

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of)
)
MANHATTAN COLLEGE,)
)
Employer,)
) Case No. 2-RC-23543
v.)
)
MANHATTAN COLLEGE ADJUNCT)
FACULTY UNION, NYSUT, AFT-NEA/AFL-)
CIO,)

Petitioner.

**AMICUS BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY
ADVENTISTS AND THE ASSOCIATION OF CHRISTIAN SCHOOLS
INTERNATIONAL IN SUPPORT OF EMPLOYER ON REVIEW OF A DECISION OF
THE REGIONAL DIRECTOR**

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INTRODUCTION

The issue in the case is whether the Board can assert jurisdiction over Manhattan College, a Catholic college listed in the Catholic Directory, or whether jurisdiction is precluded by the Supreme Court's decision in *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In deciding this issue, amici urge the Board to adopt and faithfully apply the three-part test formulated by the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2005), in order to implement the *Catholic Bishop* decision.

As we show, in order to protect the constitutionally- protected religious freedom rights of religious schools, the Board may not inquire more intrusively into a school's religiosity

than is permitted under that test. And, because the *Great Falls* test is both clear and easily administered, it represents sound policy from the more parochial perspective of administrative law.

STATEMENT OF INTEREST

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents over 70,000 congregations with more than 17 million baptized members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,200 congregations with more than one million members. In addition to churches and related administrative offices, the denomination runs approximately 725 elementary schools with over 37,000 students, 109 secondary schools with roughly 13,000 students, 14 institutions of higher learning with over 27,000 students and 58 hospitals in the United States. These institutions are in all fifty states and thousands of local towns, municipalities and counties.

The Association of Christian Schools International (“ACSI”) is a nonprofit, non-denominational, religious association providing support services to more than 3,800 Christian preschools, elementary, and secondary schools in the United States. One hundred forty-five post-secondary institutions are members of ACSI. ACSI also serves more than 1,700 schools outside the United States. ACSI is a California corporation with its national/international office located in Colorado Springs, Colorado.

As evidenced by their amicus filings in the *Great Falls* and *Carroll College* cases, providers and supporters of schools offering religious-based education have a strong and obvious interest in encouraging the Board to adopt a standard that provides proper Constitutional respect for the religious freedom rights of religious schools.

FACTUAL BACKGROUND

This case arises from a representation petition filed by the adjunct faculty of Manhattan College with the Board seeking a representation election. The school argued, based upon the Supreme Court's decision in *Catholic Bishop*, as applied by the D.C. Circuit in *Great Falls* and *Carroll College*, that the Board should not take jurisdiction.

The Regional Director concluded that Manhattan College, which is listed in the Catholic Directory, was not “a church-operated institution within the meaning of *Catholic Bishop*.” Slip Op. at 2. The Regional Director first analyzed the case under the Board's precedents that preceded the D.C. Circuit's decision in *Great Falls*, including the Board's own decision in *Great Falls* itself. Applying the very jurisprudence the D.C. Circuit had repudiated in *Great Falls*, the Regional Director based his decision, in large part, on his conclusion that the “purpose of the College is secular and not the ‘propagation of a religious faith.’” *Id.* at 19. He also placed great emphasis on the fact that, through the Sponsorship Covenant, the College had affirmed its commitment to academic freedom and responsibility. *Id.*

The Regional Director then purported to analyze the case in the alternative under the three-part test applied by the D.C. Circuit in *Great Falls* and *Carroll College*. But the Regional Director gave an inappropriately, and inexplicably narrow application to that test. Contrary to the D.C. Circuit's admonition against “trolling” through the bona fides of an institution's religious beliefs, the Regional Director engaged in a very intrusive examination of Manhattan College's religious “record,” before concluding the school could not satisfy the “holding out” requirement of the D.C. Circuit's test. *Id.* at 22. The Regional Director did find that Manhattan met the second prong of the three-part test—it was non-profit. And, not surprisingly, he concluded Manhattan College “could arguably satisfy the affiliation factor based upon the Catholic Church's recognition of the College as a Catholic institution.”

The Board granted the employer's request for review, conducted the election and impounded the ballots, and accepted additional briefing by the parties.

ARGUMENT

I. THE BOARD SHOULD ADOPT THE *GREAT FALLS/CARROLL COLLEGE* TEST FOR DETERMINING WHEN IT MAY PROPERLY EXERCISE JURISDICTION OVER RELIGIOUS SCHOOLS

In *University of Great Falls v. NLRB*, 238 F.3d 1335, 1343 (D.C. Cir. 2002), the D.C. Circuit ruled that the Board may not assert jurisdiction over an educational institution that (1) “holds itself out to students, faculty and community as providing a religious educational environment”; (2) “is organized as a nonprofit”; and (3) “is affiliated with, or owned, operated, or controlled, 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 . . .”

