at Villanova University School of Law, where I teach and write on topics related to law and religion. Before moving into law teaching, I was an attorney at Williams & Connolly here in Washington and was Associate Director of the Domestic Policy Council at the White House. I am testifying today in my personal capacity.

I think it is important to note at the outset what this issue is not about. This issue is not about whether employee unionization and mandatory collective bargaining are valuable legal and policy objectives under the National Labor Relations Act. Instead, this issue is about the freedom of religious institutions from government interference with regard to their religious mission.

I wish to make three points in my testimony. First, the NLRB's use of a "substantial religious character" test to determine the scope of the religious exemption from the NLRA is at odds with over 30 years' worth of Supreme Court and lower court precedents. Second, intrusion by the NLRB into the internal matters of religious institutions poses a threat to religious freedom.

Finally, opposition to NLRB jurisdiction over religiously-affiliated colleges and universities is not inconsistent with support by churches of the rights of workers to unionize.

For many years following enactment of the National Labor Relations Act in 1935, the National Labor Relations Board did not exercise jurisdiction over nonprofit educational institutions at all. *Trustees of Columbia University in the City of New York*, 97 NLRB 424 (1951). By the 1970s, however, the NLRB was routinely exercising jurisdiction over educational institutions, including religiously-affiliated institutions, with only an exemption for schools that were "completely religious" and offered instruction only in religious subjects. *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975).

In the landmark case of *NLRB v. Catholic Bishop of Chicago* in 1979, the Supreme Court held that the doctrine of constitutional avoidance required that NLRB's jurisdiction not extend to parochial school teachers because (1) there was a significant risk of violation of the First Amendment if NLRB jurisdiction extended to "church-operated" secondary schools, and (2) there was no clear indication of congressional intent in the NLRA to give the NLRB jurisdiction over teachers in church-operated schools. 440 U.S. 490 (1979). "In the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board," the Court wrote, "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." 440 U.S. at 507. As the Court noted, a variety of issues that the NLRB is routinely called upon to resolve in labor disputes, such as charges of unfair labor practices, would raise serious First Amendment questions if applied to religious schools:

> The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its

> relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

440 U.S. at 502.

Since *Catholic Bishop*, courts have expanded the holding of the case to cover a broad range of religiously-affiliated schools, not merely those that are "church-operated" and not merely primary and secondary schools. Then-Judge Stephen Breyer noted in his opinion in *Universidad Central de Bayanom v. NLRB* that the Court in *Catholic Bishop* did not limit its holding to primary and secondary schools and that the same entanglement problems that the Court identified in *Catholic Bishop* are present in higher education:

> [T]o fail to apply *Catholic Bishop* [to colleges and universities] is to undercut that opinion's basic rationale and purpose. The Court there rejected the Labor Board's pre-existing distinction between "completely religious schools" and "merely religiously associated schools." In doing so, it sought to minimize the extent to which Labor Board inquiry (necessary to make the "completely/merely-associated" distinction) would itself entangle the Board in religious affairs. Under this rationale, therefore, we cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board 'entanglement' as they are administered….These ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely what the Supreme Court in *Catholic Bishop* sought to avoid.

793 F.2d 383, 402 (1st Cir. 1986) (en banc) (Breyer, J., for half of an equally divided court).

NLRB presently takes the position that *Catholic Bishop* is limited to schools with a "substantial religious character" and that the Board should determine on a case-by-case basis whether a school has such a character. In order to make this determination, the Board "considers such factors as the involvement of the religious institution in the daily operation of the schools, 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." *In re University of Great Falls*, 331 NLRB No. 188 at 3 (2000).

But these are precisely the sort of intrusive inquiries that the First Amendment precludes. As the Supreme Court noted in its plurality opinion in *Mitchell v. Helms*, "[I]nquiry into… 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." 530 U.S. 793, 828 (2000).

