

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

DUQUESNE UNIVERSITY,)	
OF THE HOLY SPIRIT)	
)	Case No. 06-RC-080933
Employer,)	
)	
v.)	
)	
UNITED STEEL, PAPER AND)	
FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND)	
SERVICE WORKERS)	
INTERNATIONAL UNION,)	
AFL-CIO, CLC,)	
)	
Petitioner.)	
)	

**BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF CATHOLIC COLLEGES
AND UNIVERSITIES
IN SUPPORT OF EMPLOYER**

Elizabeth Meers
Joel Buckman
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600

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Stanley Brown
David Baron
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000

Counsel for Amicus Curiae

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STATEMENT OF INTEREST

The Association of Catholic Colleges and Universities (“ACCU”), founded in 1899, is the collective voice of Catholic higher education in the United States. ACCU represents 191 accredited Catholic institutions of higher learning in the United States, including Duquesne University of the Holy Spirit (“Duquesne” or “University”). ACCU’s membership comprises almost 90 percent of such institutions. ACCU’s mission includes strengthening the mission and character of Catholic higher education, and ACCU is often involved in educating the general public on issues relating to Catholic education. Thus, *amicus* and its members have a significant interest in the Board’s jurisdictional tests as they are applied to religious-affiliated educational institutions in the United States and in the related constitutional issues.

SUMMARY OF ARGUMENT

At the outset, *amicus* notes that the arguments set forth in this Brief are about the jurisdiction of the National Labor Relations Board (“Board”), not the natural rights of employees. The Catholic Church has long supported the moral right of workers to organize and bargain collectively. Catholic colleges and universities respect and support those teachings. Nevertheless, under the First Amendment, Catholic colleges and universities must have the freedom to pursue their goals without excessive government entanglement. Assertion of Board jurisdiction in this case has already created and will inevitably create such entanglements.

On June 19, 2012, Respondent Duquesne requested special permission to appeal a denial by Acting Regional Director Mark Wirick, Region 6 (“Regional Director”) of Duquesne’s motion to withdraw from a stipulated election agreement with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the “Petitioner” or “Union”). In its motion and special appeal, Duquesne correctly argued that the Board cannot exercise jurisdiction over the University

because it is a “church-operated school” as defined by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Regional Director sidestepped Duquesne’s objection to Board jurisdiction—without a hearing and without addressing the merits of Duquesne’s arguments—on the irrelevant basis that Duquesne had entered into a stipulated election agreement and the Board had asserted jurisdiction over Duquesne in 1982. On July 6, 2012, ACCU filed an *amicus* brief in support of Duquesne’s special appeal from that incorrect decision, which the Board agreed to consider on August 1, 2012.

On September 14, 2012, over one dissent, the Board denied without prejudice Duquesne’s special appeal. The Board correctly observed that the special appeal raised issues “concerning statutory jurisdiction.” However, the Board remanded the proceeding for counting of the ballots in order to avoid a jurisdictional question that would be moot if the Petitioner lost the election. Member Hayes dissented, explaining correctly that “[i]f [the Board] lacks jurisdiction, then we have no power to order the Regional Director to do the things my colleagues order to be done.” On remand the Regional Director found that Petitioner won a majority of the votes. Consistent with the Board’s invitation to renew its jurisdictional objection, Duquesne has again moved that the Board order the Regional Director to hold an evidentiary hearing in order to answer the jurisdictional question on a fully developed record, and, ultimately, to vacate the election and dismiss the petition. ^{1/} Again, ACCU submits an *amicus* brief in support of Duquesne.

^{1/} Duquesne has already offered sufficient evidence to address the three-pronged test for religious identity announced by the U.S. Court of Appeals for the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). (*Employer’s Mot. for Evid. Hr’g*, at Exs. 2-9). However, to the extent the Board continues (erroneously) to apply the “substantial religious character” test and engage in an unconstitutional fact-intensive inquiry to determine the applicability of *Catholic Bishop*, the Board should remand the case to the Regional Director for a hearing. Additionally, the Board should remand for a hearing to the extent Duquesne wishes to supplement the record in order to demonstrate that it meets either the *Great Falls* test or the “substantial religious character” test, whichever the Board applies.

