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Religious Accommodation at Work: Lessons from Labor Law

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Religious Accommodation at Work: Lessons from Labor Law

CHARLOTTE GARDEN

When should employers be exempted from generally applicable law because of their religious beliefs? Variations on this question have reached the Supreme Court in a series of recent cases. But these high profile, politically charged disputes represent only a subset of the religious accommodation claims with which agencies and courts are grappling. Other contexts yield useful insights about how we might strike a balance between employer religious liberty and legal protections for third parties, including employees.

This Article focuses on arguments by religiously affiliated colleges and universities that they should be exempt from the National Labor Relations Act. It begins by tracing the recent history of those arguments, and predicts that they will enjoy a warmer reception from the Trump NLRB than they did from the Obama Board. It then discusses how the legal dispute over union organizing at religious institutions of higher education helps illuminate aspects of the larger debate over religious liberty for enterprises. First, this dispute illustrates courts' difficulties in separating questions about employer religious liberty from courts' conceptions of appropriate managerial prerogative. Second, it shows both that some religious exemptions have significant value in secular markets, and when that is true, employers may be able to negotiate accommodations that partially compensate employees for the costs they incur as a result of employer accommodations.

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Religious Accommodation at Work: Lessons from Labor Law

CHARLOTTE GARDEN *

INTRODUCTION

Three times in recent years, the U.S. Supreme Court has grappled with clashes between generally applicable law and an enterprise's religious exercise—yet many thorny questions surrounding religious accommodations for enterprises remain. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court held that the Commission violated a baker's First Amendment rights by conveying disrespect to his religious beliefs, but did not resolve whether public accommodations laws must ever yield to accommodate market participants' religious beliefs.¹ The other two cases falling into this category involved employers seeking exemptions from their obligations under the Affordable Care Act. In *Burwell v. Hobby Lobby Stores*, the Court held that under the Religious Freedom Restoration Act, certain companies were entitled to an exemption from the “contraceptive mandate” based on the religious objections of their owners, at least where the federal government had already devised an accommodation available to some employers.² And in *Zubik v. Burwell*, the Court did not reach a decision; instead, it remanded the case so that the parties could attempt to reach a satisfactory arrangement on their own.³

Although these cases illustrate only a narrow swath of the types of cases related to religious exercise that reach the courts,⁴ they have captured the majority of the public attention.⁵ This is at least in part because these

* Associate Professor, Seattle University School of Law. I am grateful to participants in the *Religious Freedom: Liberty, Legislation, and Litigation* symposium for their helpful feedback and suggestions, to the editors of the Connecticut Law Review for their careful work on this essay, and to Joseph Wright for his invaluable research assistance.

¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014).

³ *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (“[T]he Court vacates the judgments below and remands to the respective United States Courts of Appeals [T]he parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’” (quoting Supplemental Brief for Respondent at 1, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418))).

⁴ See, e.g., Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a) (allowing prisoners to assert religious exercise claims).

⁵ See, e.g., Kathleen A. Brady, *The Disappearance of Religion from Debates about Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1096–97 (2017) (discussing the various types of

cases also implicate sexual orientation, sexual autonomy, and women's full participation in the workforce. Still, as courts, legislatures, and the public grapple with whether and when it is appropriate to accommodate corporate religious exercise, it can be useful to consider a wider range of contexts in which those questions arise. This Article attempts to do that by focusing on arguments by religiously affiliated colleges and universities (RACUs) that they should be exempt from the National Labor Relations Act (NLRA).

Whether the National Labor Relations Board (NLRB) may take jurisdiction over bargaining units of educators working at RACUs has become a contentious issue over the last several years, as unions like the Service Employees International Union (SEIU) have sought to organize adjunct professors, graduate students, and others at both secular and religious schools.⁶ In 2014, the NLRB announced a new test for deciding these questions, which no circuit court has yet reviewed.⁷ However, that will soon change, and in any event, the NLRB under President Trump is likely to revisit this test, should the opportunity arise.

This Article begins by tracing the recent history of the law governing NLRB jurisdiction over educators working at RACUs and explains that even though the Board's new standard is relatively favorable to unions, it is unlikely to be useful under the Trump NLRB. It then discusses three ways that the legal dispute over union organizing at RACUs helps illuminate aspects of the larger debate over religious liberty for enterprises. First, it illustrates how difficult it is for the Court to separate employer and employee religious liberty from ideas about the scope of employers' authority. Second, it shows that some religious exemptions have significant market value to the employers that seek them—a complicating factor that is not necessarily present in every context in which corporations seek religious accommodations. Third, it argues that while the Court's approach to religious exemptions to labor law does not now require exempt employers to attempt to negotiate an accommodation that compensates employees for their loss of statutory rights, there is reason to believe employers and unions could succeed in in doing just that. Further, labor law may be a context in which interested parties are relatively likely to be

challenges to accommodation laws, including contraception and same-sex marriage); Andrew Koppleman, *Kent Greenawalt, Defender of the Faith*, 95 TEX. L. REV. 821, 821 (2017) (reviewing KENT GREENAWALT, *EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED?* (2016)) (arguing that the "coalition" in which "almost everybody loved the idea of exempting religious objectors from generally applicable laws" was "splintered" by religious-based challenges to the contraceptive mandate and public-accommodations laws).

⁶ *Standing Up for Higher Education*, SERVICE EMPLOYEES INTERNATIONAL UNION, <http://seiufacultyforward.org/> [<https://perma.cc/P7SB-B9WZ>] (last visited Feb. 10, 2018).

⁷ See *infra* notes 27–35 and accompanying text (describing the test adopted in *Pacific Lutheran*).

able to negotiate a religious accommodation—though it is not a context in which the Court has encouraged that outcome.