The Religious Freedom Restoration Act, enacted in 1993, brings with it a new factor for the NLRB to consider when attempting to exercise jurisdiction over religious educational institutions. RFRA requires that the government not substantially burden the free exercise of religion (even if the burden results from a rule of general applicability) unless the burden is necessary for the furtherance of a compelling governmental interest and is the least restrictive means of achieving that interest. Three years after RFRA was enacted, the University of Great Falls challenged the NLRB's finding that it was not exempt from recognizing a faculty union, stating that the NLRB's exercise of jurisdiction would violate RFRA. NLRB responded by stating that RFRA had no effect on its jurisdictional decisions because the Board's practices in the wake of *Catholic Bishop* avoided creating a substantial burden on the freedom of the exercise of religion. The NLRB then evaluated the Great Falls under its *Catholic Bishop* standard and concluded that it was not "church operated" within the meaning of the holding of *Catholic Bishop* largely because the Catholic Church was not involved directly in the day-to-day management or administration of the school.

The D.C. Circuit, in an opinion that sharply rebuked the Board, held that the NLRB's determination of a school's religious character was an inappropriate and invalid way to make jurisdictional determinations. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir.

2002). The D.C. Circuit articulated a three-pronged test to determine whether a religious institution was exempt from the jurisdiction of the NLRB that would avoid the intrusive inquiry into the good faith claims of a religious university that *Catholic Bishop* sought to avoid: (1) the institution "holds itself out to students, faculty and community as providing a religious educational environment," (2) the institution "is organized as nonprofit," and (3) 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." 278 F.3d at 1347. The NLRB has yet to employ this clear three-pronged test that appropriately balances religious freedom with the objectives of the NLRA, which argues for codification of the *Great Falls* test in the statute. As the D.C. Circuit explained, the *Great Falls* test "allow[s] the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into aletering its religious mission to meet regulatory demands." Id. at 1345. In 2008, another institution, Carroll College, successfully challenged the Board's exercise of jurisdiction over it when the D.C. Circuit again held that a school met all three components of the test set forth in *Great Falls*. *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). The Board, however, continues to adhere to its own "substantial religious character" framework for evaluating the religious exemption of colleges and universities from NLRB oversight.

Most recently, three Catholic schools—St. Xavier in Chicago, Manhattan College, and Duquesne University in Pittsburgh—have had claims for exemption from NLRB jurisdiction rejected by the Board and are now appealing those decisions. In each instance, the schools clearly satisfy the test in *Great Falls*. For instance, the NLRB maintains that Manhattan College, while clearly holding itself out to be a religious institution, does not meet the admissions, hiring,

and curriculum criteria that the NLRB thinks exempted institutions must meet in order to be "substantially religious." In response, the Association of Catholic Colleges and Universities and the Association of Jesuit Colleges and Universities have filed amicus briefs on behalf of their sister institutions.

Cases addressing similar attempts by government to distinguish which institutions are "really" religious and which are not come to the same conclusion. For example, in *Colorado Christian University v. Weaver*, the U.S. Court of Appeals for the Tenth Circuit (in an opinion written by then-Judge Michael McConnell) held that a Colorado public scholarship program that excluded students who attended "pervasively sectarian" universities was unconstitutional. 534 F. 3d 1245, 1250 (10th Cir. 2008). In order to determine if a university was "pervasively sectarian," the government was required to examine the curriculum of the school and take into consideration whether, for example, the students were required to attend religious services. But such inquiries are precisely what the First Amendment prohibits, for "[t]hese determinations threaten to embroil the government in line-drawing and second-guessing regarding matters about which it has neither competence nor legitimacy." 534 F.3d at 1265. As Justice William Brennan argued in his concurring opinion in *Presiding Bishop v. Amos*, "[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1978) (Brennan, J., concurring in the judgment).

The Board's narrow view of what constitutes a religious institution is at odds with the approach taken in other contexts, such as employment discrimination law. Title VII exempts religious organizations from the prohibition on discrimination based on religion, and both EEOC's own guidance and cases such as *LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217 (3d Cir. 2007), hold that the exemption for religious institutions from Title VII's prohibition on discrimination based on religion is quite broad. As Judge Roth put it in the Thrid Circuit's opinion in *LeBoon*:

> First, religious organizations may engage in secular activities without forfeiting protection under Section 702....Second, religious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection....Third, religious organizations may declare their intention not to discriminate, as the LJCC did to the United Way and in its employee handbook, without losing the protection of Section 702....Fourth, the organization need not enforce an across-the-board policy of hiring only coreligionists....We will not deprive the LJCC of the protection of Section 702 because it sought to abide by its principles of "tolerance" and "healing the world" through extending its welcome to non-Jews.

