TESTIMONY OF BRUCE E. ENDY, ESQ.
BEFORE THE HOUSE LABOR RELATIONS COMMITTEE
REGARDING HOUSE BILL 2626

Mister/Madame Chairperson and Members of the Committee:

My name is Bruce Endy. I have been legal counsel to the National Association of Catholic School Teachers and many of its affiliated local unions since 1974. I am here to support the passage of House Bill 2626.

I know that there are a number of issues with which the committee will asked to grapple. The first, is whether the police power of the state should be directed to protect workers within the Commonwealth who have been without statutory protections since 1979 by granting them statutory protection if they wish to create or join (or refrain from joining) labor organizations. The second is whether the passage of this worker protection is constitutional both under the Pennsylvania Constitution and that of the United States. And a third matter to consider is that, if it is right and just to protect workers who are employed by religiously affiliated employers what is the least restrictive means by which the legislature can accomplish that goal.

We are here today, because in 1979 the Supreme Court of the United States held that there was no direct evidence that Congress specifically intended to include teachers who were employed by schools that were affiliated with a religious organization within the jurisdiction of the NLRA. It is important to note that Catholic Bishop did **not** rule that it was unconstitutional for the NLRA to include those teachers within its jurisdiction.

The Pennsylvania Supreme Court reached the same conclusion in *Association of Catholic Teachers Local 1776 v. Pennsylvania Labor Relations Board*, 547 Pa 594 (1996) when asked to

determine if the Pennsylvania Public Employee Relations Act included teachers in religiously affiliated schools within its jurisdiction. Once again the court did not reach the constitutional issues raised in the case but relied on the legislative history of the statute to find that there was no positive evidence that the legislature clearly and affirmatively sought to include these teachers within the jurisdiction of the law. We seek that clear and affirmative grant of authority in this legislation.

First, it is important to understand what the Pennsylvania Labor Relations Act does and what it does not do. In the first instance, the act gives employees the right to have a collective voice with respect to their own employment conditions, it permits employees to decide for themselves whether they wish to join (or not join) a labor organization. One cannot emphasize enough that the statutory scheme does not give employers a vote on this issue. The choice is reserved solely to the employees; which makes one wonder why so many employers spend so much money campaigning against the employees' "free choice" of a representative. When that ballot is cast, it is cast only by workers, not by employers. Then, the statute provides that this choice should be made free from coercion; that is free from employer coercion and free from a labor union's coercion. Not free from the opinions of others, including employers, but free from coercion.

If employees select a representative of their own choosing, the statute requires that employers bargain with the employees' representative in good faith. But the law leaves the parties free to bargain and reach their own agreements; or not. The law does not compel an employer to agree to anything; rather it leaves the parties to their own devices to determine what their agreements will encompass.

Now Catholic teachers know, and I suggest that the Church would have to admit, that a process by which teachers might select their own representatives and having been selected, the

negotiation of a collective bargaining agreement do not violate any tenet of the Catholic religion. I say this with positive assurance because all over the country and here in Pennsylvania teachers and religiously affiliated schools do it. Elections were held and collective bargaining agreements have in fact been negotiated in Scranton/Wilkes-Barre, in Philadelphia, in Altoona, and in Pittsburgh. There are collective bargaining agreements in place between teachers in religiously affiliated schools in Ohio, New York, New Jersey, Massachusetts Minnesota and Missouri. So the issue is not that it violates some tenet of faith to have representative elections and engage in collective bargaining, the issue for the religiously affiliated schools that are opposed to this bill is: we don't want to be required to do these things. And so it goes, whether you are Catholic, Jewish, Baptist or Episcopalian there are religiously affiliated schools that in fact have teachers who are represented by labor organizations and who have collective bargaining agreements.

This brings us to the nub of the question: **can** the legislature compel religiously affiliated schools to engage in collective bargaining with their lay teachers and should they. Let me address whether the legislature can.

As you know, the National Labor Relations Act does not cover a number of employers. As a result many states, like the Commonwealth of Pennsylvania adopted state labor acts that were, in large measure modeled on the National Labor Relations Act. New York State has one such law. The original 1937 New York State Labor Law excluded from its jurisdiction "charitable, educational or religious associations." In 1968 that exclusion was simply removed from the statute and the legislature made it clear that it was intending the law to now cover those employers who were previously exempt from the statute.

In 1984 the application of the New York State Labor Law to teachers in religiously affiliated

schools was challenged on First Amendment grounds by the Archdiocese of New York in a case called *Catholic High School Association of the Archdiocese of New York v. Culvert* a copy of which I have provided to the Committee. Observing that the Supreme Court's decision in *Catholic Bishop of Chicago* did **not** rule on the constitutionality of the NLRA's application to religiously affiliated schools the Second Circuit Court of Appeals squarely visited the subject and held that the application of the New York State Labor Law violated neither the Establishment Clause or the Free Exercise Clause of the United States Constitution.

The Pennsylvania Labor Relations Act operates in virtually the same way as does the New York State Labor Law. An administrative agency is charged with the administration of the act. To paraphrase the Second Circuit, an employer's good faith is put in issue only if a union or an individual brings a charge; the PLRB does not itself initiate an unfair labor practice charge; the six (ten in NY) unfair labor practices specified in the Act are entirely secular, the investigation of unfair labor practices by the Board are limited to those directly related to the unfair labor practices set forth in the charge; and the orders of the Board are not self-enforcing, but must come before the courts where a party may raise a First Amendment defense when and if the Board seeks judicial enforcement of its order. In short, the Second Circuit ruled that this scheme does not constitute "comprehensive, discriminating and continuing" state surveillance of a church by the government and, consequently does not involve the government in an excessive entanglement in the affairs of a church.

Catholic High School Association of the Archdiocese of New York was followed, in 1997 by a similar challenge in a case called *In the Matter of New York State Employment Relations Board v. Christ the King Regional High School* again I have provided a copy to the Committee. This case

arose out of a strike by the teachers, the mass discharge of those teachers and a continuing refusal to bargain over a new agreement. New York State's highest court revisited the issues raised a decade earlier, with the same result, finding that the New York State Labor Law was constitutional under both the Establishment Clause of the First Amendment and the Free Exercise Clause, holding that the law was clearly a facially neutral, universally applicable and secular regulatory regimen. It was intended to improve labor relations by encouraging good faith collective bargaining and in no way implicates religious conduct or belief.

What changed between the Second Circuit's decision in *Catholic High School Association of the Archdiocese of New York* and the decision by the New York Court of Appeals in *Christ the King Regional High School* was that the Supreme Court of the United States had decided *Employment Division of Oregon v. Smith*, a case that essentially changed the constitutional analysis under the Free Exercise Clause of the First Amendment. *Smith* did away with the previous balancing test first enunciated in *Sherbert v. Verner* and determined that a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs, but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment.

The response to *Smith* by the Pennsylvania legislature was to enact the Religious Freedom Protection Act that would, arguably restore the *Sherbert v. Verner* balancing test. We think it appropriate to enact this bill in accordance with the Supreme Court's interpretation of the United States Constitution in *Smith* and except the bill from Religious Freedom Protection Act which may be done as specifically provided in that Act.

One last word about the Second Circuit's decision in *Catholic High School Association of the Archdiocese of New York.* The Second Circuit observed that it would not be appropriate for the

New York State Labor Board to adopt a test for determining the commission of an unfair labor practice when the motive asserted by the religious employer was "in part" based on anti-union animus and "in part" based on some religiously asserted reason. Rather the appropriate test to determine a violation is whether the employer's actions would not have been taken "but for" its anti-union animus. Hence, the insertion in the bill of section 2 which is a "but for" requirement where there is an assertion that an employment decision is based on religiously motivated grounds.

The constitutional issues were addressed again in 1992 when the teachers at the Hill-Murray High School in Minnesota petitioned the Minnesota Bureau of Mediation Services for recognition under the Minnesota Labor Relations Act. Again, that labor law functions similarly to the Pennsylvania Labor Relations Act. Once again the Supreme Court of Minnesota in a case called *In the matter of a Petition of Investigation and Determination of an Appropriate Unit and Exclusive Representation: Hill-Murray Federation of Teachers v. Hill-Murray High School*, rejected the notion that the state's labor law violated either the Establishment Clause or the Free Exercise Clause of the First Amendment finding that the labor law is a law of general applicability, not intended to regulate religious conduct or beliefs.

Once again, focusing on the so-called "entanglement" prong of an Establishment Clause analysis the court found that the level of state involvement in certifying a bargaining unit, conducting an election or investigation potential unfair labor practice charges was "minimal." The court noted the state cannot mandate religious beliefs, or force the parties to agree to specific terms. As in the earlier cited cases the court noted that "it is a fundamental tenet of the regulation of collective bargaining that government brings the private parties to the bargaining table and then leaves them alone to work through their problems." The court held:

> The obligation imposed upon Hill-Murray by the application of the MLRA is the duty to bargain about hours, wages and working conditions. We decline to categorize this minimal responsibility as excessive entanglement. * * * The First Amendment wall of separation of church and state does not prohibit limited governmental regulation of purely secular aspects of a church school's operation.

The Minnesota Constitutional provision respecting religion is quite similar to Article 1, §3 of the Pennsylvania Constitution. Reviewing the state's constitutional protection of religion the Hill-Murray court applied the older *Sherbert v. Verner* balancing of the interest test to the application of the state's labor law to the school and, once again, found that the state's interest in protecting labor peace, protecting the teachers right of association, and the right of employees to collectively organize is more than a competing interest of the state, but are "overriding and compelling"and outweigh any minimally intrusive burden on the school's religious beliefs.

The last of this trilogy of cases that I will mention was decided by the Supreme Court of New Jersey in 1997. The State of New Jersey does not have a labor relations act that applies to private employers and employees. Rather, codified in the New Jersey State Constitution is a provision guaranteeing the right of workers to organize and bargain collectively. In *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School* the Supreme Court of New Jersey visited the same arguments as had the prior courts and found no constitutional violations.

At least four courts since *Catholic Bishop of Chicago* have thus reviewed the constitutional issues squarely and found no impediment to the application of state labor laws like the Pennsylvania Labor Relations Act to religiously affiliated employers. I would say, then, based on this evidence, that the Commonwealth **can** craft a statute that would provide protection for workers rights in the context of their employment for a religiously affiliated employer.

The facts on the ground demonstrate that religiously affiliated employers are no more sensitive to the rights of workers than are other employers. They seek to avoid the minimal obligations imposed by the Pennsylvania Labor Relations Act by hiding behind the cloak of religious freedom. Yet the Commonwealth's labor laws impose no burden on religious belief, only on **conduct** that is coercive and burdens the rights of workers. By continuing to exclude religiously affiliated employers from the coverage of the PLRA the Commonwealth essentially grants to them a preference based on religious status. We ask that that preference end today.

Thank you.

LEXSEE

In the Matter of New York State Employment Relations Board, Respondent, v. Christ the King Regional High School, Appellant.

No. 104

COURT OF APPEALS OF NEW YORK

90 N.Y.2d 244; 682 N.E.2d 960; 660 N.Y.S.2d 359; 1997 N.Y. LEXIS 1367; 155 L.R.R.M. 2632

April 30, 1997, Argued
June 12, 1997, Decided

PRIOR HISTORY: Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 31, 1995, which affirmed an order and judgment (one paper) of the Supreme Court (James F. O'Donoghue, J.), entered in Queens County in a proceeding pursuant to *Labor Law § 707*, granting the petition to enforce an order of respondent New York State Employment Relations Board that directed appellant to bargain with the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO and to reinstate certain teachers, and denying a motion by appellant to dismiss the petition.

Matter of New York State Empl. Relations Bd. v Christ the King Regional High School, 217 AD2d 701, affirmed.

DISPOSITION: Order affirmed, with costs.

HEADNOTES

Constitutional Law - Freedom of Religion - Application of State Labor Relations Act to Lay Faculty of Religious School Appellant, a religious school that employs both lay and religiously affiliated faculty, is not exempt from the operation of the State Labor Relations Act (*see, Labor Law § 700 et seq.*) under the Free Exercise Clause of the *US Constitution First Amendment*. A generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment. The general applicability of New York State's Act does not automatically and preemptively abridge appellant's rights under the Free Exercise Clause of the First Amendment. The State Labor Relations Act is a facially neutral, universally applicable and secular regulatory regimen. It is intended to improve labor relations by encouraging good-faith collective bargaining. The Act in no way implicates religious conduct or beliefs; nor does it purport to impose any express or implied restriction or burden on religious beliefs or activities. Accordingly, the State Labor Relations Act properly governs labor relations between the appellant School and its lay faculty.

Constitutional Law - Establishment of Religion - Application of State Labor Relations Act to Lay Faculty of Religious School Appellant, a religious school that employs both lay and religiously affiliated faculty, is not exempt from the operation of the State Labor Relations Act (*see, Labor*

Law § 700 et seq.) under the Establishment Clause of the *US Constitution First Amendment*. The Labor Relations Act imposes on all employers the obligation to engage in good-faith collective bargaining. Issues may include hours, wages, and working conditions. State involvement in fostering negotiated terms and conditions of employment of its lay teachers does necessarily implicate and intrude upon religious concerns and rights of the School. The New York State Employment Relations Board's oversight of the collective bargaining process does not generally, automatically or initially impinge upon the religious character, beliefs or First Amendment rights of the School. If, on individual application in the collective bargaining process or implementation, a line is crossed or the wall of separation is breached, that is the time and circumstance to assert and have adjudicated such arguably actual infringements.

Constitutional Law - Establishment of Religion - State Employment Relations Board's Reinstatement of Lay Teacher Dismissed by Religious School for Religious Reasons An order of the New York State Employment Relations Board which directed appellant, a religious school that employs both lay and religiously affiliated faculty, to reinstate a lay teacher, who was discharged for "unchristian behavior", is sustained. The Board may protect teachers from unlawful discharge by limiting its finding of a violation of the collective bargaining agreement to those cases in which the teacher would not have been discharged but for the unlawful motivation. Although the First Amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual, the Board is still free to determine, using a dual motive analysis, whether the religious motive was in fact the cause of the discharge. Therefore, the Board may order reinstatement of a lay teacher at a parochial school only if he or she would not have been fired otherwise for asserted religious reasons. Here, support exists in the record that the conclusory characterization of the religious motive for the discharge enjoys no record support or even effort by appellant to present evidence that the teacher's reinstatement implicates or engenders a religious entanglement.