Since then, several cases have arisen in which the Board has been asked to exercise jurisdiction over religious institutions.¹ Without adopting the *Great Falls* test, the Board in two cases has considered how the test would come out on the facts then before it, in each case concluding the test would not be satisfied. *Salvation Army*, 345 NLRB 550 (2005); *Catholic Social Services*, 355 NLRB No. 167 (2010). It has, however, declined to actually adopt that test. *Carroll College*, 345 N.L.R.B. 254, n. 8 (2005); *Carroll College v. NLRB*,

¹ The teaching of *Catholic Bishop*, *Great Falls* and the other cases discussed in this brief--that governmental entities should not “troll” the beliefs of religious entities, and that a “bright-line” test must be employed--apply not only to religious schools relying on *Catholic Bishop*. That teaching should apply also to other religious entities relying on, for example, the First Amendment or the Religious Freedom Restoration Act. However, we do not discuss the latter issues in this brief.

supra, 558 F.3d at 570 (concluding Board’s exercise of jurisdiction must be reversed under *Great Falls*).

As we now show, the Board is constitutionally mandated to apply a test at least as stringent as (*i.e.* a test that avoids intrusive inquiry into religiosity as much as) that applied by the D.C. Circuit in *Great Falls* and *Carroll*. The Board is also constitutionally required to apply the test faithfully, and not to merely give lip service to the test, as did the Regional Director in this case.

A. The *Great Falls* Test Properly Implements Catholic Bishop By Providing Adequate Protection For The Free Exercise Rights Of Religious Schools

Catholic Bishop was the first case to forbid the Board from exercising jurisdiction over religious schools. The Supreme Court there read the NLRA in light of the religion clauses of the First Amendment to hold that the Board lacks jurisdiction over church-operated schools. 440 U.S. at 507.

The Court explained that the assertion of jurisdiction by the Board over church-operated schools “will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools’ religious mission.” 440 U.S. at 502. It further feared that if the NLRA conferred jurisdiction, the Board could not “avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining.” *Id.* Noting Congress had not indicated it intended to risk such constitutional infirmity, the Court applied the “constitutional avoidance” doctrine to construe the NLRA narrowly to forbid Board jurisdiction over religious schools. *Id.* at 502-04.

It is fair to say that the Board has never embraced the *Catholic Bishop* decision with enthusiasm. At first, the Board applied *Catholic Bishop* only to parochial schools, concluding its holding did not apply either to colleges or universities. *See St. Joseph’s College*,

282 NLRB 65, 68 (1986). The Board eventually, and somewhat begrudgingly reversed itself, recognizing the *Catholic Bishop* analysis applies equally to all educational levels. *Id.*

In some cases, the Board also held that *Catholic Bishop* applied only to schools that were “pervasively sectarian,” but did not apply to religious schools that also provide secular education. *E.g. University Central de Bayamon*, 273 NLRB No. 1110 (1984). Thus, in such cases the Board decided whether to assert jurisdiction based solely on its fact-intensive assessment of the school’s relative degree of religiosity. *Id.*

The Board’s insistence on asserting jurisdiction over a religious school was rebuffed by the federal appellate courts. Writing for half of an equally-divided en banc court, then-Judge Breyer concluded that the analysis in *Catholic Bishop* applies fully to a “college that seeks primarily to provide its students with a secular education, but which also maintains a subsidiary religious mission.” *Universidad Central de Bayamon v. NLRB*, 793 F.3d 383, 398-99 (1st Cir. 1986) (en banc). As he explained, Board jurisdiction in such cases posed just as a great a risk of the “kind of ‘entanglement’ --arising out of the inquiry process itself,” as the Supreme Court’s decision in *Catholic Bishop* sought to avoid. *Id.* at 401. To prevent such an impermissible inquiry, Judge Breyer concluded the Board should apply a three-part test virtually identical to the one eventually adopted in *Great Falls*. *Id.*

Rather than conform to the views expressed by Judge Breyer, the Board in other cases changed the name of its test from “pervasively sectarian” to “a substantial religious character.” But the substance of its test to determine jurisdiction over church-operated schools remains unchanged – and still impermissible. As the Board itself explained in *Great Falls*, “[s]ince *Catholic Bishop*, the Board has decided on a case-by-case basis whether a religion-affiliated school has “a substantial religious character,” so as to preclude the exercise of Board

jurisdiction. *Great Falls*, 331 N.L.R.B. No. 188, at 2. See also, e.g., *Jewish Day Sch. of Greater Washington*, 283 NLRB 1308, 1309 (1987); *St. Joseph's College*, 282 NLRB 65, 68 (1986).