503 F.3d 217 at 230.

It is ironic that the 200-plus Catholic colleges and universities in the United States—which have had a mission for generations of teaching not merely Catholic theology but also business, science, literature, medicine, and law—are now threatened with being put under the thumb of NLRB oversight for it. It is ironic that Catholic colleges and universities, especially in major urban areas (such as Boston College, Fordham, St. John's, Georgetown, Villanova, DePaul, Loyola-Chicago, and Loyola-Los Angeles) that have long provided an education for both Catholics and non-Catholics are now told by the Board that opening their doors to all gives license to the NLRB to interfere with the school's hiring and employment practices. It is ironic that Catholic universities' embrace of academic freedom and inquiry now gives cause to the

Board to conclude that they are not "really" religious institutions. As the D.C. Circuit put it in *Great Falls*:

> If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty. To limit the *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause—not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.

278 F.3d 1335, 1346 (D.C. Cir. 2002).

I hasten to add that the Catholic Church has long been an advocate for the rights of employees to form unions and for economic justice. But there is nothing inconsistent with affirming the objectives of unionization while insisting that religious freedom requires that religious institutions be free of government oversight of employment practices. Indeed, as some commentators have noted, the collective bargaining and labor dispute processes at the heart of NLRB jurisdiction are in tension with what the Church holds out in its own teaching. As one scholar has argued:

> [B]ehind the bargaining process and a key factor in motivating the parties to reach agreement is the availability of economic weapons and the threat that they will be used. The presence of these weapons and a corresponding "'area of labor combat"' is, as the Supreme Court has said, part and parcel of the structure of the Act. Labor peace is achieved under the Act by balancing the power of employers and employees, directing both parties to bargain in good faith, and giving each party wide discretion in the use of weapons should less adversarial tactics fail.
>
> This vision of the collective bargaining process is deeply inconsistent with the Church's vision. For the Church, the animating spirit in labor-management relations must be one of brotherhood and cooperation….Thus, for the Church, the collective bargaining process is not one where the parties necessarily proceed from antagonistic viewpoints and concepts of self-interest. To the contrary, each party must try to understand the other's position, even put themselves in the other's position, and genuinely seek reasoned interchange and a harmonious outcome. The common good, not merely common ground, should be the object of the negotiating process, and the primary motivation for reaching agreement should be love, not fear.

Kathleen A. Brady. "Religious Organizations and Mandatory Collective Bargaining under Federal and State Labor Laws: Freedom From and Freedom For," 49 *Villanova Law Review* 77, 121-22 (2004).

In conclusion, let me draw your attention to a recent case that I think helpfully illuminates the debate over NLRB jurisdiction over religious institutions. The United States Supreme Court held unanimously earlier this year that the First Amendment grants religious institutions immunity from discrimination claims with regard to employment decisions about "ministers," which includes a much broader category of employees than merely ordained clergy. We can all agree that employment anti-discrimination laws are important and valuable, but, as Chief Justice Roberts wrote in his opinion for the Court, the balance between religious freedom and "the interest of society in the enforcement of employment discrimination statutes" has been decisively struck by the First Amendment in favor of religious freedom. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 710 (2012). Similarly, we might have broad agreement about the importance of the objectives of the NLRA, objectives that the Catholic Church and many other churches embrace, but, when it comes to the internal governance of religiously-affiliated colleges and universities, the First Amendment—and a long line of Supreme Court and court of appeals cases—strikes the balance on behalf of institutional autonomy. Whatever one's views about the scope of employee rights to unionize under the NLRA, those claims must yield to the institutional freedom of religious schools, and the constitutionally appropriate test is simply whether the school holds itself out as a religious institution, is a non-profit, and is religiously-affiliated. Further and more intrusive inquiry into an institution's mission by the government jeopardizes the religious freedom of religiously-affiliated schools to live out their character as they see fit.