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In *Carroll College v. National Labor Relations Board*, the U.S. Court of Appeals for the District of Columbia held that in order to avoid NLRB jurisdiction, academic religious entities need only show that they: (1) advertise themselves as providing a religious educational environment; (2) are non-profit; and (3) are “affiliated” directly or indirectly with an entity associated with a recognized religious organization.

## Court Curbs NLRB Jurisdiction Over Academic Religious Institutions

By Jaffe D. Dickerson and Ruth Benson

The U.S. Court of Appeals for the District of Columbia established a setback to the jurisdiction of the National Labor Relations Board (NLRB) over religious academic institutions in its recent decision, *Carroll College v. National Labor Relations Board*. Religious schools are likely to rely heavily on the decision’s relaxed burden of proof to escape the jurisdiction of the NLRB. Academic religious institutions need only show that they: (1) advertise themselves as providing a religious educational environment; (2) are a non-profit entity; and (3) are “affiliated” directly or indirectly with an entity associated with a recognized religious organization.

### The Background

Carroll College is a private college in Wisconsin, affiliated with the Synod of Lakes and Prairies of the United Presbyterian Church of the U.S.A. In 2004, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - UAW persuaded the NLRB to require the college to bargain with the union as the collective bargaining representative of the faculty, but the college refused to bargain. The college challenged the NLRB’s jurisdiction on the basis that requiring the college to bargain with the union would “substantially burden its free exercise rights in violation of the Religious Freedom Restoration Act.”<sup>1</sup> The case was heard on appeal before the U. S. Court of Appeals for the D.C. Circuit, where for the first time, Carroll argued that it was exempt from NLRB jurisdiction under prior precedent, including the U.S. Supreme Court case *NLRB v. Catholic Bishop of Chicago*<sup>2</sup> and the D.C. Circuit Court of Appeals decision in *University of Great Falls v. NLRB*.<sup>3</sup> The court of appeals agreed.

### The Analysis

#### *Scope of Inquiry*

Citing *Catholic Bishop*, the court affirmed the limited scope of the permissible inquiry into the religious mission of a religious-affiliated school. The court noted that in light of the prohibitions of the First Amendment regarding governmental interference

with religion, the NLRB may not bolster the reach of its jurisdiction by inquiring into the good faith of the position asserted by school administrators and its relationship to the school's religious mission. It is the very process of inquiry itself, not just the conclusions that may be drawn from the process, that offends the First Amendment. Although the Supreme Court did not establish a test for determining exemption from NLRB jurisdiction in *Catholic Bishop*, in several cases after *Catholic Bishop* the NLRB invoked what came to be known as the "substantial religious character" test, allowing the NLRB to consider any aspect of a religious school's organization that it deemed relevant to exercising its jurisdiction.

### **D.C. Circuit Scuttles the "Substantial Religious Character Test"**

Relying on its decision in *Great Falls*, the D.C. Circuit Court rejected the notion that the NLRB can "troll through" the beliefs of schools, making determinations about their religious mission and that mission's centrality to the primary purpose of the school. Rather, the court substituted a sharply relaxed three-part test for a religious school's exemption from NLRB jurisdiction: (1) the school must hold itself out to students, faculty and the community as providing a religious educational environment; (2) the school must be organized as a non-profit; and (3) the school must be affiliated with, or owned by, a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. The court emphasized that this is meant to be a "bright-line" rule to avoid delving into matters of religious doctrine or motive.

### **Evidence Supporting Religious Affiliation**

Perhaps the most interesting part of the D.C. Circuit Court's opinion is its endorsement of the kind of evidence that can establish NLRB exemption. As to the first prong of the test — holding itself out to provide a religious educational environment — the court looked favorably at Carroll College's charter documents, course catalogue, mission statement, student bulletins, and "other public documents." As to the second prong, it was undisputed that Carroll College is a non-profit entity.

The court's examination of the third prong of the test is what religious schools are most likely to welcome: evidence of affiliation with a religious group, already loosely defined, can easily be demonstrated. The court accepted the following as evidence of affiliation: Carroll College's Articles of Incorporation describe its relationship with the Presbyterian Synod; Carroll College and the Synod are parties to an agreement that recognizes and affirms Carroll College's origin and heritage in the concern of the church for the intellectual and spiritual growth of its students, faculty, administration and staff; and Carroll College's course catalogue states that it is affiliated with the Presbyterian Church. The court determined that such evidence easily satisfied the third prong of its test, specifically rejecting the NLRB's argument that Carroll College had to prove that the Church "sponsors" the college, owns its campus, and has the right of ultimate control.

## **Conclusion**

Unless overturned, the *Carroll* opinion will stand as a powerful tool for academic religious institutions in avoiding union organizational efforts. Academic religious organizations should review their charters, mission statements and other relevant public material to determine whether they meet the three-part test established by the D.C. Circuit Court of Appeals in order to insulate them from future union organizational efforts.

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<sup>1</sup> 42 U.S.C. § 2000bb-1 (2000).

<sup>2</sup> 440 U.S. 490 (1979).

<sup>3</sup> 278 F. 3d 1335 (D.C. Cir. 2002).