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NLRB Limits Authority Over Religiously Affiliated Colleges and Universities

In a June 10, 2020 decision involving [Bethany College](#), a higher education institution affiliated with Synods of the Evangelical Lutheran Church in America, the National Labor Relations Board (NLRB) firmly retreated from asserting its authority over the unionization of faculty at religious schools. The decision dismissed a complaint against the Lutheran college and took decisive steps to bring the Board’s process into line with established Supreme Court precedent limiting NLRB authority. By doing so, the NLRB adopted the *Great Falls* test set forth by the D.C. Circuit in prior NLRB matters and explicitly rejected the Board’s own 2014 test that assessed the substantive religiosity of the faculty members proposed as a bargaining unit. Although the Board recognized its mission to protect employees’ rights, it found the exercise of its mission was ultimately “subordinate” to protecting rights under the Constitution. The use of the bright-line three-prong *Great Falls* test will provide greater clarity about the limits of the Board’s jurisdiction.

This case is the latest in which the Board has grappled with its jurisdiction under the U.S. Supreme Court’s decision in [NLRB v. Catholic Bishop of Chicago](#). There, the Court blocked the Board seeking elections and hearing labor disputes of lay teachers in church-operated primary and secondary schools. The Court construed the National Labor Relations Act to avoid a significant risk of infringement on the First Amendment because the process of adjudication under the Act would require a detailed inquiry into the relationship between the school’s religious mission and the role of faculty. Such inquiries, enforced through the Board, the Court found risked unconstitutional excessive entanglement.

Trying to skirt *Catholic Bishop*, the Board attempted to assert its jurisdiction over religious higher education on a case-by-case basis by inquiring whether there was proof of a “substantial religious character.” In 2002, the D.C. Circuit rejected this inquiry as an intrusion into religious matters in [University of Great Falls](#). Instead, the Court set out an objective three-prong test to determine the boundary of the NLRB’s reach. Under the *Great Falls* test, as restated in the *Bethany College* case, the Board “must decline to exercise jurisdiction” over an institution that (a) “holds itself out . . . as providing a religious educational environment”; (b) is “organized as a nonprofit”; and (c) 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.”

Seeking to avoid the import of a series of adverse judicial decisions based on *Great Falls*, the Board in [Pacific Lutheran University](#) examined not just the religiosity of the college but whether the college held out the faculty members themselves as having a specific role in the religious educational environment. To determine this, the Board required more than “generalized statements” about the role of faculty to establish they held a “specific religious function” that would exempt the school from the Board’s reach. This approach was roundly rejected earlier this year by the D.C. Circuit in [Duquesne University](#). The D.C. Circuit found the expansion to be well out of line with *Catholic Bishop* where “the Supreme Court

did not differentiate between teachers who play religious roles and those who play secular roles, but rather held that the Board lacked jurisdiction over *all* teachers at church-operated schools.”

In yesterday’s *Bethany College* decision, the Board determined the expanded test of *Pacific Lutheran* was, indeed, “fatally flawed” where it required an otherwise impermissible entangling inquiry into the religious function of specific faculty. The Board explicitly renounced any jurisdiction over *bona fide* religious schools and formally adopted the *Great Falls* test as it was originally set out. The decision stated the Board’s intent to “leave the determination of what constitutes religious activity versus secular activity precisely where it has always belonged: with the religious institutions themselves, as

well as their affiliated churches” Having determined the appropriate test, the Board had no trouble finding sufficient evidence that *Bethany College* held itself out to the public as a religious educational institution and was both organized as a nonprofit and affiliated with a church. Accordingly, it dismissed the complaint.

This latest case appears to establish clear boundaries to limit the NLRB from future attempts to reach religious schools. However, given the decades of litigation over these issues, it would be folly to think this case settles all these questions. Administrators, as well as union officials, will need to study this case and others like it to determine the scope of its impact, with an eye toward possible continued controversy over this issue and future changes in the law or the NLRB.



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