In determining whether a religious school has “a substantial religious character,” the Board “considers such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty.” *Great Falls*, 331 N.L.R.B. No. 188, at 3.

It was this approach—*i.e.* determining in a fact-intensive inquiry whether a religious school has “a substantial religious character”—that the D.C. Circuit flatly rejected in *Great Falls*, and then again in *Carroll College*. Reversing the Board’s exercise of jurisdiction in *Great Falls*, the Court emphasized that the First Amendment prevents the Board “from trolling through a person’s or institution’s religious belief.” To avoid such an impermissible inquiry, the D.C. Circuit held that the Board must refuse to exercise jurisdiction if the school in question “holds itself out . . . as providing a religious educational environment,” is “organized as a nonprofit,” and “is affiliated with, or owned . . . by a recognized religious organization . . .” *Id.* at 1343.

The D.C. Circuit carefully and correctly explained that the rule it adopted was compelled by *Catholic Bishop* itself. As it first noted, the “NLRB’s ‘substantial religious character test’ not only creates the same constitutional concerns that led to the Supreme Court’s decision in *Catholic Bishop*, it is so similar in principle to the approach rejected in *Catholic Bishop* that it is inevitable that we must reject this ‘new’ approach.” *Id.* at 1341.

The D.C. Circuit also took pains to explain that its test was compelled by the Supreme Court’s First Amendment jurisprudence generally. As the court noted, the plurality in

Mitchell v. Helms, 530 U.S. 793, 828 (2000), had explained “it is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.” 278 F.3d at 1341-42 (citing cases).

The D.C. Circuit further noted that “the prohibition on such intrusive inquiries into religious beliefs underlay” *Presiding Bishop v. Amos*, 483 U.S. 327 (1987), where the Supreme Court upheld an exemption in Title VII “as applied to the firing of a janitor by a church-owned gymnasium.” 278 F.3d at 1342. *Amos* makes clear “that a nonprofit institution owned or operated by a church should be exempted from ‘a case-by-case determination whether its nature is religious or secular’ under Title VII.” *Id.* citing 483 U.S. at 340, 345.

The D.C. Circuit also relied on other Supreme Court cases that teach that “it is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest in the free exercise field, than it would be for them to determine the ‘importance of ideas before applying the ‘compelling interest’ test in the free speech field.” *Id.* at 1342-43, quoting *Employment Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990). As the Supreme Court itself had said in *Smith*, “[j]udging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’” 494 U.S. at 886-87.

Among the cases relied upon by the D.C. Circuit was *Serbian E. Orthodox Diocese v. Milivojevich*, 426 F.2d 696, 708-09, 713 (1976). There, the Court made clear that, if involved in second-guessing a church’s actions in defrocking a bishop, a court would inevitably be obliged to “substitute[] its own inquiry into church policy and resolutions” for that of the church’s, inviting “judicial rewriting of church law,” in a manner inimical to the First Amendment. *See also, e.g. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in*

North America, 344 U.S. 94, 116 (1952) (Free Exercise Clauses protects power of religious organizations “to decide for themselves, free from state interference, matters of . . . faith and doctrine.”)

Based on its review of the existing Supreme Court jurisprudence, the D.C. Circuit concluded that “*Catholic Bishop*, along with the Court’s subsequent decisions in *Presiding Bishop v. Amos*, *Smith*, and *Mitchell*” compelled the rejection of the Board’s “substantial religious character” test. *Id.* at 1343. Instead, it held the three-part test it adapted from *Bayamon*, constituted “a useful and accurate method of applying *Catholic Bishop*.” *Id.* That test, it explained, creates a “bright-line” rule for determining jurisdiction “without delving into matters of religious doctrine or motive.” *Id.* at 1344.

We recognize that the Board typically regards itself as free to disregard opinions from the federal courts of appeal, while recognizing its obligation to follow precedents established by the Supreme Court. Whatever merit there is to the Board’s view on this matter generally, there is no justification for it to continue to refuse to adopt the *Great Falls* test as its own test for determining jurisdiction over church-operated schools.