I. THE NATIONAL LABOR RELATIONS ACT AND RELIGIOUS EMPLOYERS: AN OVERVIEW OF RECENT DEVELOPMENTS

This Part begins with an overview of recent legal developments regarding NLRB jurisdiction over religious colleges and universities, focusing in particular on the Board's recent decision in *Pacific Lutheran University*. It then provides an overview of labor organizing at religious colleges and universities, including related litigation following *Pacific Lutheran*. Finally, it situates *Pacific Lutheran* against the Board's history of policy oscillation, observing that the newly configured Trump Board is likely to revisit that case if given the opportunity.

A. *The Genesis of the Pacific Lutheran University Standard*

In recent years, the question of whether adjunct professors and others who teach at RACUs may unionize has become important. This is in large part because of the SEIU's wide-ranging and often successful "Faculty Forward" campaign to organize adjuncts, graduate students, and other academic workers in higher education.⁸ This campaign responds to higher education's increasing reliance on adjunct and contingent faculty to deliver core education to students at a cheaper price.⁹ The SEIU's organizing campaigns have tended to focus on two main components: first, pay and benefits; and second, job predictability and stability.¹⁰

Colleges and universities have responded in a range of ways to on-campus organizing drives. Some have waged public relations campaigns aimed at encouraging their employees to vote against union representation,¹¹ and have also argued before the NLRB that their

⁸ See SERVICE EMPLOYEES, *supra* note 6 (noting that the group is advocating for change in the education system); Justin Miller, *When Adjuncts Go Union*, AM. PROSPECT (June 30, 2015), <http://prospect.org/article/when-adjuncts-go-union> [<https://perma.cc/8MU6-WTY2>] (describing SEIU's announcement of "a highly ambitious long-term plan to organize one million adjunct faculty members nationwide").

⁹ See Larry Gordon, *California Colleges See Surge in Efforts to Unionize Adjunct Faculty*, L.A. TIMES (Jan. 3, 2015, 6:00PM) <http://www.latimes.com/nation/la-me-unions-colleges-20150104-story.html> [<https://perma.cc/G7MS-48VS>] (stating that, according to William Herbert of the National Center for the Study of Collective Bargaining in Higher Education and the Professions, at Hunter College in New York, "[t]he unusual number of union campaigns springs from the use of more part-time instructors as a way to reduce the hiring of tenure-track faculty").

¹⁰ See Colleen Flaherty, *\$15,000 Per Course?*, SLATE (Feb. 12, 2015, 10:00 AM), http://www.slate.com/articles/life/inside_higher_ed/2015/02/_15_000_per_course_the_seiu_s_faculty_forward_sets_a_goal_for_adjunct_professor.html [<https://perma.cc/9HNM-WV7T>] (discussing the pay per course that some instructors and professors are pushing for at some universities).

¹¹ See Colleen Flaherty, *For Your Anti-Union Information*, INSIDE HIGHER ED (Aug. 30, 2016) <https://www.insidehighered.com/news/2016/08/30/crop-anti-union-university-websites-sparks->

employees are ineligible to unionize for a range of reasons.¹² On the other hand, some schools have maintained a neutral stance regarding the possibility of their academic workers unionizing, and have successfully negotiated collective bargaining agreements with elected unions.¹³

That same range of responses exists with respect to RACUs. For example, Georgetown University did not oppose a union drive by its adjunct professors, who then voted to be represented by an SEIU local union and later successfully bargained their first contract with the university,¹⁴ on the other hand, Georgetown is opposing a union drive by its graduate students.¹⁵ In contrast, other RACUs have fought adjunct union drives inside and outside the NLRB's adjudicative process.¹⁶ However, a key difference between RACUs and secular private colleges and universities is that only the former can argue that their religious character should preclude the NLRB from taking jurisdiction over their instructor workforces.

The scope of the NLRA's application at religious colleges and universities is governed at least in part by the Supreme Court decision *NLRB v. Catholic Bishop of Chicago*.¹⁷ In that case, the Court relied on the canon of constitutional avoidance to hold that the NLRB was not authorized to take jurisdiction over a bargaining unit of lay teachers at a

criticism-proponents-graduate-assistant [https://perma.cc/79CQ-7DG4] (describing anti-union websites hosted by universities facing union drives).

¹² For example, Columbia University fought a union drive launched by the United Auto Workers both by campaigning against the union over a prolonged period of time and arguing before the NLRB that graduate student workers did not qualify as "employees" who are eligible to unionize under the NLRA. The NLRB ruled against Columbia and the graduate students voted in favor of unionization; Columbia is now in the process of appealing that decision. See Tr. of Columbia Univ. N.Y., 364 N.L.R.B. No. 90, 1–2 (Aug. 23, 2016) (holding that Columbia graduate assistants were employees under the NLRA); Elizabeth A. Harris, *Student Unionizing to Go to Court*, N.Y. TIMES, Jan. 30, 2018, at A21 (describing Columbia's litigation stance regarding graduate assistant unionization).

¹³ See *Landmark Neutrality and Election Agreement for Barnard College Contingent Faculty*, UAW (July 20, 2015), <http://uaw.org/landmark-neutrality-and-election-agreement-for-barnard-college-contingent-faculty/> [https://perma.cc/W2X4-B4FE] (discussing that Barnard President Debora Spar "pledge[d] to remain neutral . . . and encourage[d] everyone in the Barnard community . . . to also remain neutral by refraining from campaigning for or against the Union") (internal quotation marks omitted).

¹⁴ Peter Schmidt, *Georgetown U. Adjuncts Vote to Unionize*, CHRON. OF HIGHER EDUC. (May 3, 2013), <http://www.chronicle.com/article/Georgetown-U-Adjuncts-Vote-to/139069> [https://perma.cc/3EEA-PCQA].

¹⁵ Colleen Flaherty, *Graduate Students Protest Georgetown's Position on Union*, INSIDE HIGHER ED. (Dec. 7, 2017), <http://www.insidehighered.com/quicktakes/2017/12/07/graduate-students-protest-georgetown-positions-position-union> [https://perma.cc/TP77-M2ZT].