It is now time for the Board to correct the Regional Director's erroneous assertion of authority over a church-operated educational institution merely because it entered into a stipulation agreement and acquiesced in Board jurisdiction some thirty years earlier. First, under *Catholic Bishop*, the Board cannot exercise authority over a church-operated educational institution because Congress withheld that power. As the Board's September 14 decision recognized, *Catholic Bishop* presents a question of the Board's statutory jurisdiction, which cannot be resolved by consent of private parties. Therefore, it is simply not relevant that the Board may have erroneously asserted jurisdiction over Duquesne in the past or that Duquesne signed a voluntary election agreement (which in any event is silent as to whether *Catholic Bishop* applies and indeed states that Duquesne "provides religious and other higher education"). The Board must address the merits of Duquesne's challenge to its jurisdiction on a fully developed record.

Second, even if Board and judicial precedent did allow church-affiliated institutions to waive jurisdictional objections by waiting until an enforcement proceeding to assert them, Duquesne has not waived its objection here. To the contrary, Duquesne timely raised the jurisdictional issue during these representation proceedings. Jurisdictional objections have been and can be raised even after an election has been conducted. The timing and nature of Duquesne's jurisdictional objections are proper under any standard. Therefore, the Regional Director must hear Duquesne's claims on the merits and may not use an election agreement to obstruct a jurisdictional inquiry that is mandated by law.

Finally, though not the focus of Duquesne's present motion, Duquesne has presented substantial evidence that it falls within the *Catholic Bishop* exception under either the Board's

unconstitutional 2/ “substantial religious character” test or the D.C. Circuit’s constitutional tripartite test for Board jurisdiction over a religiously-affiliated institution. The Board should reverse the Regional Director’s decision and order the Regional Director to hold an evidentiary hearing to determine whether Duquesne is exempt from the Board’s jurisdiction under *Catholic Bishop*.

ARGUMENT

I. THIS APPEAL CONCERNS FREEDOM OF RELIGION AND THE PROPER SCOPE OF GOVERNMENT AUTHORITY, NOT THE NATURAL RIGHTS OF WORKERS

The instant case is about the Board’s jurisdiction, not the natural rights of employees. As Petitioner points out, the Catholic Church has “long supported the moral right of workers to organize and bargain collectively, and the moral duty of employers to bargain.” Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1398 (1981); see Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* § 305 (2004) (“The Magisterium recognizes the fundamental role played by labor unions, whose existence is connected with the right to form associations or unions to defend the vital interests of workers employed in the various professions.”). 3/ Catholic colleges and universities respect and support the Church’s teaching on human work.

Nevertheless, support for the moral rights of workers does not require support for government control over all labor matters. Principles of religious freedom and church autonomy secure the right of religious institutions to be free of state interference in establishing “their own

2/ See *infra* Part III.

3/ Available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

rules and regulations for internal discipline and government.” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976). As a leading commentator has observed:

Even if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal. Regulation may be thought of as taking the power to decide a matter away from the church and either prescribing a particular decision or vesting it elsewhere—in the executive, a court, an agency, an arbitrator, or a union. And regulation takes away not only a decision of general policy when it is imposed, but many more decisions of implementation when it is enforced.

Laycock, *supra*, at 1399.

These concerns are particularly acute in the context of higher education, where bargaining over the terms of employment inevitably “transmutat[es]” into bargaining over academic policy. *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1123 (7th Cir. 1977), *aff’d*, 440 U.S. 490 (1979). Government superintendence of these matters will necessarily, if unintentionally, lead to government influence over “the very process of forming the religion as it will exist in the future.” Laycock, *supra*, at 1391.