There are, to the contrary, several reasons why the Board should, indeed must, adopt a test at least as stringent as the *Great Falls* test. First, as the D.C. Circuit explained in *Great Falls*, the test it adopted there simply represents a “a useful and accurate method of applying *Catholic Bishop*.” *Id.* *Great Falls* is thus well grounded in Supreme Court precedent, and a decision to reject the jurisprudence of the First and D.C. Circuits is similar to, if not in essence, a decision to refuse to follow binding Supreme Court precedent.

Second, the Board itself has no expertise in constitutional interpretation.

University of Great Falls, 331 NLRB 1663 (2000) (Board may not pass upon constitutionality of

federal statute); *Fashion Valley Mall v. NLRB*, 524 F.3d 1378 (D.C. Cir. 2005) (same). To the contrary, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *United States v. Nixon*, 418 U.S. 683, 703 (1974) quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Great Falls*, *supra*, (Board entitled to no *Chevron* deference as to construing ambiguous statutory language under constitutional avoidance doctrine). As an administrative agency with no judicial power, the Board is thus obligated to follow the constitutional adjudications of Article III courts, even intermediate appellate courts.

And third, whatever flexibility the Board might enjoy to pick and choose between conflicting federal judicial authorities is not present here. That is because *every* federal decision to consider the matter has endorsed the approach reflected in *Great Falls*.

To illustrate, the D.C. Circuit in *Great Falls* adopted virtually verbatim the test that the First Circuit had enunciated in *Bayamon*. 793 F.3d at 398-99. That test remains good law in that circuit. *New Life Baptist Church Academy v. East Longmeadow*, 666 F.Supp. 293 (D. Mass. 1987).

Likewise, in *Carroll College*, a different panel of the D.C. Circuit strongly endorsed *Great Falls* in again refusing to enforce a jurisdictional order the Board had based on its “substantial religious character test.” 558 F.3d at 570. As that panel explained, “[i]n *Great Falls* we held that the Board’s approach involved just ‘the sort of intrusive inquiry that *Catholic Bishop* sought to avoid.’” *Id.*

And in *Spencer v. World Vision*, 2011 U.S.App. Lexis 1675 *16 (9th Cir. 2011), the majority opinion cited *Great Falls* with approval for “striking down an inquiry which ‘boil[ed] down to ‘is [an entity] sufficiently religious.’” *See also, Colorado Christian University v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (citing *Great Falls* with approval in holding

state may not discriminate between “pervasively sectarian” and other colleges in awarding scholarships).

In sum, *Great Falls*, which correctly and concisely implements the Supreme Court’s seminal holding in *Catholic Bishop*, has received universal approval in the case law. Significantly, no case has ever criticized it or offered a competing test for assessing Board jurisdiction over church-operated schools. It is, therefore, incumbent upon the Board to adopt the *Great Falls* test for determining jurisdiction, and to apply it in this case.

B. The Board Must Not Pay Mere Lip Service To *Great Falls*, But Rather Must Fully Adhere To Its Hands-Off Approach

In *Great Falls*, the D.C. Circuit set out a “bright-line,” almost mechanical, test for determining jurisdiction “without delving into matters of religious doctrine or motive.” 278 F.3d at 1345. “To determine whether the University of Great Falls held itself out as ‘providing a religious educational environment,’ we looked to its course catalogues, mission statement, student bulletin and other public documents.” *Carroll College, supra*, 558 F.3d at 572, citing *Great Falls*, 278 F.3d. at 1345. And, to avoid the “trolling” that . . . *Catholic Bishop* itself sought to avoid,” “there was no inquiry into the content of the school’s religious beliefs nor skepticism whether those beliefs were followed.” *Id.*

The Regional Director took a radically different approach in concluding the Board could assert jurisdiction here. In the first part of his opinion, he spent seven pages analyzing the religious pedigree and status of the College. Slip Op. at 9-15. Based on this analysis, he concluded that “the purpose of the College is secular and not the ‘propagation of a religious faith.”” *Id.* at 19. In this connection, he concluded it was not significant that the College had in its public documents re-affirmed “its commitment to a continued relationship with [the Institute]

of the Christian Brothers,” finding greater significance in the College’s avowed commitment to “academic freedom.” *Id.*

In considering hypothetically whether a different result would be required under *Great Falls*, the Regional Director likewise took a narrow view of the *Great Falls* “holding out” factor. The Regional Director acknowledged that various public College documents refer to the College’s “Catholic fabric” and “Catholic identity.” *Id.* at 22. But he found those references insignificant because the College’s public documents also “emphasiz[e] its independence, academic freedom, diversity and secular mission.” *Id.* In other words, the Regional Director engaged in precisely the type of skeptical “inquiry into the content of the school’s religious beliefs . . . [and] whether those beliefs were followed” that *Catholic Bishop* and *Great Falls* both forbid. *See, Carroll College, supra*, 558 F.3d at 572.