¹⁶ One of these schools is Seattle University, which is also my employer. Seattle Univ., 364 N.L.R.B. No. 84, 1–3 (Aug. 23, 2016).

¹⁷ 440 U.S. 490 (1979). I have previously analyzed and critiqued *Catholic Bishop*, and I do not repeat that discussion here. See generally Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, 96 B.U. L. REV. 109 (2016).

parochial high school.¹⁸ Thus, *Catholic Bishop* stands for the proposition that there are at least some groups of employees of religiously affiliated organizations as to whom the NLRB may not take jurisdiction, whether or not the employer's union opposition is motivated by religious or secular considerations. Or, as the *Catholic Bishop* Court approvingly described the Seventh Circuit's reasoning below, "interference with management prerogatives, found acceptable in an ordinary commercial setting, was not acceptable in an area protected by the First Amendment."¹⁹ In other words: the First Amendment has a role in resolving the interplay between an institution's religious liberty and its management rights. Moreover, the Seventh Circuit viewed the First Amendment as having a larger role in the context of exemptions from labor law than from laws that implicated the institution in other ways, such as in its role as owner and manager of a piece of property or even its role as educator.²⁰

Affirming the Seventh Circuit, the Supreme Court identified (but did not resolve) constitutional questions about the application of the NLRA to the parochial teachers. They included the risk of "entanglement" if the NLRB ordered a parochial school to bargain collectively with its teachers or adjudicated an unfair labor practice charge.²¹ Here, the Court was focused not just on the outcome of those processes, but on "the very process of inquiry leading to findings and conclusions."²² Moreover, the Court worried that the "introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management,"²³ or that "conflicts" between "clergy-administrators" and "negotiators for unions" might arise.²⁴

The *Catholic Bishop* Court did not provide clear guidance on whether the NLRB should apply the same approach to other religiously affiliated employers, such as hospitals or universities. As a result, the NLRB and the circuit courts have struggled to apply *Catholic Bishop* in these contexts. I have discussed the history of the Board's application of *Catholic Bishop* to other types of religious employers elsewhere.²⁵ Suffice it to say, the Board's pre-2014 approach was imperfect and had been criticized by

¹⁸ *Catholic Bishop*, 440 U.S. at 500–01, 506–07.

¹⁹ *Id.* at 496.

²⁰ *See id.* (describing the Seventh Circuit's opinion in which the "court distinguished local regulations which required fire inspections or state laws mandating attendance, reasoning that they did not 'have the clear inhibiting potential upon the relationship between teachers and employers with which the present Board order is directly concerned'").

²¹ *Id.* at 502.

²² *Id.*

²³ *Id.* at 503 (quoting *Pa. Labor Relations Bd. v. State Coll. Area Sch. Dist.*, 337 A.2d 262, 267 (Pa. 1975) (internal quotation marks omitted)).

²⁴ *Id.*

²⁵ Garden, *supra* note 17, at 120–24.

circuit courts, which in turn had suggested other approaches with their own problems.²⁶

In 2014, a divided NLRB adopted a new standard to determine whether to accept jurisdiction over faculty at religiously affiliated colleges and universities in a decision known as *Pacific Lutheran University*.²⁷ Under the *Pacific Lutheran* standard, the Board will accept jurisdiction over faculty members who are otherwise eligible to unionize unless “the university or college demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty member[s] as performing a specific role in creating or maintaining the school’s religious educational environment.”²⁸

Both prongs of the new test reflect the Board majority’s understanding—based on *Catholic Bishop*—that it would be “impermissible” for the Board to inquire “into the good faith of the university’s position [that it is a religious institution] or an examination of how the university implements its religious mission.”²⁹ Beyond that, the first prong is aimed at helping the Board determine “whether First Amendment concerns are even potentially implicated” in the case, and demands only that the university make a “minimal showing” that it holds itself out as religious in forums other than the NLRB.³⁰ The Board’s second prong focuses on whether the RACU holds out individual instructors as playing a “specific role” in the school’s religious mission and was derived from the *Catholic Bishop* Court’s focus on teachers’ “‘critical and unique role’ in creating and sustaining a religious environment.”³¹ Thus, the Board drew a negative inference based on *Catholic Bishop*’s reasoning, concluding that ordering bargaining or adjudicating unfair labor practices in cases involving instructors who did not have a role to play in a school’s religious mission could not raise entanglement concerns.³²

²⁶ *Id.*

²⁷ *Pac. Lutheran Univ.*, 361 N.L.R.B. 1404 (Dec. 16, 2014). This Article discusses only the aspects of *Pacific Lutheran* that relate to NLRB jurisdiction over religiously affiliated colleges and universities. It does not address questions related to when faculty members should be categorized as “managerial” workers who are ineligible to unionize for that reason.

²⁸ *Id.* at 1408.

²⁹ *Id.* at 1409. The Board’s view on this point is consistent with *Catholic Bishop*, though courts in other contexts assess whether individuals claiming entitlement to religious exemptions or accommodations are sincere in their purported beliefs. See Garden, *supra* note 17, at 145–46 (describing the “difficulty of assessing whether subjective religious beliefs are sincere” in litigation).

³⁰ *Pac. Lutheran*, 361 N.L.R.B. at 1409–10.

³¹ *Id.* at 1410–11 (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979)).

³² *Id.* at 1411 (“Faculty 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 which do not identify themselves as religious institutions and which are indisputably subject to the Board’s jurisdiction. Both faculty provide nonreligious instruction and are hired, fired, and assessed under criteria that do not implicate religious considerations.”).

