The National Labor Relations Board ("NLRB") determined last week that it has no jurisdiction over faculty members at religious institutions of higher education in Bethany College, 369 NLRB No. 98. The decision overrules a prior jurisdictional test laid out by the NLRB in 2014 that cleared the way for faculty members to unionize and become subject to collective bargaining. Bethany College is being viewed by religious institutions as critically important in restoring the First Amendment rights of faith-based educational institutions.

The Prior State of the Law

In 2014, the Obama-era NLRB afforded faculty members at religious institutions of higher education the opportunity to unionize when it set forth new jurisdictional standards over faculty at religious institutions. This decision, known as the Pacific Lutheran decision, established that faculty members could unionize through NLRB channels if the faculty members did not serve specific religious functions as part of their jobs. This required showing that the institution did not hold those faculty members out as performing a specific role in creating or maintaining the institution’s religious educational environment.
The New Jurisdictional Test

Under the current administration, the NLRB quickly signaled its intention to reverse course and appease First Amendment advocates by walking back the Pacific Lutheran decision. The new decision in Bethany College provides that it is beyond the NLRB’s jurisdiction to assess whether faculty members at religiously affiliated universities are performing specific religious functions. The reasoning behind the new decision is that conducting an inquiry into what constitutes a religious function would intrude into areas safeguarded by the First Amendment.

In Bethany College, the NLRB adopts a jurisdictional test founded by the United States Court of Appeals for the District of Columbia in 2002. This jurisdictional test provides that the NLRB must decline to exercise jurisdiction over faculty at an institution that (a) holds itself out as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with or owned by, operated by, or controlled by a recognized religious organization or other entity where membership is determined with reference to religion.

In conclusion, the NLRB’s new decision scraps the 2014 jurisdictional standard and adopts a new standard which prevents the NLRB, a governmental entity, from having a say in how religious institutions are run.

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