COUNSEL: *Jackson, Lewis, Schnitzler & Krupman*, Woodbury (*Roger S. Kaplan* and *Ariadne M. Krassas* of counsel), for appellant. The Board's jurisdiction over Christ the King violates constitutional guarantees of freedom of religion. (*Church of Lukumi Babalu Aye v Hialeah, 508 US 520; Committee of Interns & Residents v New York State Labor Relations Bd., 420 F Supp 826; Catholic Bishop v National Labor Relations Bd., 559 F2d 1112, 440 US 490; Employment Div., Ore. Dept. of Human Resources v Smith, 494 US 872; Aguilar v Felton, 473 US 402; McCollum v Board of Educ., 333 US 203; Abington School Dist. v Schempp, 374 US 203; Wisconsin v Yoder, 406 US 205; Pierce v Society of Sisters, 268 US 510.*)

Dennis C. Vacco, Attorney-General, Albany (*Howard L. Zwickel, Barbara G. Billet* and *Peter H. Schiff* of counsel), for respondent. I. Appellant's claim that the Board's mere exercise of jurisdiction violates its First Amendment rights has been rejected in *Culvert* by the Second Circuit in a decision that is preclusive here. In addition, the jurisdiction actually exercised by the Board in this case did not involve any religious issues. (*Catholic Bishop v National Labor Relations Bd., 559 F2d 1112, 440 US 490; National Labor Relations Bd. v Bishop Ford Cent. Catholic High School, 623 F2d 818, cert denied sub nom. Lay Faculty Assn. v Bishop Ford Cent. Catholic High School, 450 US 996; Lemon v Kurtzman, 403 US 602; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659; Kaufman v Lilly & Co., 65 NY2d 449; Greene v United States, 79 F3d*

1348.) II. The Board's assertion of jurisdiction over appellant does not violate the *Establishment Clause of the First Amendment to the United States Constitution.* (*Matter of New York State Labor Relations Bd. v Loehmann Corp., 269 App Div 566; Equal Empl. Opportunity Commn. v Mississippi Coll., 626 F2d 477, 453 US 912; Avitzur v Avitzur, 58 NY2d 108, 464 US 817; Equal Empl. Opportunity Commn. v Pacific Press Publ. Assn., 676 F2d 1272; Catholic Bishop v National Labor Relations Bd., 559 F2d 1112; Catholic High School Assn. v Culvert, 753 F2d 1161; DeMarco v Holy Cross High School, 4 F3d 166; Scheiber v St. John's Univ., 84 NY2d 120; Geary v Visitation of Blessed Virgin Mary Parish School, 7 F3d 324; Weissman v Congregation Shaare Emeth, 38 F3d 1038.*) III. The Board's assertion of jurisdiction over appellant does not violate the *Free Exercise Clause of the First Amendment to the United States Constitution.* (*Cantwell v Connecticut, 310 US 296; Employment Div., Ore. Dept. of Human Resources v Smith, 494 US 872; Salvation Army v Department of Community Affairs, 919 F2d 183; Sherbert v Verner, 374 US 398; Wisconsin v Yoder, 406 US 205; Matter of Salahuddin v Coughlin, 222 AD2d 950, 88 NY2d 806; United States v Lee, 455 US 252; Catholic High School Assn. v Culvert, 753 F2d 1161; Wolman v Walter, 433 US 229; Board of Educ. v Allen, 392 US 236.*)

JUDGES: Chief Judge Kaye and Judges Titone, Smith, Levine, Ciparick and Wesley concur.

OPINION BY: BELLACOSA

OPINION

[*247] [**962] [***361] Bellacosa, J.

The New York State Employment Relations Board commenced this proceeding under *Labor Law § 707* to enforce its order against appellant Christ the King Regional High School. That order directed the School to bargain in good faith with the Lay Faculty Association (the Union) and to reinstate certain teachers.

Supreme Court granted the Board's petition and denied the School's motion to dismiss, [**963] [***362] and the Appellate Division affirmed (*217 AD2d 701*). The School appeals as of right on a claimed substantial constitutional issue (*see, CPLR 5601 [b] [1]*). On First Amendment grounds, under the Free Exercise and *Establishment Clauses of the United States Constitution*, appellant seeks an absolute, threshold exemption from the operation of the New York State Labor Relations Act (*see, Labor Law § 700 et seq.*). Appellant believes that the State Act should not apply to labor relations between it and the Union.

I.

The School is a Roman Catholic secondary school located in Queens County, New York City. Prior to 1976, it had been operated by the Roman Catholic Diocese of Brooklyn. In 1976, however, the Diocese conveyed responsibility and title to appellant, contingent upon the School continuing as a Roman Catholic High School. The School employs lay and religiously affiliated faculty, and teaches both secular and religious subjects.

Also in 1976, the Union began representing the lay faculty at the School. During the spring and summer of 1981, the School administration and the Union met repeatedly to try to negotiate the terms of a collective bargaining agreement. These efforts failed and the Union staged a strike beginning in the fall of 1981. The School discharged the striking workers and ended negotiations. This labor dispute has continued ever since.

The State Employment Relations Board (then called the Labor Relations Board) cited the School for alleged

violations of the Labor Relations Act. The Board charged the School with refusing to bargain in good faith, and improperly discharging and failing to reinstate striking employees.

[*248] The School first challenged the Board in Federal court, asserting that the State Board's jurisdiction was preempted by the National Labor Relations Act and that its claimed powers intruded upon the School's constitutional freedom of religion protections. The District Court dismissed the School's complaint, rejecting both claims (*Christ the King Regional High School v Culvert, 644 F Supp 1490* [SD NY]), and the Second Circuit Court of Appeals affirmed (*815 F2d 219, cert denied 484 US 830*), without addressing the First Amendment contention.

Subsequently, the State Board's complaint was considered by an Administrative Law Judge (ALJ), who rejected the School's constitutional arguments and ruled against it on a variety of grounds. The recommended relief was that the Board order the School to cease (1) requiring employees to refrain from joining or aiding the Union, (2) discouraging or interfering with membership in the Union through hiring, promotion or any other practices, and (3) refusing to bargain in good faith with the Union. The ALJ recommended additional relief involving reinstatement of teachers and associated remedies. The Board essentially adopted the ALJ's findings and recommendations and then commenced this *Labor Law § 707* proceeding for judicial enforcement of its order. The School, in turn, moved to dismiss the petition, pressing its constitutional claims.

II.

We turn our attention first to the School's free exercise claim. The United States Supreme Court has articulated a more nuanced free exercise analysis in *Employment Div., Ore. Dept. of Human Resources v Smith (494 US 872)*, expressly rejecting its previously utilized balancing test (*id., at 883-885* [citing *Sherbert v Verner, 374 US 398, 402-403]; see also, City of Boerne v Flores, US , 117 S Ct 2157* [No. 95-2074, June 25, 1997]). Now, a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment (*id., at 878-879*).

Applying the *Smith* standard to the instant matter, we are satisfied that the State Labor Relations Act properly governs labor relations between the appellant School and its lay faculty (*see, e.g., Matter of Hill-Murray Fedn. of Teachers v Hill-Murray* [**964] [***363] *High School, 487 NW2d 857, 863* [Supreme Court of Minnesota applied *Smith*, too, and concluded that the application of its State's Labor Relations Act to a religious school [*249] and its faculty was not violative of the Free Exercise Clause]). The general applicability of New York State's Act does not automatically and preemptively abridge appellant's rights under the Free Exercise Clause of the First Amendment. The State Labor Relations Act is a facially neutral, universally applicable and secular regulatory regimen. It is intended to improve labor relations by encouraging good-faith collective bargaining (*see, Catholic High School Assn. v Culvert, 753 F2d 1161, 1166-1167*). The Act in no way implicates religious conduct or beliefs; nor does it purport to impose any express or implied restriction or burden on religious beliefs or activities (*see, e.g., id., at 1169-1171* [applying the earlier balancing test to conclude that the then-New York State Labor Relations Board's exercise of jurisdiction over labor relations between parochial schools and their lay teachers did not

constitute a Free Exercise Clause violation]). Appellant's claimed burden, particularly in contrast to the sweeping threshold immunity that it seeks, is plainly incidental, inchoate and speculative.

Appellant School here, nevertheless, unpersuasively attempts to distinguish *Smith*, in part, by confining its application to circumstances involving criminal statutes. The plain language of *Smith* answers and refutes such an artificial demarcation (*see, Vandiver v Hardin County Bd. of Educ., 925 F2d 927, 932; Salvation Army v Department of Community Affairs, 919 F2d 183, 194-195* [quoting *Employment Div., Ore. Dept. of Human Resources v Smith, 494 US 872, 886, supra*]; *see also, Matter of Hill-Murray Fedn. of Teachers v Hill-Murray High School, 487 NW2d 857, 863, supra*).

Appellant alternatively urges that the situation presented by this case falls within an exception propounded by *Smith* itself. *Smith* concluded that the standard of general applicability may not apply to "hybrid" situations involving the Free Exercise Clause, when considered in conjunction with other high-ranking constitutional protections, such as freedom of speech and of the press (*Employment Div., Ore. Dept. of Human Resources v Smith, supra, 494 US, at 881-882*). The School's argument suggests that the application of the State Labor Relations Act to it would interfere with fundamental rights of parents of students to direct the religious education of their children. This argument is flawed and unpersuasive because, as we analyze the matter, the Supreme Court in *Smith* did not intend its hybrid exception to turn back on itself in circumstances such as this singularly generic First Amendment setting and circumstance (*see, Matter of Hill-Murray Fedn. of* [*250] *Teachers v Hill-Murray High School, supra, 487 NW2d, at 863* ["the rights of parents in the education of their children ... are altogether different than the rights of a religiously affiliated employer with respect to the control of and authority over their lay employees"]). Rather, the Court expressly referenced the hybrid exceptional situations to free exercise settings in which other discrete constitutional protections are also implicated (*Employment Div., Ore. Dept. of Human Resources v Smith, supra, 494 US, at 881-882*).

In sum, the core teaching of *Smith* and the assemblage of associated authorities and lines of analysis cogently bring us to the conclusion that appellant's free exercise claim, invoked with sweeping, threshold cloakage, cannot prevail. Whether individualized First Amendment eventualities and incursions may be legally cognizable in applied settings is not presented or properly before us, and we eschew any opinion, implication or drawing of inferences in that regard.

III.

We turn now to the School's Establishment Clause argument. Our conclusion is that the State Employment Relations Board's legislatively invested jurisdiction does not violate appellant's First Amendment rights in this regard.

The Second Circuit Court of Appeals, faced with this precise issue, determined that the then-Labor Relations Board's [**965] [***364] assertion of jurisdiction as between parochial schools and their lay teachers was valid. The court began by noting that "[t]he Supreme Court has made it clear, when discussing the Establishment Clause, that 'total separation is not possible in an absolute sense, [for s]ome relationship between government and religious organizations is inevitable' " (*Catholic High School Assn. v Culvert, 753 F2d 1161, 1166, supra* [quoting *Lemon v Kurtzman, 403 US 602,*

614]). The court further explained that " 'the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship' " (*id.*). Applying the United States Supreme Court's test for ascertaining Establishment Clause violations, it concluded, that only the excessive entanglement prong was potentially implicated by the application of the State Labor Relations Act to the subject School (*id., at 1166* [citing *Lynch v Donnelly, 465 US 668]*). The court concluded that the "Board's relationship with the religious schools over mandatory subjects of bargaining does not involve the degree of 'surveillance' necessary to find excessive [*251] administrative entanglement" (*id., at 1166*). The court also noted that the Board's supervision over collective bargaining involving secular terms and conditions of employment "is neither comprehensive nor continuing" (*id., at 1167*). That is likewise so in this case and adds an important ingredient to our independent assessment and rejection of the all-encompassing posture and nature of the appellant's claim.

Catholic Bishop v National Labor Relations Bd. (559 F2d 1112, affd on other grounds 440 US 490) is nevertheless heavily relied upon by the School in the instant case. Notably, in *Catholic Bishop*, the Seventh Circuit Court of Appeals held that the National Labor Relations Board could not exert jurisdiction over church-operated schools because of "the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools" (*id., at 1124*). While the United States Supreme Court affirmed, it did so for different and narrower reasons (*440 US 490, supra*). It ruled on statutory construction grounds only. The Supreme Court stated that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" (*id., at 507*). Therefore, the Supreme Court expressly left open the "difficult and sensitive" First Amendment question we are faced with today in the instant case (*id.; see, Catholic High School Assn. v Culvert, supra, 753 F2d, at 1163*).

The Second Circuit Court of Appeals declined to follow the Seventh Circuit down its "slippery slope," reasoning that "[i]t is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems" (*Catholic High School Assn. v Culvert, supra, 753 F2d, at 1167*). The court further explained that "[t]he government cannot compel the parties to agree on specific terms," rather, "[a]ll it can do is order an employer who refuses to bargain in good faith to return and bargain on the mandatory bargaining subjects, all of which are secular" (*id., at 1167; see, Matter of Hill-Murray Fedn. of Teachers v Hill-Murray High School, 487 NW2d 857, 864, supra* [holding the duty to bargain about hours, wages and working conditions constitutes a minimal responsibility that does not qualify as excessive entanglement]).

[*252] In the present case, the Labor Relations Act imposes on all employers the obligation to engage in good-faith collective bargaining. Issues may include hours, wages, and working conditions. The School would exempt itself at the very threshold of the Act's application on the ground that even the generally applicable employer-employee bargaining responsibility and neutral

labor-management issues constitute excessive entanglement of government into the religious sphere of the School's interests and operations. We disagree with the School's theory [**966] [***365] that the mere potentiality for transgression is enough. It believes that State involvement in fostering negotiated terms and conditions of employment of its lay teachers necessarily implicates and intrudes upon religious concerns and rights of the School. This is not so and does not follow from the operation of the regulatory regimen.

This tautological and sweeping contention, moreover, does not withstand close analysis. The Board's oversight of the collective bargaining process does not generally, automatically or initially impinge upon the religious character, beliefs or First Amendment rights of the School. If, on individual application in the collective bargaining process or implementation, a line is crossed or the wall of separation is breached, that is the time and circumstance to assert and have adjudicated such arguably actual infringements.

IV.

Next, we consider the School's particularized challenge of the Board's order directing reinstatement of teacher Gaglione, who was discharged for "unchristian behavior." The School claims that the Board disregarded the religious reason for the firing, thus exhibiting its inability to separate secular from religious grounds and illustrating the State's excessive entanglement in the parent-school and teacher-student relationships at the School.

Notably, "[t]he Board may--consistent with the First Amendment--protect teachers from unlawful discharge by limiting its finding of a violation of the collective bargaining agreement to those cases in which the teacher would not have been discharged 'but for' the unlawful motivation" (*Catholic High School Assn. v Culvert, 753 F2d 1161, 1169, supra; see, National Labor Relations Bd. v Transportation Mgt. Corp., 462 US 393*). Although "the First Amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual," the Board "is still free to determine, [*253] using a dual motive analysis, whether the religious motive was in fact the cause of the discharge" (*Catholic High School Assn. v Culvert, supra, 753 F2d, at 1168; see, DeMarco v Holy Cross High School, 4 F3d 166, 171*). Therefore, the Board "may order reinstatement of a lay teacher at a parochial school only if he or she would not have been fired otherwise for asserted religious reasons" (*Catholic High School Assn. v Culvert, supra, 753 F2d, at 1169*).

Applying the dictates of analysis, policy and relevant precedent to the state of this particular record and in the context of this part of the over-all controversy, we are satisfied that the Board's direction of reinstatement of teacher Gaglione should be sustained. Support exists in the record that the conclusory characterization of the religious motive for the discharge enjoys no record support or even effort by the School to present evidence that Gaglione's reinstatement implicates or engenders a religious entanglement.

