BEFORE THE
NATIONAL LABOR RELATIONS BOARD

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

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

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

Counsel for Amicus Curiae

July 6, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THIS APPEAL CONCERNS FREEDOM OF RELIGION AND THE PROPER SCOPE OF GOVERNMENT AUTHORITY, NOT THE NATURAL RIGHTS OF WORKERS 3

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 4

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 5

B. Under *Catholic Bishop*, The Board Has No Statutory Jurisdiction Over Disputes Between Church-Operated Educational Institutions And Their Instructors 6

III. EVEN IF A CHURCH-OPERATED EDUCATIONAL INSTITUION COULD WAIVE ITS *CATHOLIC BISHOP* EXEMPTION FROM BOARD JURISDICTION, DUQUESNE HAS NOT DONE SO HERE 8

IV. DUQUESNE HAS PRESENTED SUBSTANTIAL EVIDENCE THAT IT IS A CHURCH-OPERATED EDUCATIONAL INSTITUTION EXEMPT FROM THE JURISDICTION OF THE NLRA UNDER *CATHOLIC BISHOP* 11

CONCLUSION 14

TABLE OF AUTHORITIES

Pages

CASES

Carroll College v. NLRB,
558 F.3d 568 (D.C. Cir. 2009)....................12

Catholic Bishop of Chicago v. NLRB,
559 F.2d 1112, 1123 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979)....................4

Centex Indep. Elec. Contractors Assoc., Inc.,
344 NLRB 1393 (2005)....................6

East Newark Realty Corp.,
115 NLRB No. 75, 115 NLRB 483 (1956)....................6

First FM Joint Ventures, LLC,
331 NLRB 238 (2000)....................8

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979)....................passim

NLRB v. Fed. Sec., Inc.,
154 F.3d 751 (7th Cir. 1998)....................5, 6

NLRB v. Peyton Fritton Stores, Inc.,
336 F.2d 769, 770 (10th Cir. 1964)....................8

Plaquemines Port, Harbor and Terminal Dist. v. Fed. Maritime Comm'n,
838 F.2d 536 (D.C. Cir. 1988)....................5

Saint Anthony Hosp. Sys. v. NLRB,
655 F.2d 1028 (10th Cir. 1981)....................7, 8, 10

Saint Elizabeth Cmty. Hosp. v. NLRB,
626 F.2d 123 (9th Cir. 1980)....................9

Saint Elizabeth Hosp. v. NLRB,
715 F.2d 1193 (7th Cir. 1983)....................10

Saint Xavier Univ.,
Case 13-RC-22025, 2011 WL 4912692 (NLRB Div. of Judges May 26, 2011)....................7

Serbian E. Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 4

Spann v. World of Faith Christian Ctr. Church,
589 F. Supp. 2d 759 (S.D. Miss. 2008) 10

Tenn. Gas Pipeline Co. v. Fed. Power Comm'n,
606 F.2d 1373 (D.C. Cir. 1979) 5

The Salvation Army of Mass. Dorchester Day Care Center,
247 NLRB No. 62, 247 NLRB 413 (1980) 7, 8, 10

Univ. of Great Falls v. NLRB,
278 F.3d 1335 (D.C. Cir. 2002) 12

STATUTES

29 U.S.C. § 152(2) 5

OTHER AUTHORITIES

261 NLRB 587 (1982) 8

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) 3

First Amendment 1, 9, 10, 11

http://www.officialcatholicdirectory.com/mtree/education/colleges-universities.html?limit=40 13

Justice and Peace, *Compendium of the Social Doctrine of the Church*, § 305 (2004) 3

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.

Respondent Duquesne appeals a decision by Acting Regional Director Mark Wirick, Region 6 ("Regional Director"), dismissing 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"). In its motion, Duquesne correctly argues 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). In his decision below, the Regional Director sidestepped Duquesne's objection to Board jurisdiction—without a hearing and without addressing the merits of Duquesne's arguments—solely on the irrelevant basis that the Board asserted jurisdiction over Duquesne in 1982.

The Regional Director's decision is erroneous. First, under *Catholic Bishop*, the Board cannot exercise authority over a church-operated educational institution because Congress withheld that power. Thus, whether *Catholic Bishop* applies is a question of the Board's 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 Regional Director must address the merits of Duquesne's challenge to Board jurisdiction.