However, the Board also concluded that its inquiry was restricted to examining how the RACU described individual faculty members' duties, explaining that "if the college or university holds itself out as requiring its faculty to conform to its religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties as a faculty member, we will decline jurisdiction."³³

In contrast, the two NLRB dissenters concluded that even the Board's limited and deferential inquiry into whether a RACU held out its faculty members as playing a role in its religious mission was more than *Catholic Bishop* allowed.³⁴ Instead, they urged the Board to adhere to a test previously announced by the D.C. Circuit, in which the Board would decline jurisdiction over any institution that:

(a) holds itself out to students, faculty and community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) 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.³⁵

Shortly after it decided *Pacific Lutheran*, the Board applied the new test in the context of adjunct union elections at other RACUs.³⁶ Parsing how schools described individual instructors' jobs, the Board in multiple cases ultimately excluded instructors charged with teaching religious doctrine from potential bargaining units, but accepted jurisdiction over bargaining units involving instructors of other subjects.³⁷

However, as the next Section discusses, the *Pacific Lutheran* standard may be reversed by the Trump NLRB. Moreover, that danger is likely to prompt unions hoping to organize instructors at RACUs to eschew the NLRB election process for now, rendering the *Pacific Lutheran* standard mostly unusable as a practical matter.

³³ *Id.* at 1412.

³⁴ *Id.* at 1430.

³⁵ *Id.* at 1438 (citing *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1347 (D.C. Cir. 2002)).

³⁶ *Seattle Univ.*, 364 N.L.R.B. No. 84 (Aug. 23, 2016).

³⁷ *See, e.g., id.* (holding that some of the faculty, like calculus teachers, do not perform a specific religious function).

B. *What's Next for Union Organizing at Religious Colleges and Universities?*

The NLRB has been routinely criticized for policy oscillation,³⁸ a fact of life that is probably inevitable given the role of partisan political affiliation in filling Board seats and the fact that the text of the NLRA itself leaves considerable room for interpretation.³⁹ As NLRB seats come open, recent custom dictates that President Trump will appoint replacements so as to maintain three Republican and two Democratic members; as of the date this article was published, the Board was comprised of three Republican members and one Democratic member, with the remaining seat vacant.⁴⁰

With its change in partisan valance, the Trump NLRB is likely to reverse *Pacific Lutheran* if given the chance. Already, the Board's new general counsel has called for new Board complaints that implicate "cases [decided] over the last eight years that overruled precedent and involved one or more dissents"—a category that includes cases applying the *Pacific Lutheran* standard—to be "submitted to Advice."⁴¹ Moreover, in the last days of previous Board chairman Philip Miscimarra's term, the Board issued a flurry of cases overturning decisions from the Obama Board era and even earlier.⁴²

Given this political reality, unions are likely to conclude that attempting to proceed under the *Pacific Lutheran* standard will do nothing more than expend their own resources while giving the Trump Board an

³⁸ See, e.g., Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2015–16 (2009) (discussing how NLRB policy oscillation undermines the NLRB's legitimacy as expert policy maker).

³⁹ Custom dictates that the president appoints three Board members from his own party and two from the other party. Board members serve staggered five-year terms. See Ronald Turner, *Ideological Voting on the National Labor Relations Board Revisited (With Special Reference to Decision-Bargaining Over Employer Relocation Decisions)*, 14 Hous. Bus. & Tax L.J. 24, 29–30 (2014) (discussing the inevitably political appointment process and its impact on Board members).

⁴⁰ Steven M. Swirsky, *What to Look Out for This Year at the NLRB*, NAT'L L. REV. (Feb. 6, 2018), <https://www.natlawreview.com/article/what-to-look-out-year-nlr> [<https://perma.cc/C3VT-4ECR>].

⁴¹ Memorandum from the Office of the General Counsel of the NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers at 1, 4–5 (Dec. 1, 2017), http://hr.cch.com/ELD/GC18_02MandatorySubmissionstoAdvice.pdf [<https://perma.cc/9A8W-V3XA>]. "Submitting a case to Advice" means that the Office of the General Counsel has an opportunity to direct that the Board's prosecutorial arm take a particular position or argue the case in a particular way, and it is often a first step in changing Board law.

⁴² See Andrew Strom, *At the NLRB, GOP Board Members Show How to Play Hard Ball*, ONLABOR (Dec. 21, 2017), <https://onlabor.org/at-the-nlr-gop-board-members-show-how-to-play-hard-ball/> [<https://perma.cc/KYB4-75MM>] (explaining that the new Republican majority on the NLRB issued five decisions that overturned precedent).

opportunity to overturn *Pacific Lutheran*. With little upside in sight, unions are unlikely to file new petitions seeking to represent instructors at RACUs and may withdraw existing petitions.⁴³ Thus, even while *Pacific Lutheran* remains on the books, it is likely to be close to a dead letter for as long as the NLRB is controlled by Republicans.

This is not to say, however, that no organizing will occur at RACUs. As noted above, some universities willingly agree to bargain collectively with a union once a majority of their employees indicate their support for that union without forcing an NLRB election.⁴⁴ Thus, the Trump Board's near-certain hostility to *Pacific Lutheran* is likely to place a premium on unions' ability to convince employers to agree to remain neutral about the prospect of union organizing and to agree to alternative election procedures.⁴⁵ Perhaps paradoxically, this means that the visibility of unions' work organizing instructors at RACUs could increase rather than decrease, particularly on campuses where instructors and unions perceive that a robust publicity campaign might prompt an employer to agree to neutrality and an alternative election process.⁴⁶

This Part has detailed the recent history of RACUs' religious liberty claims involving the NLRA. The next Part contains a brief discussion of some ways that the fight over the application of the NLRA to religious employers might help inform the ongoing debate about other forms of religious accommodations for employers.

II. WHAT THE NLRA CONTEXT REVEALS ABOUT RELIGIOUS ACCOMMODATIONS AT WORK

A. *Religious Accommodations and Employer Control*

Cases about religious accommodations for employers could be recharacterized as cases about the scope of employer control.⁴⁷ When

⁴³ Indeed, the SEIU local union seeking to represent adjunct professors at Seattle University withdrew its charge that the university was unlawfully refusing to bargain collectively after President Trump was elected. SEIU Local 925's Motion to Remand, Seattle Univ., Case 19-CA-185605 (NLRB Oct. 18, 2017); *Seattle Univ.*, NLRB (Jan. 5, 2018), <https://www.nlr.gov/case/19-CA-185605> [<https://perma.cc/6HD5-GXWT>].