We also observe, in a general overview, that the Board's procedural requirements and safeguards should prevent it from becoming enticed or embroiled in religious facets beyond the borders of its regulated responsibilities. Had the School tendered some proof at the appropriate, earliest, timely administrative stages to establish its claim that it could not reinstate Gaglione because, for example, he might be an inappropriate role model

suitable to and consistent with the religious principles and mission of the School, the Board's promulgated policies might have affected its remedial order in regard to this particular reinstatement, the only one particularly challenged directly in these judicial enforcement proceedings (*see, Matter of St. John's Preparatory School [Lay Faculty Assn.]*, 49 SERB No. 51 [holding Board could not compel reinstatement of teachers which the School had stated conflicted with the role of teachers in a Catholic school]). No such record or case was made in this regard as to this part of the long-standing and seemingly intractable conflict among the respective parties of this matter.

In sum, the state of the pertinent law is that the Board cannot force labor parties to agree on specific terms; it can, however, compel them to try to negotiate in good faith. Such overarching authority and particularized supervision do not intrude on appellant's [***366] free exercise [**967] or nonestablishment rights, to the point of stepping over First Amendment limitations. The First Amendment's metaphorical wall of separation between church and State does not per se prohibit appropriate [*254] governmental regulation of secular aspects of a religious school's labor relations operations. We neither breach the historically characterized wall nor make it higher or stronger by upholding the Board's statutory authority here and by rejecting the School's claim of an absolute, threshold exemption from its applicability.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Titone, Smith, Levine, Ciparick and Wesley concur.

Order affirmed, with costs.

LEXSEE

SOUTH JERSEY CATHOLIC SCHOOL TEACHERS ORGANIZATION, AN UNINCORPORATED LABOR ORGANIZATION, PLAINTIFF-RESPONDENT, v. ST. TERESA OF THE INFANT JESUS CHURCH ELEMENTARY SCHOOL, SAINT BARTHOLOMEW CHURCH ELEMENTARY SCHOOL, THE CHURCH OF SAINT JUDE ELEMENTARY SCHOOL, SAINT JOSEPH PROCATHEDRAL CHURCH ELEMENTARY SCHOOL, SAINT JOSEPH CHURCH ELEMENTARY SCHOOL AND SACRED HEART CHURCH ELEMENTARY SCHOOL, DEFENDANTS-APPELLANTS.

A-120 September Term 1996

SUPREME COURT OF NEW JERSEY

150 N.J. 575; 696 A.2d 709; 1997 N.J. LEXIS 224; 155 L.R.R.M. 2972; 135 Lab. Cas. (CCH) P58,340

March 18, 1997, Argued
July 24, 1997, Decided

PRIOR HISTORY: [***1] On certification to the Superior Court, Appellate Division, whose opinion is reported at *290 N.J. Super. 359, 675 A.2d 1155 (1996)*.

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Church Elementary School, et al. (A-120-96), 150 N.J. 575, 696 A.2d 709.

Argued March 18, 1997 -- Decided July 24, 1997

COLEMAN, J., writing for a unanimous Court.

The issue raised in this appeal is whether lay teachers in church-operated elementary schools have an enforceable state constitutional right to unionize and to engage in collective bargaining respecting terms and conditions of employment without violating the Religion Clauses of the *First Amendment of the United States Constitution*.

South [***2] Jersey Catholic School Teachers Organization (plaintiff) asserts that it was elected the majority representative of the lay teachers employed by elementary schools operated by the Catholic Diocese of Camden (defendants). Because defendants refused to recognize plaintiff or to bargain collectively, plaintiff instituted suit, seeking to compel defendants to recognize it as the collective-bargaining representative of the lay teachers and to compel defendants to engage in collective bargaining in respect of the terms and conditions of employment. Plaintiff maintained that the lay teachers are private employees and sought relief based on *Article I, Paragraph 19 of the New Jersey Constitution*, which gives private employees the right to organize and bargain collectively.

The trial court granted summary judgment dismissing the complaint, refusing to compel defendants to recognize and bargain with plaintiff as a labor representative of the lay teachers on the ground that to do so would violate the Free Exercise and Establishment Clauses of the First Amendment. According to the trial court, granting the relief sought by plaintiff would interfere with defendants' free exercise of religion [***3] and would involve excessive entanglement between the State and the Catholic Church.

The Appellate Division reversed, finding that this case involves only a Free Exercise Clause claim rather than an Establishment Clause claim or both. Relying on the right to organize and bargain collectively established by the New Jersey Constitution, the Appellate Division concluded that there is a compelling state interest in permitting plaintiff to organize and to engage in collective bargaining that outweighs the claimed burden on defendants' free exercise rights. That compelling state interest was identified as "the preservation of industrial peace and sound economic order." The court also found that the distinctions between the levels of religious indoctrination that occur at the elementary level versus the high school level are not controlling given that the Diocese of Camden has bargained collectively over secular conditions of employment in the high schools since 1984.

The Supreme Court granted defendants' petition for certification.

HELD:

Lay elementary-school teachers employed by the Diocese of Camden have a state constitutional right to unionize and to engage in collective [***4] bargaining. The scope of that negotiation, however, is limited by the Religion Clauses of the First Amendment to wages, certain benefit plans, and any other secular terms or conditions of employment similar to those that are currently negotiable under an existing agreement with the high school lay teachers employed by the Diocese of Camden.

1. Defendants' reliance on *NLRB v. Catholic Bishop* is misplaced. That case was decided strictly on statutory interpretation grounds; the U.S. Supreme Court avoided the constitutional claims that were asserted. In addition, this case is distinguishable from a case involving the National Labor Relations Act (NLRA) because the regulatory scheme of the NLRA requires much more entanglement of government with religion than does Article I, Paragraph 19 of the State Constitution. (pp. 5-7)

2. The standard for conducting an Establishment Clause analysis is based on a three-pronged test: 1) the statute must have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive government entanglement with religion. The primary effect [***5] of Article I, Paragraph 19 is to require a private employer to enter into collective bargaining with the elected representative of its employees. The Camden Diocese has been collectively bargaining with lay high school teachers for quite some time. This strongly suggests that bargaining over some similar secular terms and conditions of employment can be achieved without either advancing or inhibiting religion. (pp. 7-15)

3. Government entanglement must be excessive before it violates the Establishment Clause. The agreement between the high schools and their lay teachers over secular terms and conditions of employment demonstrates that the Diocese can negotiate while

preserving its authority over religious matters. Any distinction, in terms of impressionability between the high school and elementary school students is not constitutionally significant. By limiting the scope of collective bargaining to secular issues such as wage and benefit plans, neutral criteria are used to insure that religion is neither advanced nor inhibited. In addition, the extent of the State's involvement would be minimal. Thus, requiring defendants to bargain collectively with plaintiff over the same terms [***6] and conditions as are negotiable under the high school agreement does not violate the Establishment Clause. (pp. 15-19)

4. To determine whether the government has coercively interfered with a religious belief, or has impermissibly burdened a religious practice, in violation of the Free Exercise Clause the *Sherbert/Yoder* compelling interest test was established. That test has been modified by case law in *Employment Div. v. Smith* and by Congress with passage of the Religious Freedom Restoration Act (RFRA). (pp. 19-22)

5. The RFRA test permits a state to burden the free exercise of religion if the burden imposed is in furtherance of a compelling state interest and represents the least restrictive means of furthering that compelling state interest. The Appellate Division rejected a constitutional challenge to RFRA and decided this case based on that standard. However, a few days ago, the U.S. Supreme Court held RFRA unconstitutional. Therefore, the *Smith* standard will be applied to determine whether the Free Exercise Clause has been violated. (pp. 22-25)

6. Under *Smith*, the compelling state interest requirement does not apply unless the regulatory law impacts [***7] the Free Exercise Clause *and* some other constitutional protection. Nor does the *Smith* standard apply the *Sherbert* balancing test, which asks whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling governmental interest. Because Article I, Paragraph 19 is neutral and of general application, the fact that it incidentally burdens the free exercise of religion does not violate the Free Exercise Clause. (pp. 25-26)

7. Defendants assert a hybrid claim -- requiring them to recognize the union and engage in collective negotiations would violate both the Free Exercise Clause and their First amendment right to free association. Because defendants did not brief this argument, it is waived. Nonetheless, on the merits, the Court concludes that employers do not have a constitutional right not to associate when employees' right to organize would be jeopardized. (pp. 26-28)

8. Defendants also claim that requiring them to engage in collective bargaining with the lay teachers would violate both the right to free exercise of religion and the right of parents to control the rearing of their children. The parents [***8] right of directing the rearing of their children is clearly not implicated here. Nonetheless, in applying the *Smith* test to these claims, the State of New Jersey has a compelling state interest in allowing private employees to unionize and to bargain collectively over secular terms and conditions of employment. (pp. 28-31)

As **MODIFIED**, judgment of the Appellate Division is **AFFIRMED**. The complaint is **REINSTATED** and the matter is **REMANDED** to the Chancery Division for further proceedings consistent with this opinion.

CHIEF JUSTICE PORITZ and JUSTICES HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN join in JUSTICE COLEMAN'S

opinion.

COUNSEL: *James A. Serritella*, a member of the Illinois bar, and *Martin F. McKernan, Jr.*, argued the cause for appellants (*McKernan, McKernan & Godino*, attorneys; *Mr. Serritella, Mr. McKernan, James J. Godino, Jr., Francis J. Monari, Christopher G. Martucci, James C. Geoly*, a member of the Illinois bar and *W. Cole Durham, Jr.*, a member of the Utah bar, of counsel and on the briefs).

Benjamin Eisner argued the cause for respondent (*Spear, Wilderman, Borish, Endy, Spear* and *Runckel*, attorneys).

James Katz argued [***9] the cause for *amicus curiae*, American Civil Liberties Union of New Jersey (*Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby & Graziano*, attorneys).

JUDGES: The opinion of the Court was delivered by COLEMAN, J. Chief Justice PORITZ and Justices HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN.

OPINION BY: COLEMAN

OPINION

[*581] [**712] The opinion of the Court was delivered by

COLEMAN, J.

The issue raised in this appeal is whether lay teachers in church-operated elementary schools have an enforceable state constitutional right to unionize and to engage in collective bargaining respecting secular terms and conditions of employment without violating the Religion Clauses of the *First Amendment of the United States Constitution*. Plaintiff asserts that it was elected the majority representative of the lay teachers employed by defendants. The trial court refused to compel defendants to recognize and to bargain with plaintiff as the labor representative of the lay teachers on the ground that to do so would violate the Free Exercise and Establishment Clauses of the First Amendment. The Appellate Division reversed in a published opinion. *290 N.J. Super 359, 675 A.2d 1155. 290 N.J. Super. 359, 675 A.2d 1155 (1996)*. We granted [***10] defendants' petition for certification. *146 N.J. 567, 683 A.2d 1162 (1996)*.

We now affirm and hold that the lay elementary-school teachers have a state constitutional right to unionize and to engage in collective bargaining. The scope of that negotiation, however, is limited by the Religion Clauses of the First Amendment to wages, certain benefit plans, and any other secular terms or conditions of employment similar to those that are currently negotiable under an existing agreement with high school lay teachers employed by the Diocese of Camden.

[**713] I

Defendants are elementary schools operated by the Catholic Diocese of Camden. Each of the church-operated schools employs a sizeable number of lay teachers. Plaintiff, a lay teacher organization, [*582] asserts that it was elected by a majority of the lay teachers employed in each defendant school. When plaintiff sought to have defendants recognize it as the collective-bargaining representative of the lay teachers, a Board of Pastors, acting on behalf of defendants, informed plaintiff that it would be recognized only if it signed a document entitled "Minimum Standards for Organizations Wishing to Represent Lay Teachers in a Parish or Regional Catholic [***11] Elementary School in the Diocese of Camden" ("Minimum Standards"). Plaintiff was informed that the Minimum Standards were not negotiable. That document, among other things, vests in the Board of Pastors complete and final authority to dictate the outcome of any dispute; it

also prohibits plaintiff from assessing dues or collecting agency fees from non-union members.

Plaintiff refused to accept the Minimum Standards, claiming that to do so would have amounted to bargaining away a number of lay teacher rights prior to certification of the union and before the collective-bargaining process had commenced. Defendants accordingly refused to recognize plaintiff or to bargain collectively. Plaintiff then instituted the present litigation to compel defendants to recognize it as the collective-bargaining representative of the lay teachers and to compel defendants to engage in collective bargaining respecting the terms and conditions of employment Plaintiff maintained that the lay teachers are private employees and sought relief based on *Article I, Paragraph 19 of the New Jersey Constitution.* It provides:

> Persons in private employment shall have the right to organize and bargain collectively. [***12] Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.
>
> [*N.J. Const. art. I, P19.*]

The trial court granted summary judgment dismissing the complaint. It concluded that granting the relief sought by plaintiff would interfere with defendants' free exercise of religion and [*583] would involve an excessive entanglement between the State and the Catholic Church.

The Appellate Division found that the present case involves only a Free Exercise Clause claim rather than an Establishment Clause claim or both. Relying on the right to organize and bargain collectively established by the New Jersey Constitution, the court concluded that there is a compelling state interest in permitting plaintiff to organize and to engage in collective bargaining that outweighs the claimed burden on defendants' free exercise rights. That compelling state interest was identified as "the preservation of industrial peace and a sound economic order." *290 N.J. Super. at 389, 675 A.2d 1155* (internal quotation marks omitted). It also [***13] found that distinctions between the levels of religious indoctrination that occur in elementary and high schools are not controlling in the present case given that the Diocese of Camden has bargained collectively over secular terms and conditions of employment in the high schools for a number of years.

II

Defendants argue that the decision in *NLRB v. Catholic Bishop, 440 U.S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979)*, deprived the state courts of subject matter jurisdiction and dictates that defendants cannot be compelled to recognize the union and to engage in collective bargaining without violating the Religion Clauses because the controversy involves a labor and management dispute that is controlled by the National Labor Relations Act ("NLRA"), *29 U.S.C.A. §§ 151-169*. States are preempted from acting on matters subject to the NLRA unless the National Labor Relations Board ("NLRB") has declined, or would decline, to assert jurisdiction. *Lay Faculty Ass'n v. Roman Catholic Archdiocese, 122 N.J. Super. 260, 269, 300 A.2d 173 (App.Div.1973)*. Although the United States Supreme Court in *Catholic Bishop* concluded that Congress did not intend that cases

addressing [***14] whether lay teachers in [**714] church-operated schools have a right to unionize and to engage in collective bargaining be covered [*584] by the NLRA, *Catholic Bishop, supra, 440 U.S. at 504-07, 99 S. Ct. at 1320-22, 59 L. Ed. 2d at 543-45*, defendants nonetheless maintain that the Appellate Division should be reversed for failing to follow the Supreme Court's decision in *Catholic Bishop*.

Plaintiff and the American Civil Liberties Union ("ACLU"), appearing as *amicus curiae*, respond that defendants have misinterpreted *Catholic Bishop*. Plaintiff and the ACLU maintain that (1) our courts may exercise subject matter jurisdiction over the present case; and (2) defendants may be compelled to recognize the union and to bargain collectively. The ACLU also asserts that *Catholic Bishop* "justifies the application of [Article I, Paragraph 19]" in the present case.