II. WHETHER AN EDUCATIONAL INSTITUTION IS EXEMPT FROM THE NLRA UNDER *CATHOLIC BISHOP* IS A QUESTION OF THE BOARD’S STATUTORY JURISDICTION THAT NO EMPLOYER CAN WAIVE

Private parties cannot grant jurisdiction to an agency where Congress has withheld it. In *Catholic Bishop*, the Supreme Court concluded that Congress withheld from the Board jurisdiction over certain church-operated schools. Because Duquesne has questioned the Board’s statutory jurisdiction under *Catholic Bishop*, it is irrelevant that Duquesne entered into a voluntary election agreement or acquiesced to Board jurisdiction in the past. Petitioner could not – and does not even attempt to – address head-on this fundamental flaw.

A. Without Statutory Jurisdiction, The Board Has No Authority Over An Employer-Employee Relationship, And No Waiver Or Agreement By The Parties Can Confer That Authority

“Agency jurisdiction, like subject matter in the federal courts, cannot be achieved by consent of the parties.” *Plaquemines Port, Harbor and Terminal Dist. v. Fed. Maritime Comm’n*, 838 F.2d 536, 542 n.3 (D.C. Cir. 1988). Thus, a party’s acquiescence in or even consent to jurisdiction cannot create jurisdiction where none exists. *Id.*; see also *Tenn. Gas Pipeline Co. v. Fed. Power Comm’n*, 606 F.2d 1373 (D.C. Cir. 1979) (“[A]n agency may, if authorized by statute, issue an advisory opinion or abstract declaration without regard to the existence of an actual controversy.”) (emphasis added). Nothing in the National Labor Relations Act purports to change this bedrock principle. See *NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 754–55 (7th Cir. 1998).

To the contrary, in defining “employer,” the NLRA eliminates the NLRB’s jurisdiction over certain entities. See 29 U.S.C. § 152(2) (excluding, for example, any “wholly owned Government corporation,” “Federal Reserve Bank,” or “State or political subdivision thereof”). In *Federal Security, Inc.*, for instance, the employer alleged that the NLRB did not have jurisdiction over an unfair labor practice charge because the employer qualified as a state or political subdivision. 154 F.3d at 754. Because the employer waited to raise this jurisdictional objection until after an administrative law judge had determined that the employer had committed an unfair labor practice, the NLRB deemed the jurisdictional objection waived. *Id.* The Seventh Circuit disagreed. It held that the employer’s “contention that Congress explicitly excluded it from the Act’s coverage surely is the type of jurisdictional challenge the Board agrees can never be waived.” *Id.* The court therefore had to consider the jurisdictional question, because “if the Board had no jurisdiction over [the employer’s] decision to fire [certain]

guards . . . then [the Board’s] finding of an unfair labor practice and its decision to reinstate those guards must be summarily reversed.” *Id.*

In short, an employer’s acquiescence (and by extension, agreement) simply does not and cannot confer NLRB jurisdiction where Congress has withheld it. *See Centex Indep. Elec. Contractors Ass’n, Inc.*, 344 NLRB 1393, 1396 (2005) (“If the Board lacks statutory jurisdiction over a particular respondent, the respondent’s failure to raise the issue does not waive it. A respondent is not Congress, and a respondent’s waiver cannot confer on the Board jurisdiction which Congress has never given to it.”); *East Newark Realty Corp.*, 115 NLRB 483, 483 (1956) (recognizing that even in the case of the NLRB’s discretionary jurisdiction, a party’s “stipulation cannot foreclose inquiry by the Board to determine whether the assertion of jurisdiction in a given case would be contrary to the Board’s jurisdictional policy.”).