The approach of the Regional Director reflects the narrow approach the Board itself has taken in those cases where it has considered how *Great Falls* might apply. In *Catholic Social Services*, for example, the Board exercised jurisdiction over instructors at a Catholic Church-operated center that provided a complete educational curriculum to its school-age residents. The Center’s Mission Statement and employment contracts explicitly referenced its religious orientation and commitment to Biblical values. Nonetheless, the Board concluded the Center provided only “secular” education, because the instructors “do not [explicitly] teach or inculcate religious values.” *Catholic Social Services*, 355 NLRB No. 167 at 4. *See also Salvation Army*, 345 NLRB 550 (2005); *Carroll College*, 345 N.L.R.B. 254, n. 8 (2005).

This approach is fundamentally inconsistent with the mandate of *Great Falls*. Under its approach, the Board assesses the relative religiosity of the school in question, exercising jurisdiction over church-operated schools that, in its view, do not provide overtly

religious education. The Board's approach thus entails the precise "trolling" that . . . *Catholic Bishop* itself sought to avoid," and an improper skepticism "into the content of the school's religious beliefs . . . [and] whether those beliefs were followed." *Carroll College, supra*, 558 F.3d at 572, citing *Great Falls*, 278 F.3d. at 1345.

Moreover, the Board's approach is fundamentally at odds with the Supreme Court's recognition that religious doctrine will necessarily be inculcated into the education at church-operated schools, even when those schools offer seemingly secular curricula. In summarizing the Court's decisions, Justice Souter explained that "long experience" had led it to:

conclude[] that religious teaching in such schools is at the core of the instructors' individual and personal obligations, and that individual religious teachers will teach religiously. [Accordingly, a]s religious teaching cannot be separated from secular education in such schools or by such teachers, we have concluded that direct government subsidies to such schools are prohibited because they will inevitably and impermissibly support religious indoctrination.

Mitchell v. Helms, 530 U.S. 793, 886-87 (2000) (Souter, J. dissenting) (case citations omitted).²

Such observations are well-grounded in reality. To take but one example, many commentators have demonstrated that a seemingly secular subject like mathematics necessarily requires examination of religious questions when taught in a religious environment. Students will ask, consider and receive insight from faculty and students alike on questions such as "What contribution does the discipline of mathematics make to our understanding of the nature of the world God has created?" or "What is the significance of the fact that so many processes in the world can be given precise mathematical description . . . [while] some events and processes seem to defy mathematical analysis?" Hasker, *Faith-Learning Integration: An Overview*, [Christian](#)

² The majority in that case disagreed with Justice Souter's conclusion as to the ultimate outcome of that case, but did not disagree with his demonstration that the Court's jurisprudence had long recognized that religious values are necessarily inculcated in church-operated schools.

Scholar's Review; see also, e.g. Harris, *Answering Objections to the Integration of Faith and Learning at Christian Colleges*, (2004), www.virtualsalt.com/int/objections.pdf.

The difficulty, if not impossibility, of accurately measuring the degree to which religious education triggers, implies or demands such inquiry provides practical support for *Great Falls*' injunction against engaging in the type of fact-intensive "trolling" reflected in the Board's jurisdictional jurisprudence.

In sum, the Board should not only adopt the *Great Falls* three-part test as its own for determining when it may exercise jurisdiction over religious schools, it should apply that standard as it was intended--*i.e.* as shielding such schools from intrusive governmental "trolling" into the bona fides of their religious commitment. The Board should, in other words, recognize that *Great Falls* establishes a "bright-line" test, and thus avoid making the kind of judgmental assessments (particularly on the "holding out" factor) that are reflected in its cases.

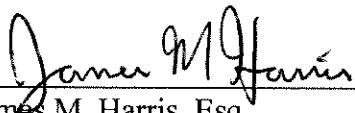
CONCLUSION

For the reasons expressed above, the Board should adopt and faithfully apply the three-part test enunciated by the D.C. in *Great Falls* in reviewing the Regional Director's decision to exercise jurisdiction over Manhattan College.

Respectfully submitted,

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