Defendants' reliance on *Catholic Bishop* is misplaced. That case was decided strictly on statutory interpretation grounds. The Court ruled that in the absence of "an 'affirmative intention of the Congress clearly expressed'" that teachers in church-operated schools should be covered by the NLRA, the NLRB [***15] did not have jurisdiction to "require church-operated schools to grant recognition to unions as bargaining agents for their teachers." *Id. at 506, 99 S. Ct. at 1322, 59 L. Ed. 2d at 545*. The Court avoided the constitutional claims that were asserted. Even if the issues under the Religion Clauses had been reached, the present case is distinguishable from a case involving the NLRA. The regulatory scheme under the NLRA requires the NLRB to act as monitor-referee, thus causing much more entanglement of government with religion than does *Article I, Paragraph 19 of the New Jersey Constitution*. The NLRB maintains ongoing regulatory authority over parties engaged in collective bargaining, exercising investigatory, prosecutorial, and adjudicatory authority. *29 U.S.C.A. §§ 158-161*. In the present case, there is no "leviathan-like governmental regulatory board" to monitor the parties' negotiations. *290 N.J. Super. at 391, 675 A.2d 1155*.

When, as in the present case, the subject matter of a case falls outside the scope of the NLRA, "state tribunals are free to exercise jurisdiction over the subject matter." *Cooper v. Nutley* [*585] *Sun Printing Co., 36 N.J. 189, 194, 175 A.2d 639 (1961); see also* [***16] *Christ the King Reg'l High School v. Culvert, 815 F.2d 219, 222-23 (2d Cir.1987)*. Article I, Paragraph 19 was intended to protect workers who are not covered by the NLRA. *George Harms Constr. Co. v. New Jersey Turnpike Auth., 137 N.J. 8, 28, 644 A.2d 76 (1994)*; Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 Rutgers L.J. 729, 742 (1987). The right of private employees to organize and to bargain collectively is so important that it has been elevated to constitutional status and is regarded as a fundamental right. *George Harms, supra, 137 N.J. at 28-29, 644 A.2d 76; Lullo v. International Ass'n of Fire Fighters, Local 1066, 55 N.J. 409, 415, 262 A.2d 681 (1970)*. In the absence of preemption, we must decide whether enforcement of the fundamental right of the lay teachers to organize and to bargain collectively conflicts with the Religion Clauses.

III

Defendants argue that requiring the Diocese to bargain collectively with plaintiff would inhibit religion and would excessively entangle the State in religious affairs in violation of the Establishment Clause. [***17] Plaintiff and the ACLU maintain that

such a requirement would not violate the Establishment Clause. As noted earlier, the Appellate Division was not persuaded that the present case implicates the Establishment Clause; the court concluded that only the Free Exercise Clause is at issue. The court reasoned that "'[g]overnment support for religion is an element of every establishment claim, just as a burden or restriction on religion is an element of every free exercise claim.'" *290 N.J. Super. at 379, 675 A.2d 1155* (quoting 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, 1394 (1981)). The Appellate Division stressed that the present case involves "the uniform application [**715] of a state [*586] constitutional provision," and concluded that the application of Article I, Paragraph 19 to parochial schools does not constitute an establishment of religion. *290 N.J. Super. at 379-80, 675 A.2d 1155.*

However, in many instances, "claims under the Establishment Clause and the Free Exercise Clause involve the same considerations and are not easily divided and put into separate pigeon holes." *Catholic High School* [***18] *Ass'n of the Archdiocese v. Culvert, 753 F.2d 1161, 1166 (2d Cir.1985).* The Religion Clauses of the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *U.S. Const. amend I.* The New Jersey Constitution also contains a Religion Clause: "There shall be no establishment of one religious sect in preference to another." *N.J. Const. art. I, P4.* Under both constitutions, the State and all instrumentalities of the State are prohibited from showing a preference for one religion over another because to do so would violate the establishment prong of the Religion Clauses. *Tudor v. Board of Educ., 14 N.J. 31, 44, 100 A.2d 857 (1953).*

Because the First Amendment has been made applicable to the states by the *Fourteenth Amendment of the United States Constitution, Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940)*, and because our State Religion Clause is literally less pervasive than the First Amendment, our discussions of the Religion Clauses will be limited to the federal provisions. *Clayton v. Kervick, 56 N.J. 523, 528, 267 A.2d 503 (1970),* [***19] *vacated on other grounds sub nom. Levine v. Clayton, 403 U.S. 945, 91 S. Ct. 2275, 29 L. Ed. 2d 854 (1971).* As the federal jurisprudence concerning the Religion Clauses now stands, there is no need to consider whether our State Constitution affords greater religious protection than that afforded by the First Amendment.

Half a century after the majority, concurring, and dissenting opinions were issued in *Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)*, the debate continues over the [*587] dimensions of the "wall of separation" between church and state that the framers of the First Amendment Religion Clauses intended to erect. The present case perpetuates that old debate and raises the additional issue whether the dispute between plaintiff and defendants should be analyzed under the Establishment Clause, the Free Exercise Clause, or both. A major crack occurred in the "wall of separation" on June 23, 1997, when the United States Supreme Court decided *Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997).* The Court overruled [***20] *Aguilar v. Felton, 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985)*, and held that New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged students pursuant to Title I of the Elementary and Secondary Education Act of 1965,

20 U.S.C.A. §§ 6301-6514, did not involve an excessive entanglement of church and state and therefore was not violative of the Establishment Clause. *Agostini, supra, 521 U.S. at 232-35, 117 S.Ct. at 2015-17, 138 L.Ed.2d at 420-22.*

There are cases in which the Establishment and Free Exercise Clauses should be analyzed jointly because "there has been some blurring of sharply honed differentiations" between those clauses. *Catholic Bishop v. NLRB, 559 F.2d 1112, 1131 (7th Cir.1977), aff'd on other grounds, 440 U.S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979).* Excessive entanglement of government with religion may be viewed both as government's sponsorship of religion and as its interference with the free exercise of religion. It must also be considered as [***21] a factor separate and apart from the effect of governmental action. *Agostini, supra, 521 U.S. at 231-33, 117 S.Ct. at 2014-15, 138 L.Ed.2d at 419-20.* As will be seen later, it is excessive entanglement that burdens the free exercise of religion and may, under certain circumstances trigger application of the compelling state interest standard under a Free Exercise Clause analysis. For those reasons we will analyze the present case under both of the Religion Clauses. Inquiries under both clauses are extremely fact sensitive.

[*588] IV

First, we consider the claims under the Establishment Clause. In *Everson, supra,* [**716] *330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711,* Justice Black, in his opinion for the majority of the Court, explained the meaning of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.
>
> . . . .
>
> That Amendment requires the state to be [***22] a neutral in its relations with groups of religious believers and non-believers.
>
> [*Id. at 15, 18, 67 S. Ct. at 511, 513, 91 L. Ed. at 723, 724-25.*]

The standard for conducting an Establishment Clause analysis is a three-pronged test that was articulated in *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, 755 (1971).* Those elements are: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Ibid.* (citations omitted); *see also New Jersey State Bd. of Higher Educ. v. Board of Dirs. of Shelton College, 90 N.J. 470, 487, 448 A.2d 988 (1982).*

For purposes of this appeal, the parties concede that *Article I, Paragraph 19 of the New Jersey Constitution* satisfies the first prong because it has the secular purpose of advancing the economic welfare of private-sector employees by establishing the right of private parties to organize and to bargain collectively. Defendants argue, however, that the second prong is implicated [***23] in this case because Article I, Paragraph 19 infringes upon their right to govern their educational process, thereby inhibiting religion. Although standing alone that argument sounds more like a free exercise claim, we will address

it under the Establishment Clause.

[*589] We are persuaded that the primary effect of that state constitutional provision is not to inhibit religion, but rather to require a private employer to enter into collective bargaining with the elected representative of its employees. *See Culvert, supra, 753 F.2d at 1166* (acknowledging that only third prong was in dispute to determine whether state labor relations board could exercise jurisdiction with respect to parochial high schools and their lay teachers); *see also Hill-Murray Fed'n of Teachers v. Hill-Murray High School, 487 N.W.2d 857, 863 (Minn.1992)* (stating that there was "no dispute that only the third prong is potentially implicated" by applying that state's labor relations act to the respondent high school's labor relations).

The Diocese's past history of collective bargaining with lay high-school teachers strongly suggests that bargaining over some secular terms and conditions of employment [***24] can be achieved without either advancing or inhibiting religion. Since 1984, defendants and plaintiff have negotiated a series of collective bargaining agreements concerning the lay high-school teachers employed by the Diocese of Camden. Significant provisions of the most recent agreement include:

> A. The Organization is hereby recognized by the Diocese as the sole and exclusive collective bargaining agent for the following lay employees at diocesan sponsored secondary schools:
>
> 1. All full-time classroom teachers;
>
> 2. All full-time guidance counselors;
>
> 3. All full-time nurses and librarians;
>
> 4. All full-time special education teachers within the diocese;
>
> . . . .
>
> Excluding all others including:
>
> 1. All principals, all vice principals appointed by the Bishop of the Diocese, and all deans of students.
>
> . . . .
>
> B. The subjects covered by this Agreement are wages, benefits and other terms and conditions of employment.
>
> C. Excluded from the scope of negotiations are the following:
>
> 1. Decisions involving educational policies and/or ecclesiastical considerations involving [***25] religious-moral qualifications.
>
> [*590] [**717] 2. The administrator's right to assign, supervise, discipline and demand responsible teacher accountability in

> all curricular and extra curricular areas.
>
> 3. The school ratio.
>
> . . . .
>
> F. ... [N]othing in the agreement shall be considered as interfering in any way with the function and duties of the Diocese insofar as they are canonical or religious.
>
> * * * *
>
> I. The Organization recognizes the sole right and duty of the Bishop of the Diocese functioning through the Diocese to see that the schools are operated in accordance with the philosophy of Catholic education, the doctrine, the teachings, the laws and norms of the Catholic Church.
>
> * * * *
>
> K. The right to hire, suspend, discharge or otherwise discipline a teacher for violation of such rules or for other proper and just cause is reserved to the Diocese.
>
> L. The Diocese retains the sole right to operate the school system and nothing shall be deemed to limit or restrict it in any way in the exercise of all its functions in management operations. This includes the right to make such rules relating to its operation as it [***26] shall deem advisable providing they are not inconsistent with the terms of the agreement.

Article XI of the agreement outlines the benefits referred to in Article I, Paragraph B. Those benefits include medical insurance, dental insurance, a prescription drug plan, life insurance, and other common benefits. The medical benefits are further described in a plan summary and are limited to individual and family coverage. No litigation has arisen out of the agreements between the lay high-school teachers and the Diocese since the first agreement was executed in 1984.

Indeed, the agreement between the Diocese and the elected representative for the lay high-school teachers preserves the Bishop's exclusive right to structure the schools and their philosophies. Thus, bargaining collectively over similar secular terms and conditions of employment for lay elementary-school teachers would not inhibit defendants' religion by interfering with issues of structure and indoctrination.

The significant issue is whether requiring collective bargaining will involve or create excessive entanglement between the State [*591] and religion. When deciding whether the excessive governmental entanglement with [***27] religion prong has or will be violated, it must be remembered that such a determination properly

> "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *People of Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 212, 68 S. Ct. 461, 465, 92 L. Ed. 649, 659 (1948)*. This prong

> most closely connects the *Lemon* test to Jefferson's notion of a "wall of separation" between church and state. *See Reynolds v. United States, 98 U.S. 145, 164, 25 L. Ed. 244, 249 (1879)* (quoting reply from Thomas Jefferson to the Danbury Baptist Association, Jan. 1, 1802). The Supreme Court has stated, "Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, ... but the concept of a 'wall' of separation is a useful signpost." *Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123, 103 S. Ct. 505, 510, 74 L. Ed. 2d 297, 305 (1982).*
>
> [*Ran-Dav's County Kosher, Inc. v. State, 129 N.J. 141, 154, 608 A.2d 1353 (1992).*]

Although the "wall of separation" is a useful signpost, [***28] the *Lemon* Court recognized that the prohibition of the state's entanglement in religion does not mean an absolute separation between Church and State. *Lemon*, proscribes only "'excessive government entanglement with religion,'" *Lemon, supra, 403 U.S. at 613, 91 S. Ct. at 2111, 29 L. Ed. 2d at 755*; it does not erect an impenetrable wall of separation. The Court reaffirmed that notion recently when it stated that "[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the [**718] Establishment Clause." *Agostini, supra, 521 U.S. at 233, 117 S.Ct. at 2015, 138 L.Ed.2d at 420* (citation omitted).

We are aware that generally, "church-related elementary and secondary schools have a significant religious mission[,] and ... a substantial portion of their activities is religiously oriented." *Lemon, supra, 403 U.S. at 613, 91 S. Ct. at 2111,* [***29] *29 L. Ed. 2d at 756.* In addition, "[t]he various characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation. This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in [*592] primary schools particularly." *Id. at 616, 91 S. Ct. at 2113, 29 L. Ed. 2d at 757* (internal quotation marks omitted).

But the agreement between the high schools and their lay teachers demonstrates that there are some secular terms such as wages and benefit plans that the Diocese can negotiate while preserving its complete and final authority over religious matters. In that context, the distinction, in terms of impressionability, between high school students and elementary school students is not constitutionally significant.

By limiting the scope of collective bargaining to secular issues such as wages and benefit plans, neutral criteria are used to insure that religion is neither advanced nor inhibited. We also perceive that the extent of the State's involvement would be minimal at most. Only excessive entanglement is proscribed and no continued state surveillance is anticipated in the present [***30] case. *Id. at 619, 91 S. Ct. at 2114, 29 L. Ed. 2d at 759-60; Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 115-16, 389 A.2d 944 (1978).* A policy under which continual entanglement between the government and religion can be anticipated would "verge on government sponsorship of

religion," *Resnick, supra, 77 N.J. at 115, 389 A.2d 944*, and would therefore be violative of the Establishment Clause. Compelling collective bargaining over such secular terms as wages and benefits pursuant to *Article I, Paragraph 19 of the New Jersey Constitution* "does not include the potential for the state [either] to mandate religious beliefs []or ... [to] force the parties to agree to specific terms." *Hill-Murray, supra, 487 N.W.2d at 864*. Moreover, "[i]t is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems." *Culvert, supra, 753 F.2d at 1167*.

In the present case, the State would require only that the Diocese recognize the lay teachers' right to bargain collectively over wages, benefits, and any other terms and conditions required [***31] by the agreement with the lay high-school teachers. The State would not force the Diocese to negotiate terms that would affect [*593] religious matters. The State would not dictate which additional terms must be negotiated, nor would it decide the specific terms of the parties' ultimate agreement. Viewed in that limited context, we are satisfied that this case does not involve the type of "comprehensive, discriminating, and continuing state surveillance," required, for instance, by the statute in *Lemon* that provided for state financial aid to nonpublic elementary schools for only secular subjects. *Lemon, supra, 403 U.S. at 619, 91 S. Ct. at 2114, 29 L. Ed. 2d at 759*. Thus, we hold that requiring defendant to bargain collectively with plaintiff over the same terms and conditions as are negotiable under the high school agreement does not violate the Establishment Clause.

V

We now turn to defendants' claim that requiring them to bargain collectively with the lay teachers violates the Free Exercise Clause. [1] Defendants seek a religiously based exemption from our state constitutional requirements. They argue that mandating collective bargaining in catholic parish schools [***32] would threaten the autonomy of church bodies and would infringe impermissibly upon the relationship with the ministerial [**719] employees. Plaintiff and the ACLU disagree.

1 For a discussion of the historical development of the Free Exercise Clause, *see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L.Rev. 1409 (1990)*.