B. Under *Catholic Bishop*, The Board Has No Statutory Jurisdiction Over Disputes Between Church-Operated Educational Institutions And Their Instructors

The Supreme Court has construed the NLRA to add an additional category of employers to which the NLRA does not apply and as to which the NLRB does not have jurisdiction—church operated educational institutions when negotiating with (at the very least) their instructors. *See Catholic Bishop*, 440 U.S. at 506–07. ^{4/} Given the inevitable and thorny Constitutional violations that would follow application of the NLRA to church-operated schools, the Court held that “Congress did not contemplate that the [NLRB] would require church-

^{4/} In Petitioner’s Mot. to Dismiss, it attempts to assert that only a subset of teaching employees at church-operated school were intended to be exempt from Board jurisdiction under *Catholic Bishop*. *Petitioner’s Mot. to Dismiss* at 11. However, the decisions Petitioner cites do not stand for this proposition. Rather, to the extent any distinction is made, the cited authorities distinguish between teaching and non-teaching personnel; they do not distinguish between teachers and other teachers. *See, e.g., NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1301-02 (9th Cir. 1991) (interpreting the NLRA to apply to the employer’s non-teaching employees even though it did not apply to its teaching employees). Duquesne’s adjunct professors are teaching employees.

operated schools to grant recognition to unions as bargaining agents for their teachers.” *Id.* at 506. The Court therefore held that the NLRA has no more jurisdiction over labor disputes between a church-operated educational institution than it does over wholly owned Government corporations, Federal Reserve Banks, states or political subdivisions thereof, or any other statutorily exempt entity. *See id.* at 511 (“Thus, the Act covers all employers not within the eight express exceptions. The Court today . . . insert[s] one more exception—for church-operated schools.”) (Brennan, J., dissenting). Thus, when *Catholic Bishop* applies, an employer cannot by consent confer authority that Congress, as interpreted by the Supreme Court, withheld.

Whether *Catholic Bishop* applies is a question of the Board’s statutory jurisdiction—as the Board’s September 14, 2012 decision in this case recognized—and cannot be waived. *Kansas AFL-CIO*, No. 17-CA-22178, 2004 WL 366244 (NLRB Div. of Judges, Feb. 23, 2004) (“Respondent relies upon *NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979), which concerned the Board’s assertion of statutory jurisdiction over teachers in church-operated schools.”); *see Saint Xavier Univ.*, No. 13-RC-22025, 2011 WL 4912692 n.3 (NLRB Div. of Judges May 26, 2011) (evidence that a Catholic university had other “certified collective bargaining representative[s]” for certain employees is “of limited relevance to the jurisdictional argument being raised by the University because jurisdiction can be raised at any time by any party, including the NLRB or courts”); *The Salvation Army of Massachusetts Dorchester Day Care Ctr.*, 247 NLRB No. 62, 247 NLRB 413 (1980) (“However, the Employer has raised the question of statutory rather than discretionary jurisdiction and, were we to find that this case involved ‘teachers in church-operated schools’ within the meaning of *The Catholic Bishop of Chicago*, the stipulation would be contrary to the Act, and the *Board could not* honor it.”) (emphasis added); *Saint Anthony Hosp. Sys. v. NLRB*, 655 F.2d 1028, 1030 (10th Cir. 1981) (a

Catholic Bishop challenge to NLRB jurisdiction is a challenge to the Board’s statutory jurisdiction).

Here, as explained below, the parties’ election agreement does not even purport to stipulate to NLRB jurisdiction. But even if the parties’ election agreement could somehow be mischaracterized as a waiver, it could not confer jurisdiction where Congress denied it. As in *St. Xavier* and *Salvation Army*, if Duquesne is a church-operated school under *Catholic Bishop*, the stipulation would be contrary to the NLRA, and the Board would have to refuse jurisdiction. Nor is it of any consequence that the Board may have erroneously exceeded its jurisdiction by certifying collective bargaining units for Duquesne’s employees in the past.^{5/} Rather, whenever the Board learns that *Catholic Bishop* may apply—and thus that its statutory grant of jurisdiction may be in jeopardy—the Board must affirmatively satisfy itself that it has jurisdiction. In this context, the Board must determine on a complete record after an evidentiary hearing whether Duquesne is a church-operated educational institution within the meaning of *Catholic Bishop*.^{6/}