Second, even if Board and judicial precedent are interpreted to 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. Indeed, jurisdictional objections have been and can be raised even after an election has been conducted by way of filing objections to an election, and here not a single ballot has been counted. The timing and nature of Duquesne's jurisdictional objections are proper under any standard. Therefore, the Regional Director must address the merits of Duquesne's claims 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 special appeal, Duquesne has presented substantial evidence that it falls within the *Catholic Bishop* exception under either the Board's "substantial religious character" test or the D.C. Circuit's constitutional bright-line test for Board jurisdiction over a religiously-affiliated institution. The Board should reverse the Regional Director's decision and order the Regional Director to determine on the merits after a hearing 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. 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."). 1/ 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

---

1/ This document is 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 jurisdiction under *Catholic Bishop*, it is irrelevant that Duquesne entered into a voluntary election agreement or acquiesced to Board jurisdiction in the past—the Board must determine after a hearing whether *Catholic Bishop* applies now.

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 *Fed. Sec.*, 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 Corporation,* 115 NLRB No. 75, 115 NLRB 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. 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-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). As such, when *Catholic Bishop* applies, an employer cannot by consent confer authority which Congress, as interpreted by the Supreme Court, withheld.

The NLRB's own decisions and most lower federal courts agree that whether *Catholic Bishop* applies is a question of the Board's statutory jurisdiction and cannot be waived. *Saint Xavier University,* Case 13-RC-22025, 2011 WL 4912692 (NLRB Div. of Judges May 26, 2011) (concluding evidence that a Catholic university had other "certified collective bargaining representatives" for certain employees is "of limited relevance to the jurisdictional argument being raised by the University because jurisdiction can be raised at anytime 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 election agreement Duquesne entered into is utterly silent about Duquesne's religious character or the application of *Catholic Bishop*. Thus, it fails even to purport to stipulate to NLRB jurisdiction. But even if it could somehow be mischaracterized as a waiver, it could not confer jurisdiction where Congress denied it. As in *Salvation Army*, if Duquesne is a church-operated school within *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 employees in the past. 2/ 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 whether Duquesne is a church-operated educational institution within the meaning of *Catholic Bishop*. 3/

III. EVEN IF A CHURCH-OPERATED EDUCATIONAL INSTITUTION COULD WAIVE ITS *CATHOLIC BISHOP* EXEMPTION FROM BOARD JURISDICTION, DUQUESNE HAS NOT DONE SO HERE

Under certain authority, though an employer covered by *Catholic Bishop* cannot confer jurisdiction on the Board by waiver, the employer may waive the opportunity to present facts supporting *Catholic Bishop's* application. *See, e.g., Saint Anthony Hosp. Sys.*, 655 F.2d, at 1030 (recognizing that the "statutory jurisdiction of the Board may be challenged at any time" but that the "'facts upon which the Board determines it has jurisdiction may be challenged only upon timely exception,'" which the Court interpreted to mean at the representation proceeding) (quoting *NLRB v. Peyton Fritton Stores, Inc.*, 336 F.2d 769, 770 (10th Cir. 1964)). 4/ But when

---

2/ 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, *Catholic Bishop* was limited 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.

3/ An employer cannot, by waiver or otherwise, provide the Board with jurisdiction over church-operated educational institutions. As such, 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.

4/ Some authority goes so far as so suggest that if an employer waits until an enforcement proceeding to object on *Catholic Bishop* grounds, it may have waived the issue. *See Saint Elizabeth Community Hosp. v. NLRB*, 626 F.2d 123, 125 (9th Cir. 1980). However, even if this proposition were a correct statement of law—which *amicus* does not concede—the proposition is inapposite here, as Duquesne has raised the jurisdictional

an employer lodges a *Catholic Bishop* objection at any point during the representation proceedings, no waiver occurs and the employer is entitled to a hearing. *See Saint Elizabeth Cmty. Hosp. v. NLRB*, 626 F.2d 123, 125 (9th Cir. 1980).

In *Saint Elizabeth*, a hospital did not raise a First Amendment challenge to the Board's exercise of jurisdiction 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. 626 F.2d 123, 124–25. Only in appealing the Regional Director's decision to the Board did the employer—for the first time—contend that the Board lacked jurisdiction on First Amendment grounds. *Id.* The Board rejected this contention. *Id.* When the employer refused to bargain, the NLRB concluded it had committed an unfair labor practice. *Id.* The employer again raised the jurisdictional argument, the Board again rejected it, and the employer appealed that determination to the Ninth Circuit. *Id.* In its brief before the Ninth Circuit, the Board contended the employer waived the jurisdictional argument by delaying until "'late in the representation proceedings.'" *Id.* The Court disagreed, holding that the employer raised the issue "sufficient to require that the issue be considered by the Board" and remanded to the Board for factual development. *Id.* Other cases agree that at least so long as a First Amendment issue is raised prior to an enforcement proceeding, it is timely. 5/ In some cases, even the Hospital's name is sufficient to raise timely 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).

---

issue during representation proceedings. The Board must now allow for a hearing so that issue can be determined on a full evidentiary record.