Unlike an Establishment Clause violation, an infringement of the Free Exercise Clause is based on coercion. *School Dist. v. Schempp, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844, 858 (1963)*. In the present case, defendants maintain that they are being forced to recognize the union and to engage in collective bargaining. The purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Ibid.* Like the rights protected by the Establishment Clause, free exercise rights are not absolute. [*594] "[R]eligious institutions do not enjoy an absolute [***33] immunity from worldly burdens." *Market St. Mission v. Bureau of Rooming and Boarding House Standards, 110 N.J. 335, 340, 541 A.2d 668 (1988); see also Elmora Hebrew Ctr., Inc. v. Fishman, 125 N.J. 404, 413-14, 593 A.2d 725 (1991)*.

Even when governmental action has a coercive effect on the free exercise of religion, it must be determined whether the impact is on beliefs or conduct. The Free Exercise Clause

embraces both the "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell, supra, 310 U.S. at 303-04, 60 S. Ct. at 903, 84 L. Ed. at 1218* (footnote omitted); *see also Bowen v. Roy, 476 U.S. 693, 699, 106 S. Ct. 2147, 2152, 90 L. Ed. 2d 735, 744 (1986); Reynolds v. United States, 98 U.S. 145, 166, 25 L. Ed. 244, 250 (1879).*

To determine whether the government has coercively interfered with a religious belief, or has impermissibly burdened a religious practice, the so-called *Sherbert/Yoder* test was established. That test was subsequently modified by case law and the Congress of the United States. We generally [***34] agree with the Appellate Division's analysis of that evolving modern standard:

> In *Sherbert v. Verner, 374 U.S. 398, 403, 83 S. Ct. 1790, 1793, 10 L. Ed. 2d 965, 970 (1963)*, the Court held that any incidental burden on the free exercise of religion may be justified only by a compelling state interest in the regulation of a subject that is within the State's constitutional power to regulate. "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *374 U.S. at 406, 83 S. Ct. at 1795, 10 L. Ed. 2d at 972* (quoting *Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430, 440 (1945)*). In *Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)*, the Court reiterated this test, and added:
>
> > But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability [***35] . . . .
> >
> > [*595] A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.
> >
> > [*406 U.S. at 220, 92 S. Ct. at 1536, 32 L. Ed. 2d at 28.*]

When faced with such a claim, we must closely examine the interests the State seeks to promote and the impediments to those objectives that would flow from recognizing an exemption from a generally

applicable law. *Yoder, supra, 406 U.S. at 221, 92 S. Ct. at 1536, 32 L. Ed. 2d at 28.* The *Sherbert/Yoder* test is at bottom a balancing test requiring consideration of whether: (1) the claims presented were religious in nature and not secular; (2) the state action burdened the religious exercise; and (3) the state interest was sufficiently compelling to override the constitutional right of free exercise of religion. *Culvert, supra, 753 F.2d at 1169.*

In *Employment Div. v. Smith, 494 U.S. 872, 885, 110 S. Ct. 1595, 1603, 108 L. Ed. 2d 876, 889 (1990),* the Court discarded the *Sherbert/Yoder* approach to free exercise challenges. *See* [***36] *Diaz v. Collins, 872 F. Supp. 353 (E.D.Tex.1994)* (recognizing [**720] abrogation of *Yoder*). In its place, the Court held that a generally applicable and otherwise valid regulatory law which is not specifically intended to regulate religious conduct or belief and which incidentally burdens the free exercise of religion does not violate the Free Exercise Clause of the First Amendment. *494 U.S. at 878, 110 S. Ct. at 1599-1600, 108 L. Ed. 2d at 885.* The Court retained the compelling interest test for instances where the regulatory law impacts the Free Exercise Clause in conjunction with another constitutional protection, such as freedom of speech and of the press, or the right of parents to direct the education of their children. *494 U.S. at 881-82, 110 S. Ct. at 1601-02, 108 L. Ed. 2d at 887-88.*

In response to the *Smith* decision, the Religious Freedom Restoration Act (RFRA), *42 U.S.C.A. § 2000bb,* was adopted in November 1993. Its stated purpose was to restore the compelling interest test set forth in *Sherbert* and *Yoder,* and to guarantee its application in all cases where free exercise was substantially burdened by otherwise neutral [***37] laws. *42 U.S.C.A. § 2000bb(a)* and *(b).* RFRA further provides in pertinent part:

> (a) In general. -- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. -- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the

> least restrictive means of furthering that compelling governmental interest.
>
> [*42 U.S.C.A. § 2000bb-1.*]

> RFRA is applicable to all federal and state law, whether statutory or otherwise, and whether adopted before or after the enactment of the Act. *42 U.S.C.A. § 2000b-3(a).*
>
> [*290 N.J. Super. at 380-81, 675 A.2d 1155.*]

[*596] Although cases from other jurisdictions have highlighted some confusion that has existed, before and after the enactment of RFRA, regarding "incidental" and "substantial" burdens on the free exercise of religion, distilled to essentials, the RFRA test permits a state [***38] to burden the free exercise of religion if the burden imposed is in furtherance of a compelling state interest and represents the least restrictive means of furthering that compelling state interest. The distinction between "incidental" and "substantial" burdens on the right to free exercise is not dispositive. The Appellate Division concluded that "[r]egardless of whether the burden is substantial or incidental, there still must be a determination of whether the State's interest is compelling." *Id. at 383, 675 A.2d 1155.*

The Appellate Division rejected a constitutional challenge to RFRA and decided the case based on that standard. The court concluded that (1) Article I, Paragraph 19 is a neutral, generally applicable civil law; (2) a compelling state interest was advanced by that law; and (3) the least restrictive means of furthering the State's interest were used by limiting the issues subject to collective bargaining.

A few days ago the United States Supreme Court held that RFRA is unconstitutional. *City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).* The Court reasoned that RFRA is [***39] a substantive law and under the Enforcement Clause of the Fourteenth Amendment, *U.S. Const. amend XIV, § 5,* Congress has the power to pass only remedial or preventative legislation. *Flores, supra, 521 U.S. at -- - --, 117 S.Ct. at 2171-72, 138 L.Ed.2d at 647-49.*

When overturning RFRA, the Court made some observations that are instructive on whether the *Smith* standard has been reestablished:

> Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If "'compelling interest' really means what it says ... many laws will not meet the [**721] test.... [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost [*597] every conceivable kind." [*Smith, supra,* 494 U.S.,] at 888, *110 S. Ct. at 1605.* Laws valid under Smith would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the [***40]

majority in Smith but to illustrate the substantive alteration of its holding attempted by RFRA. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.... RFRA's substantial burden test ... is not even a discriminatory effects or disparate impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose [***41] a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement -- a requirement that was not used in the pre-Smith jurisprudence RFRA purported to codify -- which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

[*Flores, supra, 521 U.S. at --, 117 S.Ct. at 2171, 138 L.Ed.2d at 647.*]

We will, therefore, apply the *Smith* standard in deciding whether the Free Exercise Clause has been violated. Under *Smith* the compelling state interest requirement does not apply unless the regulatory law impacts the Free Exercise Clause *and* some other constitutional protection, such as freedom of speech or freedom of the press. Nor does the *Smith* standard apply the *Sherbert* [***42] balancing test, which asks whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling government interest.

It is beyond dispute that Article I, Paragraph 19 is a generally applicable civil law. It is also neutral in that it is not intended to regulate religious conduct or belief. Instead, it is intended to enhance the economic welfare of private-sector employees. Because the state constitutional provision is neutral and [*598] of general application, the fact that it incidentally burdens the free exercise of religion does not violate the Free Exercise Clause. *Smith, supra, 494 U.S. at 878-79, 110 S. Ct. at 1600, 108 L. Ed. 2d at 885-86.*

Defendants have proffered a hybrid argument in their briefs stating that to require them to recognize the union and to engage in collective bargaining would violate both the Free Exercise Clause and their First Amendment right to free association. *Id. at 881-82, 110 S. Ct. at 1601-02, 108 L. Ed. 2d at 887-88* (holding that neutral, generally applicable law must implicate some other constitutional right in addition to Free Exercise Clause before compelling [***43] state interest standard applies). Defendants, however, have not presented any argument in their briefs to support that claim. Issues that are raised but are not supported with arguments are deemed waived. *See, e.g., 500 Columbia Turnpike Assocs. v. Haselmann, 275 N.J. Super. 166, 172, 645 A.2d 1210 (App.Div.1994)* (dismissing aspects of cross-appeal that were not supported by any argument in brief); *Kerney v. Kerney, 81 N.J. Super. 278, 282,* [**722] *195 A.2d 476 (App.Div.1963)* (appeal dismissed because appellants' brief contained no argument in support of the grounds raised in their notice of appeal); *State v. Plainfield-Union Water Co., 75 N.J. Super. 571, 583, 183 A.2d 684 (App.Div.1962)* (resolving issue raised in notice of appeal, but not advancing any reasoning to support assertion, against appellant), *aff'd sub nom. State v. Elizabethtown Water Co., 40 N.J. 280, 191 A.2d 457 (1963).*

We have nonetheless considered the merits of the issue and conclude that employers do not have a constitutional right not to associate when employees' right to organize would be jeopardized. *Texas & New Orleans R.R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 571, 50 S. Ct. 427, 434, 74* [***44] *L. Ed. 1034, 1046 (1930)* (finding provision in Railway Labor Act stating that employees' right to designate representatives without interference, influence, or coercion did not violate employer's right to freedom of association); *NLRB v. Field & Sons, Inc., 462 F.2d 748, 750* [*599] *(1st Cir.1972)* (finding that employer could not withdraw from multi-employer association and stating that "individual employer's freedom of association must ... be sacrificed"); *Fort Wayne Patrolmen's Benevolent Ass'n, Inc. v. City of Fort Wayne, 625 F. Supp. 722, 728 (N.D.Ind.1986)* (finding that freedom of association does not apply to employer-employee relationships); *cf. New York Club Ass'n v. City of New York, 487 U.S. 1, 13-14, 108 S. Ct. 2225, 2234, 101 L. Ed. 2d 1, 16 (1988)* (holding that generally applicable anti-discrimination law affecting places of public accommodation did not violate club members' First Amendment freedom of association rights); *Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548-49, 107 S. Ct. 1940, 1947-48, 95 L. Ed. 2d 474, 486-87 (1987)* (same); *Roberts v. United States Jaycees, 468 U.S. 609, 621-23,* [***45] *104 S. Ct. 3244, 3251-52, 82 L. Ed. 2d 462, 474-75 (1984)* (same). [2] Furthermore, any infringement on associational rights is amply justified by the State's compelling interest in assuring that private-sector employees' right to unionize and to engage in collective bargaining is implemented.

2 *See also* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion, 81 Cornell L.Rev. 1049, 1103 (1996)* (stating that the State can infringe on employers' associational rights by requiring employers to include disfavored groups); Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects, 51 U. Chi. L.Rev. 1012, 1023 (1984)* (stating that the NLRA, *29 U.S.C.A. §§ 151-169*, protects workers' right to associate by abridging the employers' right not to associate

with union members).

In addition, defendants claim that both the right to free exercise of [***46] religion and the right of parents to control the rearing of their children are at stake. The right of parents to "direct the upbringing and education of [their] children" as enunciated in *Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S. Ct. 571, 573, 69 L. Ed. 1070, 1078 (1925)*, clearly is not implicated in this case. Allowing lay teachers to unionize does not interfere with any parental decision making authority. We will, nonetheless, conduct the *Smith* "compelling state interest" analysis required for hybrid [*600] claims. *Smith, supra*, 494 U.S. at 881-82, 100 S. Ct. at 1595, 108 L. Ed. 2d at 887.

We are persuaded that the State of New Jersey has a compelling interest in allowing private employees to unionize and to bargain collectively over secular terms and conditions of employment.

We agree with the Appellate Division that

> for purposes of ... defendant[s'] facial constitutional challenge on the New Jersey right to organize, we conclude that there is a compelling State interest which outweighs the claimed burden on defendants' free exercise rights. Article I, paragraph 19 is a fundamental State constitutional right guaranteed [***47] to private employees. *Cooper, supra, 36 N.J. at 197, 175 A.2d 639.* This constitutional provision "reaches beyond governmental action. It also protects employees against the acts of individuals who would abridge these rights." *Id. at 196, 175 A.2d 639.* In addition to the lay teachers' fundamental right guaranteed by the State Constitution is the fact, observed in *Culvert, supra, 753 F.2d at 1171, that the State has a compelling interest in* [**723] *the "preservation of industrial peace and a sound economic order."* Moreover, defendants' concerns over the infringement on their free exercise rights are alleviated to a great extent by the fact that New Jersey, unlike the NLRB and jurisdictions such as New York and Minnesota, does not have a labor board regulating private employees. Rather, any legal relief sought by plaintiff must come from the courts. The judiciary can avoid or prevent any undue interference in the ecclesiastical concerns of the schools through the application of "neutral principles" and insure that the "least restrictive means" are employed in the bargaining relationship. *42 U.S.C.A. § 2000bb.*

A longstanding principle of First [***48] Amendment jurisprudence forbids civil courts from deciding issues of religious doctrine or ecclesiastical polity. This prohibition does not apply to civil adjudication of purely secular legal questions. *Elmora Hebrew Ctr., Inc. v. Fishman, 125 N.J. 404, 413, 593 A.2d 725 (1991)*. Courts can decide secular legal questions in cases involving some background issues of religious doctrine, so long as they do not intrude into the determination of the

doctrinal issues. *Id. at 414, 593 A.2d 725.* In such cases, courts must confine their adjudications to their proper civil sphere by accepting the authority of a recognized religious body in resolving a particular doctrinal question, while, where appropriate, applying neutral principles of law to determine disputed questions which do not implicate religious doctrine. *Ibid.* "Neutral principles" are wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations. *Id. at 414-15, 593 A.2d 725.* Our Court in *Fishman* pointed to the example, at issue in that case, of an orthodox rabbi the scope of whose duties only a religious authority could decide, but whose contract, [***49] or non-religious condition of employment, a civil court could determine. Nonetheless, our Court has stressed that neutral principles "must always be circumscribed carefully to avoid courts' incursions into religious questions that would be impermissible under the first [*601] amendment," *id. at 415, 593 A.2d 725,* because "there are many cases in which court intervention is simply inappropriate because judicial scrutiny cannot help but violate the first amendment." *Id. at 416, 593 A.2d 725.*

Professor Laycock criticizes reliance on neutral principles in this context. In his view, such reliance ignores the church's resulting loss of autonomy and avoids the required in-depth constitutional analysis. In addition, Laycock is concerned that distinctions required by such an approach are difficult for secular courts, unversed in theological subtleties. *Laycock, supra,* 81 *Colum. L.Rev.* at 1400, 1409 n. 270.

* * * *

However, in spite of these concerns, we conclude that reliance on the doctrine of neutral principles will prove proper and efficacious. The concerns of secular intrusion expressed in *Catholic Bishop* are not nearly as substantial [***50] here because of the absence of a leviathan-like governmental regulatory board. Concern over a court's ability to make the necessary distinctions between the secular and the theological is, in our view, no obstacle given the anticipated nature of the collective bargaining process.... As for the concerns regarding church autonomy: while these are legitimate, they are outweighed in this situation by the compelling governmental interest expressed in our State's constitutional provision guaranteeing the rights of working men and women.