⁴⁴ See *supra* Part I.A (providing examples of schools that have engaged in collective bargaining).

⁴⁵ See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 837–39 (2005) (exploring reasons employers might agree to neutrality).

⁴⁶ See James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 738–39 (2010) (identifying union incentives to obtain neutrality agreements); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2622 (2011) (describing the role of comprehensive campaigns in union organizing).

⁴⁷ See B. Jesse Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177, 1185 (2017) (arguing that *Hobby Lobby* “vindicated the

employers successfully press religious liberty claims, the effect is deregulatory⁴⁸—certain employers are freed to exert control over or impose conditions on their employees in ways that would otherwise be unlawful.⁴⁹ Looking at these cases through this lens, readers can group religious freedom cases involving employers with cases arising in other areas of law (including labor law) that reflect explicit or implicit assumptions about enterprises' managerial prerogatives.⁵⁰ Indeed, others have convincingly pointed out that many aspects of labor law reflect courts' assumptions about the scope of legitimate employer control;⁵¹ religious accommodation cases seem to reflect the same judicial impulse, at least in part.

For example, as described in the previous section, deference to employer control is reflected in the way the *Catholic Bishop* Court articulated its reasoning, including in its observation that collective bargaining would “encroach[] upon the former autonomous position of management.”⁵² That same impulse is also reflected in the handful of later Supreme Court cases in which religious employers have successfully claimed statutory or constitutional exemptions from certain minimum labor standards based on their religious beliefs. (The primary exception, in which an employer seeking a religious accommodation lost at the Supreme Court, involved a religious employer seeking an exemption from the minimum wage.⁵³) In contrast, the Court's cases involving religious accommodations for employees have had far more mixed results.

Post-*Catholic Bishop* cases in which employers won their religious exemption claims include *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,⁵⁴ and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,⁵⁵ in

rights of religious employers to order their own internal affairs—to govern autonomously the terms of their relationships with their employees”).

⁴⁸ For a broader discussion of the deregulatory potential of corporate religious freedom arguments, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1507–08 (2015) (observing the deregulatory potential of religious exemptions).

⁴⁹ *Id.* at 1514–15 (discussing ways that *Hobby Lobby's* rationale frees religious employers from complying with statutory limits on their authority to make decisions regarding what benefits to provide and who to hire or fire).

⁵⁰ See, e.g., Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1057 (2013) (noting that the Supreme Court has, in some cases, privileged the free speech of enterprises over the free speech of their dissenting members).

⁵¹ See, e.g., James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 518–19 (2004) (exploring assumptions in labor law that favor employers); Richard Michael Fischl, *Labor Law, the Left, and the Lure of the Market*, 94 MARQ. L. REV. 947, 955–56 (2011) (arguing that judges often reify employers' perspectives).

⁵² NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 503 (1979).

⁵³ *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

⁵⁴ 483 U.S. 327 (1987).

⁵⁵ 565 U.S. 171 (2012).

addition to *Hobby Lobby*. The issue in *Amos* was whether Title VII's exemption for religious organizations violated the Establishment Clause, particularly as applied to employment decisions involving employees who had secular duties—in *Amos*, a building engineer employed at a gymnasium that was open to the public.⁵⁶ The Court held that Congress could reasonably have decided to draw the exemption broadly in order to remove from religious organizations the “significant burden” of “predict[ing] which of its activities a secular court will consider religious.”⁵⁷ In other words, the Court upheld Congress's decision to extend Title VII's statutory exemption to cover secular employees of religious organizations because a narrower exemption might result in litigation and therefore chill religious employers in their choice of co-religionists for some jobs.

In *Hosanna-Tabor*, the Court held that the “ministerial exception” was an affirmative defense to a ministerial employee's discrimination lawsuit, because churches had the right under both religion clauses to choose whom to employ as their ministers.⁵⁸ In that decision, the Court equated managerial rights with the core of religious freedom, contrasting “outward physical acts” such as religiously motivated peyote use, with employment decisions that would “affect[] the faith and mission of the church itself.”⁵⁹ Thus, while the Court recognized that both peyote use and hiring or firing a ministerial employee could be motivated by religion, only the latter gives rise to an exemption from generally applicable law, a distinction that has been criticized by some commentators.⁶⁰ Additionally, the *Hosanna-Tabor* Court suggested the decision may not extend to employment eligibility cases—as Christopher Lund puts it, cases implicating the relationship between the employer and the government.⁶¹ Thus, whereas it is easy to imagine a church arguing that its ability to hire a minister without work authorization in the United States was an employment decision that

⁵⁶ 483 U.S. at 330–31, 333. Title VII's exemption for religious organizations applies only to discrimination based on religion, rather than other protected characteristics. 42 U.S.C. § 2000e-1(a) (2012) (“This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”).

⁵⁷ *Amos*, 483 U.S. at 336.

⁵⁸ *Hosanna-Tabor*, 565 U.S. at 192.

⁵⁹ *Id.* at 190.

⁶⁰ See Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 984 (2013) (arguing that “[i]t is unacceptable that religious individuals must obey the law but religious institutions need not”)

⁶¹ *Hosanna-Tabor*, 565 U.S. at 710 (“Nor, according to the Church, would the exception bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves.”); see Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1193 (2014); cf. Hill, *supra* note 47, at 1191–92 (noting the high “cost of departure from religious employment”).

implicated its “faith and mission,” the ministerial exemption likely does not apply.⁶² In other words, employment law is different: whereas many sorts of generally applicable laws may apply equally to churches as to other institutions, employment law does not.