III. DUQUESNE HAS NOT “WAIVED” ITS RIGHT TO CONTEST THE BOARD’S JURISDICTION UNDER *CATHOLIC BISHOP*

It is well-settled that an employer can raise a challenge to the Board’s statutory jurisdiction in a representation case at any time prior to an unfair labor practice enforcement

^{5/} The regional director’s reliance on a 30-year-old Board decision asserting jurisdiction over Duquesne is misplaced. First, in that case, Duquesne did not fully pursue its exemption under *Catholic Bishop*. *Duquesne University of the Holy Ghost*, 261 NLRB 587 (1982). Second, and more importantly, at that time, the Board interpreted *Catholic Bishop* to apply only to parochial schools. *Id.* As set forth more fully in part IV, the Board now applies *Catholic Bishop* to all religious-affiliated schools, irrespective of the level of education provided.

^{6/} An employer cannot, by waiver or otherwise, provide the Board with jurisdiction over church-operated educational institutions. Accordingly, the traditional standard for withdrawal from an election agreement—that a party must make “an affirmative showing of unusual circumstances”—is inapplicable here. See *First FM Joint Ventures, LLC*, 331 NLRB 238, 239 (2000). Indeed, *amicus* is unaware of any case law applying the *First FM* standard to a *Catholic Bishop* challenge to the Board’s jurisdiction. However, to the extent that *First FM* does provide the applicable standard in this case, surely the Board’s lack of jurisdiction under *Catholic Bishop* constitutes a sufficiently “unusual circumstance” to withdraw from a stipulated election. If *Catholic Bishop* applies, the Board has no authority to enforce the agreement.

proceeding. *See, e.g., Five Cap, Inc.*, Case Nos. GR-7-CA-37182, 1997 WL 33315906 n.9 (NLRB Div. of Judges, Jan. 31, 1997) (“While in certain instances, . . . an assertion of lack of jurisdiction has been waived by a failure to raise such a contention in the representation case, . . . where, as here, the issue is the Board’s assertion of statutory jurisdiction, . . . such a contention may be raised at any time.”); *Saint Elizabeth Cmty. Hosp. v. NLRB*, 626 F.2d 123, 124-25 (9th Cir. 1980) (hospital timely challenged the Board’s jurisdiction on First Amendment grounds despite not raising the issue until after: (1) a representation hearing, (2) disputes over the eligibility of certain employees to vote, (3) an election had been held, (4) the votes had been counted, (5) the employer objected to certain conduct in the election, and (6) the Regional Director overruled the employer’s objections); *Chelsea Catering Corp. v. United Food and Commercial Workers Int’l Union*, 309 NLRB No. 133, 309 NLRB 8228 (1992) (considering an employer’s challenge to the Board’s statutory jurisdiction almost two months after an election hearing).

Here, Duquesne timely raised its constitutional challenge to the Board’s jurisdiction and is entitled to present all relevant facts to the Regional Director. Specifically, Duquesne raised the objection almost a week before voting was to commence and over three weeks before the date on which the ballots were to be counted. A hearing granted at that time would have delayed the voting only by a matter of a few weeks. Thus Duquesne has objected to Board jurisdiction in a timely fashion by any standard and is entitled to a hearing on the jurisdictional issue.

Petitioner’s argument that Duquesne entered into an election agreement does not alter this analysis. Indeed, in the Stipulated Election Agreement itself, Duquesne not only refrained from conceding Board jurisdiction under *Catholic Bishop*, but the parties agreed that Duquesne “is a University which provides religious and other higher education.” Surely this statement is

sufficient to preserve a First Amendment jurisdictional challenge when a university's religious name alone – such as Duquesne University of the Holy Spirit – may be sufficient to timely raise the factual predicate for a First Amendment challenge to the Board's jurisdiction. *See Saint Elizabeth Hosp. v. NLRB*, 715 F.2d 1193, 1196–97 (7th Cir. 1983).