[290 N.J. Super. at 389-91, 675 A.2d 1155 (emphasis added).]

As noted by the Appellate Division, "[t]he Diocese's concern seems rooted in its objection to collective, not

individual, bargaining." *Id. at 394, 675 A.2d 1155.* Many lay elementary-school teachers presently have individual contracts with the Diocese. The high-school-lay teachers have a collectively-negotiated contract with the Diocese. In both instances, secular issues have been negotiated without apparent fear of violating the Free Exercise Clause.

Defendants also claim that the lay teachers perform a ministerial function and that if they are forced to recognize the union [**724] and to engage in collective [***51] bargaining, that would amount to an impermissible intrusion into the "precinct" of the church. We disagree.

Ministerial employees are those whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Welter v. Seton Hall Univ., 128 N.J. 279, 294, 608 A.2d 206 (1992)* (internal quotation marks [*602] omitted). The ministerial defense is raised under the Free Exercise Clause to preclude judicial resolution of an employment dispute or enforcement of an employment agreement. *Id. at 294-95, 608 A.2d 206; Alicea v. New Brunswick Theological Seminary, 128 N.J. 303, 306, 608 A.2d 218 (1992).* Even then, the courts should exercise jurisdiction, except "when the underlying dispute turns on doctrine or polity." *Welter, supra, 128 N.J. at 293, 608 A.2d 206.* Otherwise, courts should not abdicate their duty to enforce secular rights. *Ibid.*

The present case deals with the right to negotiate terms and conditions of employment collectively rather than the enforcement of a contract of employment. *See J.I. Case Co. v. NLRB, 321 U.S. 332, 334-35, 64 S. Ct. 576, 579, 88 L. Ed. 762, 766 (1944)* [***52] (stating that collective bargaining generally does not result in employment contract, but rather, sets terms for a collective bargaining agreement for current and future employees). Thus, defendants' reliance on *Welter, supra, 128 N.J. 279, 608 A.2d 206*, and *Alicea, supra, 128 N.J. 303, 608 A.2d 218*, is misplaced.

VI

In sum, we hold that requiring defendants to bargain collectively with plaintiff pursuant to *Article I, Paragraph 19 of the New Jersey Constitution* over the terms and conditions of employment set forth in this opinion does not violate the Religion Clauses of the United States Constitution. We remand the matter to the Chancery Division for it to order an official representational election, if same has not occurred, to determine whether plaintiff has the support of the majority of the lay teachers. If plaintiff receives that support, then the Diocese of Camden is ordered to recognize plaintiff as the lay elementary-school teachers' representative and to bargain collectively with plaintiff in accordance with this opinion.

The judgment of the Appellate Division is modified and affirmed. The complaint is reinstated and the matter is remanded [*603] to the Chancery Division for further [***53] proceedings consistent with this opinion.

LEXSEE 753 F.2D 1161

CATHOLIC HIGH SCHOOL ASSOCIATION OF THE ARCHDIOCESE OF NEW YORK, Plaintiff-Appellee-Cross-Appellant, v. EDWARD R. CULVERT, Individually, and in his capacity as Chairman of the NEW YORK STATE LABOR RELATIONS BOARD, an Agency of THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK, Defendants-Appellants-Cross-Appellees, and LAY FACULTY ASSOCIATION, Intervenor-Defendant-Appellant-Cross-Appellee

Nos. 83-9013, 84-7155, 84-7173

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

753 F.2d 1161; 1985 U.S. App. LEXIS 27996; 118 L.R.R.M. 2257; 102 Lab. Cas. (CCH) P55,490

May 16, 1984, Argued
January 10, 1985, Decided

PRIOR HISTORY: [**1] The defendant New York State Labor Relations Board and the intervenor defendant Lay Faculty Association appeal from a judgment of the United States District Court for the Southern District of New York (Morris E. Lasker, J.) which granted summary judgment to plaintiff cross-appellant Catholic High School Association of the Archdiocese of New York. Plaintiff instituted a declaratory judgment action against the State Labor Relations Board seeking to enjoin it from exercising its jurisdiction over plaintiff. The case arose because the intervenor Lay Faculty Association had brought an unfair labor practice proceeding against the plaintiff before the State Labor Relations Board. Plaintiff successfully argued that the exercise of jurisdiction by the State threatened plaintiff's constitutional rights under the Religion Clauses of the *First Amendment*. Defendants appeal from that decision and plaintiff cross-appeals from the district court's refusal to find that the National Labor Relations Act preempts the matter.

DISPOSITION: Affirmed as to the preemption issue raised by the cross-appeal. Reversed and remanded on the violation of the *First Amendment* Religion Clauses.

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JUDGES: Cardamone, Pratt and Friedman, * Circuit Judges. Pratt, Circuit Judge, dissenting.

* Honorable Daniel M. Friedman,

United States Circuit Judge for the Federal Circuit, sitting by designation.

OPINION BY: CARDAMONE

OPINION

[*1162] CARDAMONE, Circuit Judge:

This appeal presents delicate issues involving the relationship between church and state. Since the drafting of the *Bill of Rights*, government regulation has become increasingly expansive. The wall of the *First Amendment* delineates the permissible degree of [**3] this government intrusion into the sphere reserved for religion. This parchment barrier must be constantly manned, the Founding Fathers believed, [*1163] lest there be a union between church and state that will first degrade and eventually destroy both. The issue in this case is whether the Religion Clauses of the *First Amendment* made applicable to the states by the *Fourteenth Amendment* prohibit the New York State Labor Relations Board from exercising jurisdiction over the labor relations between parochial schools and their lay teachers. This "difficult and sensitive" question, expressly left open by the Supreme Court in *NLRB v. Catholic Bishop, 440 U.S. 490, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979), aff'g on other grounds, 559 F.2d 1112 (7th Cir. 1977)*, is one of first impression in this Circuit. Our task is to determine whether there is a principled basis upon which to limit state intrusion to secular aims.

I

The New York State Labor Relations Board (State Board or Board) administers the New York State Labor Relations Act (SLRA or Act). As originally enacted in 1937 the Act's provisions did not apply to employees of charitable, educational or religious associations [**4] and corporations. In 1968 the Act was amended to bring these employees within its scope. The next year the Lay Faculty Association (Union), the defendant-intervenor in this case, petitioned the State Board for certification as the exclusive bargaining representative of the teachers in the eleven schools managed and operated by the plaintiff Catholic High School Association (Association). The Association voluntarily assisted the Union in holding an election in which the lay teachers voted to be represented by the Union, which was then certified by the Board.

The parties agree that the schools are "church-operated" within the meaning of *Catholic Bishop*. The faculty of the Association is composed of both lay and religious teachers, all of whom are directly involved in the transmission of religious values to the students. From 1969 to 1980 the Union and the Association entered into a series of collective bargaining agreements governing the secular terms and conditions of lay teachers' employment. The by-laws of the Union specifically exclude religious faculty, and each of the agreements was expressly limited to nonreligious issues. [1] The Association has never claimed that these [**5] agreements violate the religious mission of the schools, and until now it has never challenged the Board's jurisdiction.

1 The preamble of the Collective Bargaining Agreement between the Association and the Union stated:

> The Union and its members recognize the uniqueness of the Employer and its member schools in that it is a Roman Catholic school system committed to provide education within the framework of Catholic principles and that nothing in this Agreement shall be

> construed as interfering in any way with the [Association] in carrying out [its] functions and duties that are canonical, ecclesiastical, or religious in nature; and
>
> The Union and its members further recognize that the functions and duties referred to hereinabove are not subject to the grievance, discharge, termination or other provisions of this Agreement.

Moreover, a rider to the agreement stated "there are certain areas of Canon Law, ecclesiastical decrees and religious obligations that cannot be the subject of negotiations." It further provided, for example, that "if a teacher were to teach that there was no God" then "he could be discharged . . . and the discharge would not be subject to the discharge grievance procedure."

[**6] In 1980, while the Union and the Association were negotiating a new contract, the Union filed unfair labor practice charges against the Association for the first time. The charges alleged that the Association had violated sections 704(5) and (10) of the State Labor Relations Act. The Union claimed that the Association had discouraged membership in the Union by suspending 226 teachers who had protested the Association's unilateral implementation of a substitution policy that required teachers to teach, in addition to their own, the classes of absent teachers. The Union also alleged that the Association wrote letters to individual teachers urging them to pressure the Union into accepting the Association's offers, discouraged support for the Union by referring to the futility of its efforts, and announced other changes in working conditions that the Association [*1164] would make unilaterally. None of these charges raised a religious issue and the Association is not contending that it took these actions because of its religious beliefs.

After the Union filed these charges, the Board conducted an informal confidential investigation to determine whether the Union had a *prima* [**7] *facie* case. The investigation was limited to determining the content of the letters and to whom they were mailed, and to ascertaining whether the suspensions were intended to discourage union membership. As a result of its investigation the Board issued a formal complaint. The Association immediately brought an action seeking a declaratory judgment and injunctive relief against the State Board. It challenged the State Board's assertion of jurisdiction, alleging that it violates the Religion Clauses of the *First Amendment* and that jurisdiction by the Board over lay teachers in church-operated schools is preempted by the National Labor Relations Act. At a conference in the district court judge's chambers, the Association agreed to file a motion for summary judgment after it received the defendant State Board's answer to its complaint and stipulated that the Union would be permitted to intervene. The Union and the Board opposed the Association's motion for summary judgment and the Board cross-moved. The Association's motion was granted by United States District Judge Morris E. Lasker upon his conclusion that the State Board's assertion of jurisdiction violated the *Establishment* [**8] *Clause*. The district court enjoined the Board from continuing its proceedings against the Association.

The virtually identical issue was

presented but left unresolved in *Catholic Bishop*. There a closely-divided Supreme Court held that the National Labor Relations Board (NLRB) lacked jurisdiction over lay teachers because Congress had not affirmatively indicated that it intended them to be covered by the National Labor Relations Act (NLRA). Since there is such a clear statement of legislative intent in this case, the district court concluded that it must decide the constitutional question.

At the outset the district court held that *First Amendment* claims raised in the Association's complaint were justiciable. *573 F. Supp. 1550, 1553-54 (S.D.N.Y. 1983)*. It based this holding on a finding that the "threat of injury" to the Association's religious freedoms was "sufficiently real and imminent to constitute a justiciable case or controversy." *Id. at 1554*. Judge Lasker then reached the *First Amendment* issues and held that application of the Act to lay teachers violated the *Establishment Clause* because it "threatens to produce excessive entanglement between church and state." [**9] *Id. at 1556*. He found that the threat of entanglement arises because the Act's good faith bargaining requirement might "lead to negotiation over religious matters" and because the State Board has the power to investigate unfair labor practice charges in the course of which religious issues might arise. *Id. at 1557*. He specifically limited his holding to lay teachers, as opposed to other church employees, *id. at 1558 n.49*, and found it unnecessary to rule on the Association's free exercise claim. *Id. at 1556 n.36*.

The district court also held that limitations in the collective bargaining agreement would not cure the conflict with the *Establishment Clause*. It found that an "SLRB examination into whether the Association has acted in good faith in its dealings with the [Union] may reach religious matters regardless of the terms of agreement between the parties." *Id. at 1558*. Finally, Judge Lasker held that the NLRA does not preempt the State Board from asserting jurisdiction over parochial schools. This holding was based on his finding that the NLRA does not apply to parochial school teachers. The Board and Union appeal from the district court's determination [**10] that the Board's assertion of jurisdiction is unconstitutional, and the Association cross-appeals the district court's holding that the Board's jurisdiction is not preempted by the NLRA.

[*1165] II

We begin by considering the Union's and the State's contention that the Association's *First Amendment* claims fail to meet the threshold "case or controversy" requirement of Article III of the Constitution. [2] The Board and Union argue that during the fourteen years that the Act's provisions have applied to church-operated schools, the Board has handled many representation and unfair labor practice proceedings involving lay teachers at parochial schools and none of these cases have involved a religious question or have required it to inquire into or interfere with religious beliefs. [3] In contending that there must be a factual record developed before a court strikes down the assertion of a state agency's jurisdiction as unconstitutional, appellants rely on *Associated Press v. National Labor Relations Board, 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937)*, which involved a freedom of the press challenge to NLRB jurisdiction over newspapers. The Supreme Court there explained [**11] that "courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Id. at 132*. The Association responds that permitting jurisdiction over its labor relations with its teachers would *necessarily* implicate the Religion Clauses. The

Association asserts that the Seventh Circuit considered and properly dismissed the argument raised by the Union and the Board when it stated:

> The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists.

Catholic Bishop, 559 F.2d at 1126.

> 2 As a threshold matter, we must decide whether the National Labor Relations Act preempts the State Board's jurisdiction. We hold that it does not. If *Catholic Bishop* had held that teachers are within the jurisdiction granted by the NLRA but are not "employees" within the meaning of that Act, the State Board would plainly be preempted from exercising jurisdiction. *See Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 780, 91 L. Ed. 1234, 67 S. Ct. 1026 (1947)* (Frankfurter, J. concurring); *NLRB v. Committee of Interns and Residents, 566 F.2d 810 (2d Cir. 1977), cert. denied, 435 U.S. 904, 55 L. Ed. 2d 495, 98 S. Ct. 1449 (1978)*. But *Catholic Bishop* held merely that the NLRB did not have jurisdiction over lay teachers because there was no clear statement that Congress had intended to cover them. *440 U.S. at 506-07*. The *Catholic Bishop* Court stated that absent such affirmative indication, the NLRB had no jurisdiction because of the "difficult and sensitive" issues that would be raised in light of a teacher's critical role in the religious mission of the school. *Id. at 507*. Thus, this case is unlike *Committee of Interns and Residents* in which the NLRB retained jurisdiction over the employer, but deemed residents and interns not to be employees within the meaning of the Act. In this case the State Board has validly asserted jurisdiction because Congress did not indicate that the NLRB had jurisdiction.

[**12]

> 3 Appellants further urge that the district court was incorrect in presuming that the Act presented the same threat of entanglement found to exist under the NLRA by the Seventh Circuit. But there is no dispute that the Act is in fact patterned after the NLRA, and appellants point to no differences in interpretation material to the entanglement threat. *See generally* K. Hanslowe, *Procedures and Policies of the New York State Labor Relations Board* 9-14 (1964) (comparison with National Act).

We agree with the Association. The Supreme Court, affirming the Seventh Circuit on other grounds, distinguished *Associated Press* and commented that "the record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses." *Catholic Bishop, 440 U.S. at 507*. Moreover, in *Felton v. Secretary of Education, 739 F.2d 48 (2d Cir.)*, cert. granted, *469 U.S. 878, 105 S. Ct. 241, 83 L. Ed. 2d 180 (1984)*, we struck down a provision that gave parochial schools in disadvantaged areas the services [**13] of public school teachers. Under the facts of that case we could find no principled basis to limit the

state intrusion to secular aims. *Id. at 66-67.* We considered that case although there was no [*1166] record evidence that the aid fostered religion, *id. at 67,* and explained:

> In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy.

Id. at 66. For the same reasons a justiciable controversy exists in this case. If we allow the camel to stick its nose into the constitutionally protected tent of religion, what will follow may not always be controlled. Thus, we must now turn to the question of whether the camel can be kept firmly tethered outside.