The exemptions in *Catholic Bishop* and *Hosanna-Tabor* have at least two important similarities. First, neither the *Catholic Bishop* nor the *Hosanna-Tabor* standard demands that employers attempting to qualify for protection under either case actually state that an accommodation was necessary because of a conflict between their religious beliefs and secular law.⁶³ Thus, a parochial school can avoid NLRB jurisdiction even if its leadership does not believe there is a conflict between collective bargaining and their religious commitments, and it can fire a ministerial employee for no reason other than a desire not to pay the costs involved in providing a reasonable accommodation that would otherwise be required under the Americans with Disabilities Act. Second, in neither case did the Court consider whether there was a way to compensate employees in part for their lost statutory rights and protections—instead, the only choices for employees who have lost statutory protections under either of these cases are to grin and bear it or to quit.⁶⁴

For another indication that ideas about the importance of employer prerogative play at least an implicit role in religious accommodation disputes, we might look to cases involving the religious exercise rights of employees. That is, if norms about employer control influence congressional or court decisions about the scope of religious accommodations, then we would expect religious accommodations for employees to be narrower than accommodations for employers. And indeed, this is the case. Title VII of the federal Civil Rights Act contains protections for religious employees, including those who need an accommodation because their religious practices are inconsistent with

⁶² Lund, *supra* note 61, at 1193 (arguing that the Court’s distinction is explained by the employee’s consent to be treated according to church principles and decisions); *see also* Ashutosh Bhagwat, *Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 95–96 (2014) (discussing the *Hosanna-Tabor* Court’s failure to offer a clear explanation of the ministerial exemption’s boundaries).

⁶³ NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 506 (1979) (concluding that Congress did not intend an NLRA provision to apply to church-operated schools and articulating no conditions for officials at church-operated schools to qualify for that exemption); *Hosanna-Tabor*, 565 U.S. at 190–92 (determining that an employee qualified for the ministerial exemption by looking to “all the circumstances of her employment,” rather than any communications made by the employee in pursuit of an exemption).

⁶⁴ *Catholic Bishop*, 440 U.S. at 507 (rejecting extension of NLRB’s jurisdiction to church-operated schools because that would implicate constitutional issues); *Hosanna-Tabor*, 565 U.S. at 194 (noting that the relief sought “is precisely [the relief] that is barred by the ministerial exception”).

employer work rules.⁶⁵ However, Title VII's religious accommodation provision applies only if the desired accommodation does not cause "undue hardship on the conduct of the employer's business,"⁶⁶ and the Supreme Court has held that an undue hardship includes anything that qualifies as "more than a de minimis cost."⁶⁷ As others have observed, this is a major limitation that sharply diminishes the usefulness of Title VII for religious employees, in contrast to its broadly protective approach to religious employers, as seen in *Amos*.

Moreover, the Supreme Court has held that there are limits to states' abilities to compel employers to accommodate religious employees. In *Estate of Thornton v. Caldor*, the Court struck down on Establishment Clause grounds a Connecticut statute that gave every employee an absolute right to refuse to work on his or her Sabbath.⁶⁸ The Court's reasoning focused mainly on the burdens imposed on employers when employees exercised their rights under the statute. For example, the Court wrote that:

There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule—a school teacher, for example; the statute provides for no special consideration if a high percentage of an employer's work force asserts rights to the same Sabbath. Moreover, there is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers. Finally, the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals.⁶⁹

In that passage (and elsewhere in the opinion), the Court mentions both employers and nonadherent employees, seemingly expressing concern about the statute's effect on both groups. But closer inspection reveals that the Court's primary concern was the statute's infringement on employers'

⁶⁵ 42 U.S.C. § 2000a-1 (2012).

⁶⁶ *Id.* § 2000e(j).

⁶⁷ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."); see also Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 170–72 (2015) (discussing the de minimis standard); Dallan F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 718–19 (2015) (addressing inconsistent application of the de minimis standard).

⁶⁸ 472 U.S. 703, 710–11 (1985).

⁶⁹ *Id.* at 709–10 (citations omitted).

managerial prerogatives. First, there is the purpose of the statute itself, which was concerned with limiting employers' authority to fire workers at will for a single reason: refusing to work on the Sabbath. It did not, however, require employers to respond to that limitation by forcing existing employees to cover for their Sabbath-observing coworkers; instead, employers could have adjusted their opening hours or hired more employees who were willing to work weekends. Second, each of the burdens in the paragraph above is phrased in terms of restrictions or inconveniences that befall employers, not employees; even where employees are mentioned, it is in terms of the employer having to "impose" significant burdens on them—a construction that brings to mind an autocratic employer that adjusts to life under the statute by forcing unwilling (but nonreligious) employees to work on their coworkers' Sabbaths instead of taking any of the other available paths.

Taking these cases together, a picture emerges: where employers' rights are concerned, Congress and the Supreme Court have been willing to grant exemptions even at the cost of fundamental statutory protections for employees. Conversely, where employees' religious liberty rights are at stake, the Court has interpreted narrowly or even struck down the relevant statutes—again preserving employer control.⁷⁰

B. *Valuable Exemptions & the Possibility of (Partially) Compensating Employees for Their Loss of Rights*

Cases involving exemptions from NLRA coverage also help demonstrate one way in which certain religious accommodations for employers differ from one another: some are likely to make the employer more competitive in the secular marketplace.⁷¹ This distinction implicates both employers' incentives to claim exemptions and the list of third parties who are burdened by accommodations.

An accommodation in the form of an exemption from federal labor law is a considerable deregulatory concession. It means not only freedom from the obligation to bargain collectively with an elected labor union, but also freedom to ignore statutory protections for employees' concerted activity, which apply whether or not those employees have voted to unionize.⁷² Thus, unlike an employer who is subject to NLRB jurisdiction, an employer who is exempt is free to punish or even fire employees who discuss their own pay or other working conditions amongst themselves;

⁷⁰ To be clear, this is not to say that employer control is the only explanation for these decisions, but rather, simply to point out that it is a common thread running through them.