5/ *See, e.g.*, *Saint Anthony Hosp. Sys.*, 655 F.2d, at 1030 (counting as significant that the employer "failed to object to jurisdiction during the representation proceeding and first asserted its First Amendment challenge to jurisdiction in the unfair labor practice proceedings before the Board").

Here, Duquesne timely raised its constitutional challenge to the Board's jurisdiction and is entitled to present all of the facts to the Regional Director. Specifically, Duquesne raised the objection over three weeks before the date on which the ballots were to be counted. Thus it has objected to Board jurisdiction in a timely fashion by any standard and is entitled to a hearing on the jurisdictional issue. Nor can it seriously be contended that Duquesne's entering into an election agreement alters this analysis. Under NLRB precedent, an employer must present newly discovered or previously unavailable evidence in order to revoke factual concessions in a stipulation concerning the Board's exercise of *discretionary* jurisdiction. *Salvation Army of Massachusetts*, 247 NLRB 413. This proposition is not applicable to concessions implicating *statutory* jurisdiction. Further, in the Stipulated Election Agreement here, Duquesne not only refrains from conceding Board jurisdiction under *Catholic Bishop*, but actually states that it "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 mere religious name will suffice. *See Saint Elizabeth Hosp.*, 715 F.2d at 1196. 6/

6/ Petitioner's argument before the Regional Director based on Title VII cases that a church-operated educational institution can waive its "religious exemption" is both inapposite and inaccurate. 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. Second, the very 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. World of Faith Christian Center Church*, 589 F. Supp. 2d 759, 763 (S.D. Miss. 2008). Applying those principles here, Duquesne timely objected to the Board's jurisdiction such that no prejudice would result to the Petitioner. Additionally, as discussed above, at least one Board decision found proper notice in a *Catholic Bishop* challenge based solely on the fact that the institution's name indicated its religious affiliation. *Saint Elizabeth Hosp.*, 715 F.2d at 1196.

IV. THE REGIONAL DIRECTOR SHOULD DETERMINE 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. If the Regional Director conducts this analysis—as it must—it would determine that Duquesne properly invokes *Catholic Bishop* and that the Board lacks jurisdiction regardless of which test it chooses to apply.

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 assess whether an entity is exempt from the NLRA's jurisdiction under *Catholic Bishop*, the Board analyzes the entity's "substantial religious character." This test calls for a 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 v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009).

In two cases currently pending before the NLRB, 7/ 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 v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). It is premature to address the proper test to be followed in assessing whether the Board has jurisdiction over Duquesne at this point. The Board's jurisdiction can only be determined on the basis of a full evidentiary record and briefing by the parties.

Nevertheless, and regardless of which test applies, Duquesne has presented strong evidence that the Board cannot assert jurisdiction in this case. 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 initially named Pittsburgh Catholic College of the Holy Ghost until 1911, when its name was changed to Duquesne University of the Holy Spirit. In its Statement of Mission, Duquesne demonstrates that the propagation of the Catholic faith is one of its 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.

7/ *See Manhattan College and Manhattan College Adjunct Faculty Union, New York State United Teachers, AFT/NEA/AFL-CIO*, Case No. 02-RC-23543, and *Saint Xavier University and Saint Xavier University Adjunct Faculty Organization, IEA-NEA*, Case No. 13-RC-22025.

See Duquesne's Statement of Mission. Similar proclamations are contained 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.

Additionally, Duquesne receives significant support and guidance from its affiliated religious group, the Catholic Church and the Spiritans. For instance, 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). 8/ Such characteristics are indisputably of a substantial religious character, and Duquesne is included as a Catholic University on the Official Catholic Directory, 9/ signifying that the Catholic Church considers it to exemplify these characteristics.

To be sure, the Board need not decide today whether Duquesne ultimately falls within *Catholic Bishop*. 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. The foregoing analysis demonstrates that Duquesne has raised at the very least a substantial question as to the Board's statutory jurisdiction, and the Regional Director should hold a hearing and determine the merits.

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

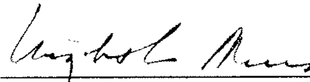
9/ Colleges & Universities, Official Catholic Directory, http://www.officialcatholicdirectory.com/mtree/education/colleges-universities.html?limit=40&limitstart=40.

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.

Dated: July 6, 2012

Respectfully Submitted,



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 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

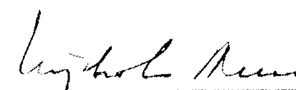
Arnold Perl, Esq.
Glankler Brown
6000 Poplar Avenue, Suite 400
Memphis, TN 38119
E-mail: aperl@glankler.com

Hon. Mark Wirick
Acting Regional Director, Region 6
National Labor Relations Board
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222
E-mail: mark.wirick@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 6th day of July, 2012



Elizabeth Meers
Hogan Lovells US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20037
(202) 637-8676
Counsel for Amicus Curiae