Moreover, in arguing that Duquesne has “waived” its right to a hearing, Petitioner relies exclusively on the inapposite assertion that a church-operated educational institution can “waive” its “religious exemption” under Title VII. First, under the plain terms of *Catholic Bishop*, the NLRB's enforcement power over a church-operated educational institution under the NLRA is a jurisdictional question that cannot be waived. Any available waivers of “religious exemptions” in the Title VII context are therefore entirely irrelevant. Second, the Title VII case on which Petitioner relies states that failure to plead an affirmative defense early in the proceeding will not necessarily result in waiver “where the responding party has an opportunity to respond to the affirmative defense and no prejudice results.” *Spann v. Word of Faith Christian Ctr. Church*, 589 F. Supp. 2d 759, 763 (S.D. Miss. 2008). Petitioner not only has had an opportunity to respond, but indeed has responded – twice – to Duquesne's jurisdictional objections. It has not been and will not be subject to prejudice on the basis of Duquesne's timely jurisdictional challenge. Thus, even under Petitioner's own inapposite authority, Duquesne has timely objected to the Board's jurisdiction.

In sum, the law is well settled that Duquesne cannot and has not waived its jurisdictional argument, and the Petitioner has not cited a single case under the National Labor Relations Act to the contrary.

IV. AS DUQUESNE HAS REQUESTED, THE BOARD SHOULD ORDER THE REGIONAL DIRECTOR TO HOLD AN EVIDENTIARY HEARING TO ASSESS WHETHER DUQUESNE IS A “CHURCH-OPERATED” EDUCATIONAL INSTITUTION EXEMPT FROM NLRA JURISDICTION UNDER *CATHOLIC BISHOP*

The narrow question before the Board is whether the Regional Director erred in concluding that it could sidestep the jurisdictional question because Duquesne had consented to jurisdiction in the past or failed timely to raise it in this proceeding. As explained above, the Regional Director erred, and Duquesne properly raised, the *Catholic Bishop* jurisdictional question. Duquesne has submitted ample evidence to satisfy the D.C. Circuit’s test from *Great Falls*. However, to the extent the Board continues to apply its “substantial religious character” test or Duquesne wishes to supplement the record, the Board should order the Regional Director to hold an evidentiary hearing to determine Duquesne’s status under *Catholic Bishop* on a fully developed factual record.

The Supreme Court held in *Catholic Bishop* that “serious First Amendment questions . . . would follow” from the exercise of Board jurisdiction over lay faculty at Catholic high schools. 440 U.S. at 504. To avoid those constitutional difficulties, the Court construed the NLRA not to cover parochial school teachers. *See id.* at 507. Although *Catholic Bishop* involved “church-operated” secondary schools, it is undisputed that the First Amendment protections recognized in that decision extend to all religious-affiliated schools, irrespective of the level of education provided or the degree of formal church control. *See* Office of the General Counsel, National Labor Relations Board, *An Outline of Law and Procedure in Representation Cases* § 1-403, at 20 (Aug. 2008) (citing *Saint Joseph’s College*, 282 NLRB 65 (1986), and *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987)).

To determine whether an entity is exempt from NLRA jurisdiction under *Catholic Bishop*, the Board currently analyzes the entity’s “substantial religious character.” This test calls

for a searching case-by-case evaluation of such factors as “the involvement of the affiliated religious group in the school’s day-to-day affairs, the degree to which the school has a religious mission, and whether religious criteria play a role in faculty appointment and evaluation.” *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009). By its very nature, this inquiry is highly fact-intensive and demands an evidentiary hearing. *See, e.g., In re Manhattan College*, No. 2-RC-21735 (Regional Director Nov. 9, 1999) (analyzing a college’s status under *Catholic Bishop* after “[i]n accord with the Board’s order, a hearing was conducted over 30 days beginning on March 1, 1997 and ending on June 2, 1998”); *In re. St. Joseph’s College*, 282 NLRB 65, 66 (1986) (same); *see also Jewish Day Sch. of Greater Washington*, 283 NLRB 757 (1987) (same). 7/