III

The *First Amendment* states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Under the facts of this case, the claims under the *Establishment* [**14] *Clause* and the *Free Exercise Clause* involve the same considerations and are not easily divided and put into separate pigeon holes. Nonetheless, for organizational purposes, we will discuss the clauses independently of each other.

We turn first to the Association's argument that the State's assertion of jurisdiction violates the *Establishment Clause.* The Supreme Court has made it clear, when discussing the *Establishment Clause,* that "total separation is not possible in an absolute sense, [for s]ome relationship between government and religious organizations is inevitable." *Lemon v. Kurtzman, 403 U.S. 602, 614, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971).* It explained that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship." *Id.* The court has often found it useful to use the familiar three-pronged test in determining whether there has been a violation of the *Establishment Clause.*

> [1] Whether the challenged law or conduct has a secular purpose, [2] whether its principal or primary effect is to advance or inhibit religion, and [3] whether it creates an [**15] excessive entanglement of government with religion.

Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 1362, 79 L. Ed. 2d 604 (1984). The parties do not dispute that the Act has a secular purpose and that its primary effect is not to advance or inhibit religion. Nonetheless, the district court found that assertion of jurisdiction under the Act violates the *Establishment Clause* because it threatens to produce an excessive administrative entanglement of government with religion.

The court below reached this conclusion by relying on two aspects of State Board oversight. First, it found that there was an "imminent possibility" that the Association would be required to bargain with lay teachers on religious subjects. Second, it found that in the event of an alleged unlawful discharge, the State Board might have to determine

whether an asserted religious reason was a valid part of church doctrine. With respect to the degree of entanglement that results from the duty to bargain over secular terms and conditions of employment, the district court misapprehended the degree of supervision that the duty to bargain entails, and the nature of the state intrusion into the bargaining [**16] process. With respect to unlawful discharges, a recent Supreme Court ruling reveals a principled basis for an accommodation in the relationship between church and state.

We begin our analysis by examining the Association's duty to bargain. The State Board's relationship with the religious schools over mandatory subjects of bargaining does not involve the degree of "surveillance" necessary to find excessive administrative entanglement. In the three key Supreme Court cases addressing excessive administrative entanglement, *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, *Meek v. Pittenger, 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753* [*1167] *(1975)*, and *Wolman v. Walter, 433 U.S. 229, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977)*, states attempted to provide aid to support certain secular aspects of classroom instruction in parochial schools. In these three cases the Supreme Court held that the aid resulted in excessive administrative entanglement, finding that the restrictions imposed to ensure secular use of the funds would inevitably require "comprehensive, discriminating, and continuing state surveillance." *Lemon, 403 U.S. at 619*; [**17] *Meek, 421 U.S. at 370*; *Wolman, 433 U.S. at 254*. This is quite unlike the situation here where the State Board's supervision over the collective bargaining process is neither comprehensive nor continuing.

Further, it has been held, for example, that although application of Title VII of the Civil Rights Act to lay teachers at a religious college would often involve "a wide ranging investigation into many aspects of the College's hiring practices," such supervision did not constitute "ongoing interference with the College's religious practices." *EEOC v. Mississippi College, 626 F.2d 477, 487-88 (5th Cir. 1980)*. State Board procedures are no more intrusive for these purposes than EEOC procedures. First, an employer's good faith is put in issue only if a union or individual brings a charge; the State Board itself cannot initiate an unfair labor practice proceeding. In this case, the record demonstrates that the Union had not brought a charge during a decade of collective bargaining. Second, the ten unfair labor practices specified in § 704 of the Act are entirely secular. Third, a labor relations examiner must limit investigation to those issues that pertain directly to [**18] the unfair labor practices set forth in the charge. The Administrative Law Judge must similarly limit the inquiry if there is a hearing. Finally, an order issued by the State Board is not self-enforcing. A "church-operated" school believing itself aggrieved by such an order may refuse to comply and raise a *First Amendment* defense when and if the Board seeks judicial enforcement of its order.

The Association relies, as did the Seventh Circuit in *Catholic Bishop*, on a passage from an article on collective bargaining in colleges and universities:

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings, to curricular policy . . . .

> This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.
>
> Brown, *Collective Bargaining in Higher Education*, 67 Mich. L. Rev. 1067, 1075 (1969) (footnote omitted).

We decline to follow the Seventh Circuit down this slippery slope. Although this [**19] passage may accurately describe the bargaining process, the conclusion that the state is inevitably forced to become involved in all of these issues misconceives the State's role in that process. It is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems. The government cannot compel the parties to agree on specific terms. All it can do is order an employer who refuses to bargain in good faith to return and bargain on the mandatory bargaining subjects, all of which are secular. The Association apparently argues that it is the "Lilliputian bonds" that emanate from informed persuasion at the bargaining table that lead to entanglement between church and state. *See Cox, The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1409 (1958). In effect the Association contends that the state would be compelling it to do something that it must choose to do voluntarily or not at all. But as the Fifth Circuit stated in *EEOC v. Mississippi*: "That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms [**20] and conditions of their employment matters of church administration and thus [*1168] purely of ecclesiastical concern." *626 F.2d 477 at 485*. Thus, the duty to bargain does not involve excessive administrative entanglement between church and state.

The second ground for the district court's finding of excessive administrative entanglement was that the State Board's jurisdiction would require it to determine the validity of asserted religious motives as part of church doctrine. Thus, were a teacher who marries a non-Catholic to refuse to agree to raise her children Catholic and later be fired, the Board, in determining whether the asserted reason for discharge was pretextual, would have to decide whether requiring such an agreement was part of church dogma. The Board and Union urge that the Board would have no reason to inquire into the content or validity of church doctrine. They argue that courts and administrative agencies often have been called upon to determine whether religious beliefs are sincere. In *United States v. Seeger, 380 U.S. 163, 13 L. Ed. 2d 733, 85 S. Ct. 850 (1965)*, for example, the Supreme Court found that when an individual asks for a draft exemption [**21] on religious grounds, the local draft board and the Court are to "decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." *Id. at 185*.

In the present case it is not the inquiry into whether a belief is sincerely held by an individual that is at issue. Rather, it is the possibility of recurrent questioning of whether a particular church actually holds a particular belief. We agree with the Seventh Circuit that in order to demonstrate the sincerity of the belief held, "the bishop . . . would have to eliminate the pretextual aspect of claimed justification which would involve the matter of showing the validity [as part of church doctrine] of the claimed doctrinal position advanced." *Catholic Bishop*, 559 F.2d at 1129. Inevitably this would lead to the degradation of religion. One of the primary purposes

of the *Establishment Clause* was to avoid just this result. Thus, the *First Amendment* prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual.

The question remains whether this limitation of the State Board's powers should preclude it from [**22] asserting jurisdiction. We think not. The Board does not become "a toothless tiger" because of this rein on its powers. It is still free to determine, using a dual motive analysis, whether the religious motive was in fact the cause of the discharge. *See, e.g., NLRB v. Transportation Management Corp., 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983)* (asserted reason was not motivating cause because others had engaged in the same misconduct and had not been disciplined). Other circuits have made a similar accommodation by permitting the EEOC to assert jurisdiction but precluding it from determining whether an asserted reason is pretextual. *See, e.g., EEOC v. Mississippi College, 626 F.2d at 485.*

The Seventh Circuit considered and rejected such an accommodation stating:

> "The rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate § 8(a)(3) if it was in fact motivated, even partially, by the employee's union activity."
>
> . . . .
>
> We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional rights being violated which in turn [**23] would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem.

Catholic Bishop, 559 F.2d at 1130 (quoting *NLRB v. The Pembeck Oil Corp., 404 F.2d 105, 109 (2d Cir. 1968), vacated on other grounds and remanded, 395 U.S. 828, 89 S. Ct. 2125, 23 L. Ed. 2d 737 (1969)*). We agree with the Seventh Circuit that in cases involving lay faculty the Board should not be allowed to find a violation simply because anti-union animus motivated [*1169] a discharge "in part." Nonetheless, we adopt the accommodation that the Seventh Circuit rejected. It is clear that the Supreme Court seeks to accommodate apparently irreconcilable interests in the labor area where possible. *See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 616-17, 23 L. Ed. 2d 547, 89 S. Ct. 1918 (1969)* (finding no *First Amendment* free speech right to commit unfair labor practice). Such an accommodation is possible in this case. The Board may -- consistent with the *First Amendment* -- protect teachers from unlawful discharge by limiting its finding of a violation of the collective bargaining agreement to those cases in which the teacher [**24] would not have been discharged "but for" the unlawful motivation. *See Transportation Management, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667.* Were the Board allowed to apply an "in part" test in addressing an asserted religious motive, an order based on such a finding would violate the *First Amendment*. A parochial school might be forced to reinstate a teacher it otherwise would have fired for religious reasons simply because the school administration was also partly motivated by anti-union animus. To avoid this unconstitutional result, the Board therefore may order reinstatement of a lay teacher at a parochial school only if he or she would not have been fired otherwise

for asserted religious reasons.

Where a principled basis exists, as it does here, to limit state aid to or regulation of parochial schools, an attempt should be made to accommodate the interests of church and state under the *Establishment Clause*. Such accommodation firmly tethers the State Board's jurisdiction outside the constitutional tent that protects the Association's *First Amendment* rights.

IV

For basically the same reasons, we reach the same result with respect to the Association's Free Exercise [**25] claim. The Association, quoting the Seventh Circuit in *Catholic Bishop*, first argues that "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools." *559 F.2d at 1123*. Support for such an absolute view is found neither in case law nor the history of the *First Amendment*. The *First Amendment* guarantees that all are free to believe and free to act in the exercise of their religious convictions. Freedom to believe is absolute. Freedom to act is not. *See Cantwell v. Connecticut, 310 U.S. 296, 303-04, 84 L. Ed. 1213, 60 S. Ct. 900 (1940)*.

A determination of whether state regulation of the way the Association acts in its relations with its lay teachers violates free exercise requires a balancing test. The burden the state imposes on the Association's exercise of its religious beliefs must be weighed against the State's interests in enforcing the Act. We must consider whether: (1) the claims presented were religious in nature and not secular; (2) the State action burdened the religious exercise; and (3) the State interest was sufficiently compelling to override the constitutional right of free [**26] exercise of religion. *See Wisconsin v. Yoder, 406 U.S. 205, 214-15, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); Sherbert v. Verner, 374 U.S. 398, 407, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963)*. *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1390 (1967).

A

We first turn to whether the claims presented here are religious and not secular. Courts have long upheld regulation that merely causes economic hardship or inconvenience. *See, e.g., Braunfeld v. Brown, 366 U.S. 599, 6 L. Ed. 2d 563, 81 S. Ct. 1144 (1961)* (Pennsylvania's Sunday closing laws did not violate free exercise of Orthodox Jewish merchants). Many matters that pertain to private schools are already subject to governmental regulation. The Association must meet state requirements for fire inspections, building and zoning regulations and compulsory school [*1170] attendance laws, all of which regulate the conduct of the Association's schools. *See Lemon v. Kurtzman, 403 U.S. at 614; see also Wolman v. Walter, 433 U.S. at 240* (state may test teachers to ensure minimum education standards are [**27] met); *Pierce v. Society of Sisters, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925)* (state, under its police power, may regulate and license parochial schools).

Nor may the claim that any interference by the state in church affairs violates *First Amendment* rights be grounded on the history of the Amendment. Rummaging about in the attic of *First Amendment* history is not always helpful. The religious concerns of the drafters of the *Bill of Rights* and those faced today are over two-hundred years apart. Nonetheless, a brief look back reveals that the two Founding Fathers most closely identified with the Religion Clauses focused not on regulation of conduct, but on separation of church

and state and the unalienable right to freedom of religious belief. Their concern was more to prevent the establishment of an authoritarian state church like, for example, the Church of England, than it was with state regulation. As Thomas Jefferson explained in the letter that contained his oft-cited phrase concerning the "wall of separation," even though the legislative powers of government do not reach opinions, they do reach conduct. Letter from Thomas Jefferson to a Committee of the Danbridge [**28] Baptist Association (Jan. 1, 1802), *The Life and Selected Writings of Thomas Jefferson* 332-33 (Modern Library ed. 1944); *see also Memorial and Remonstrance Against Religious Assessments*, 8 *The Papers of James Madison* 298, 299 (1973).

B

The Association does not contend that collective bargaining is contrary to the beliefs of the Catholic Church. Not only does the Act not compel a belief in the value of collective bargaining, *see Cap Santa Vue, Inc. v. NLRB, 137 U.S. App. D.C. 395, 424 F.2d 883, 886-89 (D.C. Cir. 1970)*, but the Encyclicals and other Papal Messages make clear that the Catholic Church has for nearly a century been among the staunchest supporters of the rights of employees to organize and engage in collective bargaining. Kryvoruka, *The Church, the State and the National Labor Relations Act: Collective Bargaining in the Parochial Schools*, 20 Wm. & Mary L. Rev. 33, 52 n.74 (1978). That strong commitment to social and economic justice and collective bargaining was recently reaffirmed in the draft of the Catholic Bishops' Pastoral Letter of November 11, 1984. *See* N.Y. Times, Nov. 12, 1984, at B11, cols. 5 & 6.

Thus, the constitutionality of the [**29] Board's assertion of jurisdiction must only be considered with respect to its direct effect on religious beliefs. To find that an enactment violates the right to free exercise of religious beliefs, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District v. Schempp, 374 U.S. 203, 223, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963)*. The injury must be "a demonstrable reality," not merely a speculative possibility, *Beck v. Washington, 369 U.S. 541, 558, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962)*, and compliance with the regulation must be directly contrary to claimant's religious beliefs. *Wisconsin v. Yoder, 406 U.S. at 214-15*. We have already addressed both the claim that Board jurisdiction might require reinstatement of an individual who otherwise would have been fired for religious reasons, and the claim that the duty to bargain over the secular terms and conditions of employment imposes a burden on the Church. For the reasons discussed in Part III, and because of the restrictions we have placed on the Board's power, these claims do not burden freedom of religious exercise.

C

But [**30] a lingering question remains as to whether State Board jurisdiction may impermissibly chill free exercise rights; [*1171] whether, as the Seventh Circuit found, "to minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to 'steer far wider of the unlawful zone' of impermissible conduct." *559 F.2d at 1124* (quoting *Speiser v. Randall, 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958)*).

It is necessary, then, to decide whether this indirect and incidental burden on religion is justified by a compelling state interest. *See, e.g., Cantwell v. Connecticut, 310 U.S. at 307-08* (Jehovah's Witness's conviction for soliciting religious contributions was reversed because there existed no

compelling state interest); *Sherbert v. Verner, 374 U.S. 398, 406-09, 10 L. Ed. 2d 965, 83 S. Ct. 1790* (state law that denied Seventh Day Adventist unemployment compensation violated *free exercise clause* because state had no compelling interest). Here a compelling state interest exists. State labor laws are essential to the preservation of industrial peace and a sound economic order. Upon approving the 1968 [**31] amendment bringing employees of religious associations and others within the coverage of the State Labor Relations Act, Governor Rockefeller characterized it as the most important amendment to the Labor Law in recent years, stating:

> These workers will now enjoy the full protection of the State Labor Relations Act so that they may bargain collectively with their respective employers through representatives of their own choice. These basic rights and privileges have long been enjoyed by nearly all other workers in the State and the bill recognizes that it is no longer appropriate to distinguish between categories of employers with regard to the protection of these essential rights.

