

## NLRB Severely Limits Jurisdiction Over Religious Schools

On June 10, 2020, a three-member panel of the National Labor Relations Board issued a decision limiting its own jurisdiction over the faculty of self-identified religious educational institutions. The Board's decision in *Bethany College* is the latest in a long line of cases reviewing the threshold of when the Board may exercise jurisdiction over the faculty of such institutions. *Bethany College* overrules, in relevant part, the Board's earlier decision in *Pacific Lutheran University*, 361 NLRB 1404 (2014) and adopts the jurisdictional test first announced by the U.S. Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

In *Pacific Lutheran*, the Board crafted a two-part, union-friendly jurisdictional test wherein, the Board would decline to exercise jurisdiction over a unit of faculty members at a school claiming to be a religious institution only if the school demonstrated that it: (1) held itself out as providing a religious educational environment; and (2) held out the petitioned-for faculty members as performing a specific role in creating or maintaining school's religious educational environment. *Pacific Lutheran*, 361 NLRB at 1414. The second step in the inquiry effectively became the focal point of the new jurisdictional test, with the Board reasoning that "[f]aculty members who are not expected to perform a specific role in creating or maintaining the school's religious educational environment are indistinguishable from faculty at colleges and universities that do not identify themselves as religious institutions and that are indisputably subject to the Board's jurisdiction." *Id.* at 1411. The Board articulated that it would be unfair to deny those faculty in a religious school the same rights under the National Labor Relations Act as enjoyed by faculty in secular schools.

The *Bethany College* panel disagreed and held that *Pacific Lutheran* must be overruled as inherently inconsistent with the binding rationale of the Supreme Court in *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the Board's exercise of jurisdiction over teachers at faith-based schools would present serious constitutional questions. In overruling *Pacific Lutheran*, the Board adopted the *Great Falls* test in an attempt to ensure that the Board's jurisdiction does not become entangled with the First Amendment's fundamental directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The *Great Falls* test involves a three-part, objective test under which the Board "must decline to exercise jurisdiction" over an 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, 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."

In adopting the *Great Falls* test, the Board rejects the urge to make its own determinations on whether an institution's activities are secular or religious. Instead, that determination now sits "precisely where it has always belonged: with the religiously affiliated institutions themselves, as well as their affiliated churches and, where applicable, the relevant religious community."

Applying the *Great Falls* test, the Board easily found that Bethany College was exempt from the Board's jurisdiction. With regard to the first prong, it was clear from the school's handbook, job postings, and affiliation with the Evangelical Lutheran Church in America (ELCA) that it held itself out to students, faculty, and the community as providing a religious educational environment. Bethany College met the second prong because it is established as a 501(c)(3) nonprofit institution. Finally, the Board found that the third prong was met because Bethany College is owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA.



Steven Millman

**Member**

smillman@cozen.com  
Phone: (215) 446-0031  
Fax: (215) 665-2013

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The *Bethany College* decision turns a new page in the jurisdictional arguments for self-identified religious educational institutions. In adopting the *Great Falls* objective standard, the Board sets forth a clear path for religious schools to determine with relative certainty whether or not the Board may exercise jurisdiction over its faculty. The decision is likely to have broad implications not only for religious colleges and universities, but also for parochial and other religious elementary and secondary schools that have seen organization efforts in the past. It is now exceedingly unlikely that the Board will find it appropriate to exercise jurisdiction over such institutions and their faculty.

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**Contact counsel with any questions regarding these issues.**