Precisely because of this fact-intensive troll through religious doctrine and belief, in two cases currently pending before the NLRB, 8/ ACCU has argued that the Board should abandon its intrusive and unconstitutional “substantial religious character” test in favor of the non-intrusive, constitutional test adopted in *Univ. of Great Falls*, 278 F.3d 1335 (applying *Catholic Bishop* when an institution (1) holds itself out to the public as a religious institution, (2) is non-profit, and (3) is religiously affiliated). Petitioner’s implication that Duquesne’s position in this case violates Catholic doctrine illustrates the constitutional dangers of the “substantial religious character” test. 9/

7/ Neither *Manhattan College* nor *Jewish Day School* refers to the analysis as the “substantial religious character” approach, but the inquiry appears to be substantially the same.

8/ *See Manhattan College and Manhattan College Adjunct Faculty Union, New York State United Teachers, AFT/NEA/AFL-CIO*, No. 02-RC-23543, and *Saint Xavier University and Saint Xavier University Adjunct Faculty Organization, IEA-NEA*, No. 13-RC-22025. ACCU notes that on August 17, 2012, the Board granted review in a third case, *Islamic Saudi Academy*, No. 05-RC-080474, to review a Regional Director’s application of the substantial religious character test to an elementary and secondary school.

9/ The D.C. Circuit’s test raises factual questions that may merit an evidentiary hearing in some circumstances, although in this case the Petitioner has not challenged Duquesne’s contention that it meets each prong of the D.C. Circuit test. The problem with the “substantial religious character” test is not that it raises

Even under the “substantial religious character” test, Duquesne has presented strong evidence that the Board cannot assert jurisdiction in this case, certainly sufficient to warrant an evidentiary hearing. Duquesne was founded in 1878 by Reverend Joseph Strub and the Congregation of the Holy Ghost (now known as the “Congregation of the Holy Spirit”). Duquesne was named Pittsburgh Catholic College of the Holy Ghost until 1911, when its name was changed to Duquesne University of the Holy Spirit. Today, Duquesne is organized as a Nonprofit Corporation under Pennsylvania Law. Employer’s Mot. for Board to Order an Evid. Hr’g, Vacate Election, and Dismiss Pet. [hereinafter *Employer’s Mot. for Evid. Hr’g*], Ex. 4, Art. II. Its Members must be “vowed members of the Congregation of the Holy Spirit Province.” *Id.* at Art. VII. Members have several exclusive powers, including but not limited to the power to: (1) determine and change the mission, philosophy, objectives or purpose of the University, (2) elect and remove, with or without cause, all members of the Board of Directors, and (3) liquidate and dissolve the University. *Id.* at Art. IX. The Spiritan Fathers are in firm control of Duquesne University.

The Spiritan Fathers have approved a Statement of Mission demonstrating that the propagation of the Catholic faith is one of the University’s primary purposes:

Duquesne University of the Holy Spirit is a Catholic University, founded by members of the Congregation of the Holy Spirit, the Spiritans, and sustained through a partnership of laity and religious. Duquesne serves God by serving students through commitment to excellence in liberal and professional education, through profound concern for moral and spiritual values, through the maintenance of an ecumenical atmosphere open to diversity, and through service to the Church, the community, the nation and the world.

fact questions, but that the questioning it demands “is the *exact* kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid.” *Univ. of Great Falls*, 278 F.3d at 1343 (citing *Catholic Bishop*, 440 U.S. at 502 n.10 & 507–08).

See id. Ex. 2. Similar proclamations appear in Duquesne’s Articles of Incorporation, its Executive Resolutions of the Board, its Faculty Senate Constitution, its Faculty Handbook, and its Code of Student Rights, Responsibilities and Conduct. The Faculty Handbook also unequivocally declares that “we subscribe to the teachings of the Catholic Church.” *Id.* Ex. 7 at 2.