⁷¹ Cf. Matthew T. Bodie, *Faith and the Firm*, 60 ST. LOUIS U. L.J. 609, 626-27 (2016) (“[T]he stronger a corporation’s internal commitment to a religious, philosophical, political, or cultural mission, the more such a corporation is differentiating itself . . . from the general norms of commerce.”).

⁷² 29 U.S.C. § 157 (2012).

who distribute union literature in nonworking areas during nonworking time; who use their work-issued email addresses to discuss working conditions or union organizing; or who go out on strike. Finally, there is the union wage premium to consider—unionized employees tend to make more than their nonunion counterparts,⁷³ so the exemption from the obligation to bargain collectively can mean cost savings for an employer. In light of these consequences, it is easy to see why a hypothetical employer—particularly a for-profit employer or one that operates in a competitive marketplace—might be inclined to seek a religious exemption from the NLRA.

This is one way an exemption from the NLRA is arguably different than some of the other religious exemptions or accommodations discussed in the Introduction to this Article. For the reasons listed in the previous paragraph, employers have clearer financial incentives to seek an exemption from NLRB jurisdiction than to seek other common types of accommodations or exemptions. For example, an exemption from the contraceptive mandate has an uncertain effect on employers' or insurers' costs,⁷⁴ and refusing to include contraceptive coverage in employees' benefits packages may prompt some consumers to boycott and others to go out of their way to patronize an establishment.⁷⁵ Likewise, an employer that does not offer contraceptive coverage may have a more difficult time recruiting qualified employees than the many employers that do offer coverage.

In contrast, only a small minority of private sector employers are unionized, and it is common for employers to overtly oppose employees' collective action. That means an employer's religious objection to NLRB jurisdiction seems unlikely to place it at a competitive disadvantage vis-à-vis many potential employees, even as it provides a competitive advantage vis-à-vis other employers. As further evidence that at least some employers would view an NLRA exemption as valuable, one need only look to states in the southeastern United States, which sometimes tout their

⁷³ BUREAU OF LAB. STAT., TABLE 2. MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY UNION AFFILIATION AND SELECTED CHARACTERISTICS, <https://www.bls.gov/news.release/union2.t02.htm> [<https://perma.cc/93EY-K5UR>] (last modified Jan. 19, 2018).

⁷⁴ See Austin Frakt, *Does Birth Control Coverage Pay for Itself?*, N.Y. TIMES, July 9, 2014, <https://www.nytimes.com/2014/07/10/upshot/does-contraceptive-coverage-pay-for-itself.html> [<https://perma.cc/8CYS-WEP4>] (discussing the debate on whether “contraceptive coverage pays for itself in the long term” from an insurer’s perspective).

⁷⁵ This dynamic has repeatedly played out in recent years. See, e.g., Arselia Gates, *Fill the Cart or Boycott Hobby Lobby?*, DALL. NEWS (July 2014), <https://www.dallasnews.com/business/retail/2014/07/02/fill-the-cart-or-boycott-hobby-lobby> [<https://perma.cc/5BB2-B9K9>] (discussing how after the *Hobby Lobby* decision, some shoppers mentioned that they would start shopping at Hobby Lobby’s competitors, while other shoppers indicated support for or indifference to Hobby Lobby).

relatively “union free” status as a basis to attract new business.⁷⁶ Similarly, the ministerial exception may be valuable to employers, even though it applies only to a limited class of “ministerial” employees. That is, religious employers can be sure that a decision to demote or fire a ministerial employee will not lead to an expensive trial or an award of damages⁷⁷—a significant concession, as the Court seemed to recognize in its discussion of litigation risk in *Amos*.

This means there are two groups that are potentially affected by employer religious exemptions: employees, who lose the benefits of statutory rights that they would otherwise have; and market competitors that must comply with laws from which one or more religious competitors are exempt. Although the latter group has not received much attention in recent cases, potential effects on market competitors were part of the reason the Court rejected the employer’s religious defense to its noncompliance with the Federal Labor Standards Act (FLSA) in *Alamo Foundation*.⁷⁸ There, the petitioner was a religiously affiliated nonprofit organization that operated several commercial establishments for the purpose of funding its own religious activities.⁷⁹ It employed “associates,” whom the Court described as “drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation.”⁸⁰ In lieu of any wage or salary, the Foundation provided these employees “food, clothing, shelter, and other benefits.”⁸¹ Although the employees disavowed any desire to be paid—they “considered themselves volunteers who were working only for religious and evangelical reasons”⁸²—the Court held that the Foundation had violated the FLSA, rejecting its argument for an exemption based on its religious character.⁸³

Affirming the lower court’s rejection of the Foundation’s argument that its “businesses function as ‘churches in disguise,’” the Court cited the effect of an FLSA exemption on the Foundation’s competitors:

[T]he Foundation’s businesses serve the general public in competition with ordinary commercial enterprises . . . and the

⁷⁶ See, e.g., STANLEY ARONOWITZ, *THE DEATH AND LIFE OF AMERICAN LABOR: TOWARD A NEW WORKER’S MOVEMENT* (2015) (observing that southern states “offer corporations lower wages and a nonunion work environment,” among other incentives, and “foreign companies build their facilities in these communities that offer a ‘union-free’ environment”); Ned Resnikoff, *How Tenn. Politicians Killed Volkswagen Unionization*, MSNBC (Apr. 4, 2014), <http://www.msnbc.com/msnbc/tennessee-volkswagen-chattanooga-union#51477> [<https://perma.cc/4Q2H-9X3S>] (discussing attempts by Tennessee politicians to prevent employees at a Volkswagen plant from unionizing).

⁷⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 (2012).

⁷⁸ *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985).

⁷⁹ *Id.* at 292.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 293.

⁸³ *Id.* at 295–99.

payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of ‘unfair method of competition’ that the [FLSA] was intended to prevent . . . and the admixture of religious motivations does not alter a business’s effect on commerce.⁸⁴

The statutory context and the fact that *Alamo Foundation* was an enforcement action brought by the government made this case a particularly good vehicle to highlight effects on competitors. That explains why the *Amos* Court rejected a similar argument, observing that “[i]t is not clear why appellees should have standing to represent the interests of secular employers,” and that in any event, the religious employer exemption in Title VII did not violate the Equal Protection Clause.⁸⁵ However, the *Amos* Court did not deny that the scope of Title VII’s religious exemption could have implications for competitors—rather, it simply found that those implications did not make a legal difference, given the case’s statutory context and procedural posture.

As these cases show, courts considering the scope of accommodations for religious employers at least sometimes take into account competitors’ interests. Moreover, as I have argued, where employers are entitled to religious exemptions or accommodations, they should be (and may be legally required to be) structured narrowly in order to minimize the burdens imposed on employees.⁸⁶

In this regard, the NLRB cases show that at least some employers’ religious accommodation claims are amenable to solutions that partially compensate employees for the costs they incur as a result of the accommodation. This is ironic because, as discussed above, *Catholic Bishop* does not require religious employers to compensate employees for the loss of their NLRA rights at all—it is an example of what Henry Chambers Jr. has characterized as the Supreme Court’s persistent failure to “seriously consider employee rights as a counterbalance to the extension of the employer’s free exercise rights” in recent employer free exercise cases.⁸⁷

I have previously argued that collective bargaining under the NLRA provides a built-in structure for unions and employers to negotiate religious

⁸⁴ *Id.* at 299.

⁸⁵ *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 n.16 (1987).

⁸⁶ Garden, *supra* note 17, at 157.

⁸⁷ Henry L. Chambers Jr., *The Problems Inherent in Litigating Employer Free Exercise Rights*, 86 COLO. L. REV. 1141, 1144 (2015); see also Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U.J. GENDER SOC. POL’Y & L. 303, 320 (2014) (“When granting injunctions against the contraceptive benefit, courts typically ignore the economic reality that employee benefits are a form of compensation, like wages earned by and belonging to the employee.”).

accommodations in a way that both protects employers' free exercise and compensates employees for the loss of their statutory rights.⁸⁸ That discussion focused mainly on employers that objected to particular collective bargaining outcomes, such as the possibility that a union would call for the employer to provide contraceptive coverage. But a real-world example shows that it can even be possible for unions and religious employers to come together to negotiate an entire unionization and collective bargaining structure that protects employers' religious commitments while also ensuring that employees have the option to unionize and bargain collectively in a fashion that is reasonably similar to—and in some ways more employee-friendly than—the NLRA.

In 2009, the United States Conference of Catholic Bishops and a group of labor leaders produced a document entitled *Respecting the Just Rights of Workers: Guidance and Options for Catholic Health Care and Unions*.⁸⁹ The document, which was the product of lengthy discussions that took place over the course of years, sets out a framework for union drives that includes both broad statements of shared values and much more specific expectations about acceptable and unacceptable employer and union tactics during an organizing campaign.⁹⁰ As former SEIU General Counsel Judith Scott put it:

[The] document underscores the importance of respect for both parties. It emphasizes that a code of conduct should be worked out beyond the requirements of the National Labor Relations Act to reflect the Catholic social teachings and to promote a fair way in which workers can choose a union that goes beyond the basic protections you get under current labor law.⁹¹

This document reflects the sort of compromise that the Court seemed to hope might ultimately resolve the disputes that gave rise to both *Zubik* and *Hobby Lobby*, and for which some commentators have also expressed support.⁹² It may seem surprising that it arose in the context of labor law, where the *Catholic Bishop* approach leads to all-or-nothing exemptions from NLRB jurisdiction and does not require religious employers to

⁸⁸ Garden, *supra* note 17, at 158.

⁸⁹ *Respecting the Just Rights of Workers: Guidance and Options for Catholic Health Care and Unions*, U.S. CONF. OF CATH. BISHOPS 1 (June 22, 2009), http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/respecting_the_just_rights_of_workers.pdf [<https://perma.cc/6YRX-TYMV>].

⁹⁰ *See id.* at 8–9 (discussing employer and union communications with employees during an organizing drive).

⁹¹ Jack Ahern et al., *The Future of Labor Plenary Panel Discussion*, 50 J. CATH. LEGAL STUD. 149 (2011).

⁹² *See Brady, supra* note 5, at 1124 (stating that the decision in *Zubik* shows promise for resolving future issues over religious accommodation).

attempt compromise with employees and their unions.⁹³ But it is unlikely that *Catholic Bishop* would apply to religious hospitals, and moreover, labor law is structured so that two entities that are relatively equal in their understanding of labor law and organizing strategies can sit across the table from each other and hammer out an agreement. Importantly, the Catholic hospital framework had only institutional signatories—employers and unions—rather than individual employees, who likely would have lacked the necessary legal and practical knowledge necessary to negotiate meaningfully, and also would have been too numerous for negotiations to be useful. That is, a degree of institutional longevity and expertise is necessary to iron out a bargain regarding employer religious accommodations. These conditions are not likely to be present where individual employees or consumers will pay the price for a corporate religious accommodation—a state of affairs that the Supreme Court implicitly recognized in *Zubik* and *Hobby Lobby* by treating the government (rather than affected employees) as the potential negotiating partner of religious employers.

CONCLUSION

This Article's goal has been to expand the parameters of the current debate over corporate religious accommodations by adding labor law to the discussion. To be sure, there are some key legal, practical, and contextual differences between the labor law context and other more high-profile contexts, including the ACA's contraceptive coverage requirement. However, these differences highlight important questions that arise across different contexts, including the extent to which religious accommodation law reflects or is in part driven by secular assumptions and values, and how and when to encourage "compromise" accommodations that at least partially compensate employees or others who bear the costs of religious accommodations.

⁹³ NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 506 (1979).