Under the Spiritans’ guidance, the University has remained firmly Catholic. The Catholic Church defines a “Catholic University” as having four essential characteristics: (1) “a Christian inspiration not only of individuals but of the university community as such;” (2) “a continuing reflection in the light of the Catholic faith upon the growing treasury of human knowledge, to which it seeks to contribute by its own research;” (3) “fidelity to the Christian message as it comes to us through the Church;” and (4) “an institutional commitment to the service of the people of God and of the human family in their pilgrimage to the transcendent goal which gives meaning to life.” John Paul II, *Apostolic Constitution Ex Corde Ecclesiae* (1990). 10/ Duquesne is included as a Catholic University on the Official Catholic Directory, 11/ signifying that the Catholic Church considers it to exemplify these principles.

Accordingly, the Board should reject Petitioner’s simplistic argument that because the adjunct professors’ typically “barebones” letter agreements do not mention religion, these faculty members have no role in the University’s Catholic mission and *Catholic Bishop* does not apply. (*Petitioner’s Mot. to Dismiss*, at 5–6, 14.). Petitioner’s position amounts to a suggestion that only a seminary would meet the *Catholic Bishop* standard. *Id.* at 4 & Ex. B. Even under the

10/ Available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html.

11/ The Official Catholic Directory, available at <http://www.officialcatholicdirectory.com/mtree/education/colleges-universities.html?limit=40&limitstart=40>.

“substantial religious character” test, this suggestion is without merit. As one leading commentator explains,

[n]ot every religious school can or will insist that every teacher actively promote religion. But nearly all will at least require every teacher not to interfere. A religious school might hire a nonbelieving math teacher, but it is not likely to permit him to flaunt his nonbelief, to denigrate the church that runs the school, or to set a bad example. Thus, even the nonbelieving math teacher has some intrinsically religious responsibility.

Laycock, *supra*, at 1398.

To be sure, the question before the Board today is not whether Duquesne ultimately falls within *Catholic Bishop*. At this stage, it is enough for the Board to recognize that by entering into a stipulation agreement, Duquesne has not waived—and indeed could not waive—that question. Duquesne has raised at the very least a substantial question as to the Board’s statutory jurisdiction. Accordingly, the Board should order the Regional Director to hold an evidentiary hearing so the Board can decide the jurisdictional question on a fully developed record.

CONCLUSION

For the foregoing reasons, and for the reasons identified in the Employer's memorandum, the Board should grant Duquesne's motion to withdraw from the Stipulated Election Agreement, grant its request for review, and remand the case to the Regional Director with instructions to hold an evidentiary hearing regarding *Catholic Bishop's* application to Duquesne University so that the Board can resolve that question.

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Respectfully Submitted,

s/ Elizabeth Meers

Elizabeth Meers
Joel Buckman
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Telephone: 202-637-5600
Telecopier: 202-637-5910



Stanley J. Brown
David Baron
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: 212-918-3000
Telecopier: 212-918-3100

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document is being served this day upon the following persons, by e-mail, at the addresses below:

Daniel Kovalik, Esq.
United Steelworkers International Union
5 Gateway Center, Room 807
Pittsburgh, PA 15222
E-mail: dkovalik@usw.org

Arnold Perl, Esq.
Glankler Brown
6000 Poplar Avenue, Suite 400
Memphis, TN 38119
E-mail: aperl@glankler.com

Hon. Robert W. Chester
Regional Director, Region 6
National Labor Relations Board
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222
E-mail: robert.chester@nlrb.gov

The undersigned further certifies that a true and correct copy of this document is being served this day upon the following person by facsimile:

Hon. Lafe Solomon
Acting General Counsel
National Labor Relations Board
Attn: Office of Appeals, Room 8820
1099 14th St., N.W.
Washington, D.C. 20570
F: (202) 273-4483

Dated this 4th day of October, 2012



Stanley J. Brown
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
Counsel for Amicus Curiae