1968 N.Y. Sess. Laws (McKinney's), ch. 890 at 2389 (amending *N.Y. Labor Law § 715*). There is a compelling public interest in finding that all unions and employers have a duty to bargain collectively and in good faith. *Cap Santa Vue, 424 F.2d at 890*. *See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42, 81 L. Ed. 893, 57 S. Ct. 615 (1937)*. Thus, even if the exercise of Board jurisdiction has an indirect and incidental effect on employment decisions in parochial schools involving [**32] religious issues, this minimal intrusion is justified by the State's compelling interest in collective bargaining.

V

The judgment appealed from insofar as it held there was no preemption by the National Labor Relations Act is affirmed and the Association's cross-appeal is dismissed. Insofar as the judgment granted summary judgment and injunctive relief in favor of the plaintiff Association upon a finding of a *First Amendment* violation, it is reversed and the case is remanded with directions to enter summary judgment in favor of the defendant State of New York permitting it to exercise its jurisdiction over the Association in accordance with this opinion.

DISSENT BY: PRATT

DISSENT

PRATT, Circuit Judge, dissenting:

Although I agree with the majority opinion on the preemption issue, I dissent on the constitutional issue for the reasons set forth in Judge Lasker's opinion below, *573 F. Supp. 1550 (S.D.N.Y. 1983)* and in the seventh circuit's opinion in *Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112*, affirmed on other grounds, *440 U.S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (7th Cir. 1977)*.

LEXSEE 487 N.W.2D 857, 863

In the Matter of a Petition for Investigation and Determination of an Appropriate Unit and Exclusive Representative: Hill-Murray Federation of Teachers, St. Paul, Minnesota, petitioner, Appellant. v. Hill-Murray High School, Maplewood, Minnesota, Respondent. Paul W. Goldberg, Commissioner, Minnesota Bureau of Mediation Services, petitioner, Appellant.

C3-90-2617

SUPREME COURT OF MINNESOTA

487 N.W.2d 857; 1992 Minn. LEXIS 208; 122 Lab. Cas. (CCH) P57,032

July 24, 1992, Filed

PRIOR HISTORY: [**1] Review of Court of Appeals

DISPOSITION: Reversed.

SYLLABUS

SYLLABUS

The application of the Minnesota Labor Relations Act to lay employees of Hill-Murray Catholic High School does not violate either the *first amendment of the Federal Constitution* or the freedom of conscience clause of the Minnesota Constitution.

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JUDGES: Heard, considered and decided by the court en banc. KEITH, Coyne.

OPINION BY: KEITH

OPINION

[*859] OPINION

KEITH, Chief Justice.

The Minnesota Federation of Teachers, on behalf of certain lay employees of Hill-Murray High School, petitioned the Minnesota Bureau of Mediation Services (Bureau) for determination of an appropriate bargaining unit and certification [**2] as exclusive representative under the provisions of the Minnesota Labor Relations Act (MLRA or Act), *Minn. Stat. § 179.01* - .17 (1990). Hill-Murray High School (Hill-Murray) moved to dismiss the petition and asserted that Bureau jurisdiction would directly infringe upon their rights under both the federal and state constitutions. The Bureau denied the motion to dismiss the petition, determined a bargaining unit

and ordered an election. The members of the bargaining unit voted in favor of representation and the Bureau certified the Minnesota Federation of Teachers as the exclusive representative. The court of appeals reversed the Bureau's decision holding that the state was prohibited by the religion clauses of the state and federal constitutions from applying the MLRA to a religiously affiliated high school. *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 471 N.W.2d 372 (Minn. App. 1991).* We reverse.

I.

Hill-Murray High School was created by the 1971 merger of Hill High School for boys and Archbishop Murray Memorial High School for girls. The mission of Hill-Murray High School is "to provide a well-rounded quality education in a Christian context. [**3] The pursuit of excellence in all areas of learning and personal growth is integrated with a deepening faith in Christ's message for whole and effective living." Hill-Murray High School, Faculty and Staff Handbook, 1989-90 at 3. This mission is reflected in the activities and atmosphere of the school. The vast majority (80% - 85%) of students and teachers are [*860] Catholic although only teachers of religion are required to be Catholic. The school observes the Catholic seasons and holds at least one Mass per month which all students and teachers are expected to attend. The school operates a campus ministry and there is daily prayer in the classrooms. A religion department provides formal theology and religious instruction for the students. The students are required to take religion courses each trimester. The religion teachers are certified by the Archdiocese and may be removed from employment by the Archbishop. The Archbishop reviews and oversees the church doctrine that is taught at the school.

Hill-Murray is also a college preparatory secondary school at which students study mathematics, history, English, science, music, etc. and are able to participate in debate, theatre, student [**4] council, athletics, the Yearbook, Quiz Bowl, Homecoming, and in all the other myriad activities that make up the typical Minnesota high school experience. Hill-Murray is accredited by the North Central Association Commission on Schools in compliance with the requirements of the State Board of Education. The school receives public aid on behalf of the students for textbook subsidies, counseling, guidance, health services, and transportation.

The school is operated by the Hill-Murray Education Association, Inc. (Association) which leases the school premises from the St. Paul Priory. The Association is a non-profit corporation incorporated under the laws of Minnesota. Membership in the Association is composed of the parents and legal guardians of the children who are enrolled at the school. The Association is governed by a fifteen person Board of Education. The Board of Education consists of two persons appointed by the Archbishop, three persons appointed by the Prioress of the St. Paul Priory, the president of the Hill-Murray Fathers Club, the president of the Hill-Murray Mothers Club, six persons elected by a majority of the Association and two persons appointed by the majority [**5] of the Board of Education. The Board of Education has the final authority for school policy and also has responsibility for setting budgets, establishing salaries and appointing the superintendent.

The teachers are under contract with the administration of Hill-Murray. The removal of teachers from employment is subject to the provisions of these contracts. They are required to support the teachings

of the Catholic Church with respect to faith, morals, and specific doctrines of the church. The Faculty and Staff Handbook outlines many of the school policies including the grievance procedures and non-salary conditions of employment. Hill-Murray has a voluntary grievance procedure to be used in the resolution of disputes. Under this procedure, the complainant negotiates first with the person with whom the complainant has a grievance. Unresolved grievances are referred up the chain of authority until they reach a Review Committee of the Board of Education. There is also a salary negotiating committee that consists of teachers, administrators, and members of the Board of Education. It is not a collective bargaining process and Hill-Murray is not formally bound to continue recognition [**6] of the committee. Non-salary conditions of employment, as defined in the Faculty and Staff Handbook, include a description of the basic duty day (five teaching periods and one prefecting period), sixth class teaching assignment, health insurance, retirement program and procedure, unemployment insurance, tenure policy, substitution compensation, school related damage or loss of personal property, and professional liability insurance.

In 1989 the Hill-Murray Federation of Teachers petitioned the Bureau for determination of an appropriate unit and certification as exclusive representative of certain lay employees. The Bureau conducts elections pursuant to the MLRA to determine whether employees wish to be represented by a labor organization for the purposes of collective bargaining regarding [*861] rates of pay, wages, hours of employment and conditions of employment. *See Minn. Stat. § 179.16* (1990). Once the Bureau has certified an exclusive representative for bargaining, it has no ongoing authority to require parties to negotiate or to order sanctions against the parties. Any unfair labor practice must be resolved in district court pursuant to *Minn. Stat. § 179.14* (1990). The Bureau [**7] held hearings over the course of several days and ultimately issued an order determining a bargaining unit and directing an election. The bargaining unit was composed of teachers, counselors, and librarians, and excluded employees in supervisory positions, the teachers in the religion department, and the elementary school music teachers. [1] Eighteen of the twenty-seven members of the bargaining unit voted in favor of representation by the Minnesota Federation of Teachers. The Bureau certified the Minnesota Federation of Teachers as the exclusive representative. The Minnesota Federation of Teachers is a local union affiliated with the American Federation of Teachers and the AFL-CIO.

1 The Bureau decided that it did not need to address the issue of cleric inclusion or exclusion as no individual whose voting eligibility was at issue at the hearings was a cleric. Clerics are prohibited by canonical law from joining labor unions.

Hill-Murray raised constitutional objections to the Bureau's assertion of jurisdiction [**8] from the very beginning. The Bureau, while cognizant of the constitutional issues implicated by the application of the MLRA to Hill-Murray, appropriately declined to address the constitutional issues and specifically preserved them for consideration by the courts.

Hill-Murray appealed the Bureau's assertion of jurisdiction to the Minnesota Court of Appeals. The court of appeals reversed the Bureau's decision certifying the union as the exclusive representative on state and federal constitutional grounds. *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 471 N.W.2d 372 (Minn. App. 1991)*. The Federation of

Teachers and the State of Minnesota Bureau of Mediation Services petitioned this court for further review.

II.

The issues before us are:

> 1. Does the Minnesota Labor Relations Act statutorily exclude religiously affiliated organizations, employers or employees from coverage?
>
> 2. Does the application of the Minnesota Labor Relations Act to Hill-Murray violate either the free exercise or *establishment clause of the first amendment of the Federal Constitution*?
>
> 3. Does the application of the Minnesota Labor Relations Act to Hill-Murray violate [**9] the freedom of conscience clause of the Minnesota Constitution?
>
> 4. If application of the Minnesota Labor Relations Act to Hill-Murray is not unconstitutional, does the record support the unit determination by the Bureau?

III.

The question of whether lay employees of a church affiliated school may organize under the provisions of the MLRA is one of first impression in this court. The United States Supreme Court, in addressing essentially this issue, ruled that because Congress did not intend for the National Labor Relations Act (NLRA) to cover religious institutions that the National Labor Relations Board (NLRB) did not have jurisdiction over teachers in a church operated school. *NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979)*. The Supreme Court's reliance on statutory construction to resolve what they characterized as "difficult and sensitive questions" allowed them to avoid deciding the inherent constitutional questions. *Id. at 507*.

The MLRA, though similar to the NLRA, is not identical and this court is [*862] free to construe our statute in accordance with our state laws and history. *Willmar Poultry Co. v. Jones, 430 F. Supp. 573, 575 n.2 (D. Minn. 1977)*. [**10] The MLRA defines "employer" to include:

> All persons employing others and all persons acting in the interest of an employer, but does not include the state, or any political or governmental subdivision thereof, nor any person subject to the Federal Railway Labor Act, as amended from time to time, nor the state or any political or governmental subdivision thereof except when used in Section 179.13.

Minn. Stat. § 179.01, subd. 3 (1990). The definition of "employees" under the MLRA includes "the accepted definition of the word * * * but does not include any individuals employed in agricultural labor or by a parent or spouse or in domestic service of any person at the person's own home." *Minn. Stat. § 179.01, subd. 4* (1990).

Neither employers nor employees of a religiously affiliated association are expressly excluded in the MLRA. An analysis of the legislative history reveals that there was no consideration by either the Minnesota House or the Senate as to the application of the Act to church affiliated organizations and their employees. We have previously analyzed the coverage of the MLRA and

held that those who are not specifically excluded by the legislature must be [**11] regarded as within the definitions. *Northwestern Hosp. v. Public Bldg. Serv. Employes' Union Local No. 113, 208 Minn. 389, 393, 294 N.W. 215, 217 (1940)* ("Since the legislature specified certain exemptions, the most practical inference is that all intended were mentioned."). The laws of statutory construction in Minnesota also support inclusion of Hill-Murray and its employees within the coverage of the Act. *Minn. Stat. § 645.19* (1990) ("Exceptions expressed in a law shall be construed to exclude all others."). In light of the language of the Act, the absence of legislative intent to exclude religiously affiliated organizations, *stare decisis*, and the Minnesota rules of statutory construction, we conclude that Hill-Murray is covered by the MLRA unless constitutional limitations prohibit such coverage.

IV.

The *First Amendment of the United States Constitution* states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." *U.S. Const. amend. I.* These protections of religion were first applied to the states in 1940. *Cantwell v. Connecticut, 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900 (1940).* [**12]

The Supreme Court recently altered its free exercise analysis in *Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990).* The *Smith* majority cast aside the previously utilized balancing test in favor of a more narrow analysis. The balancing test allowed a burden on the exercise of religion only if the state's interests outweighed the degree of impairment of free exercise rights. *Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963); see also Bob Jones Univ. v. United States, 461 U.S. 574, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983); United States v. Lee, 455 U.S. 252, 71 L. Ed. 2d 127, 102 S. Ct. 1051, 49* A.F.T.R.2d (P-H) 802 (1982); *Thomas v. Review Bd., 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981).* The *Smith* analysis holds that a generally applicable and otherwise valid regulatory law which was not intended to regulate religious conduct or belief and which incidentally burdens the free exercise of religion does not violate the free exercise clause of the first amendment. *Smith, 494 U.S. at 878.* *Smith* retained the compelling interest test for so called hybrid situations in which the regulatory law impacts the free exercise of religion and some [**13] other constitutionally protected interest. *Id. at 881-82.*

There is no dispute that the MLRA is a valid law of general applicability [*863] and does not intend to regulate religious conduct or beliefs. Hill-Murray argues that the facts present a hybrid situation akin to that in *Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972),* and that the compelling interest balancing test should be applied in lieu of *Smith.* We find no hybrid interest on the part of Hill-Murray and note that the rights of parents in the education of their children as outlined in *Yoder* are altogether different than the rights of a religiously affiliated employer with respect to the control of and authority over their lay employees. [2] We also find no basis for Hill-Murray's argument that *Smith* applies only to criminal laws. *See Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir. 1991); Salvation Army v. Department of Community Affairs, 919 F.2d 183, 194-95 (3d Cir. 1990).*

2 Even if we did find a hybrid interest, under the compelling state interest balancing test, we

conclude that the application of the MLRA is not unconstitutional. The balancing test analysis is discussed under the Minnesota Constitution, section V.

[**14] In accordance with *Smith*, we hold that the right to free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution. The application of the MLRA to labor relations at Hill-Murray does not violate the *free exercise clause of the Federal Constitution*. To hold otherwise would, in the words of the United States Supreme Court, allow Hill-Murray to "become a law unto [itself]." *Smith, 494 U.S.* at *879* (citing *Reynolds v. U.S., 98 United States 145, 167, 25 L. Ed. 244 (1879)*).

The establishment clause is the second facet of first amendment analysis and prohibits the making of laws "respecting an establishment of religion." *U.S. Const. amend. 1*. We believe that the church-labor relations issues presented here are most appropriately analyzed under the free exercise clause and that the establishment clause challenge raised by Hill-Murray is actually a free exercise question. *See* 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, 1384 (1981) [**15] ("Regulation that burdens religion, enacted because of the government's general interest in regulation, is simply not establishment. Magic words like 'entanglement' can not make it so * * *. Courts that have analyzed the church labor relations cases in establishment clause terms have invoked the wrong provision."). Nevertheless, we realize these issues are being analyzed under the establishment clause in some jurisdictions and for this reason we will consider the establishment clause. *See, e.g., NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991) cert. denied, 119 L. Ed. 2d 586, 112 S.Ct. 2965 (1992); Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985); Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB, 752 F.2d 345 (8th Cir. 1985) cert. denied, 472 U.S. 1028, 87 L. Ed. 2d 633, 105 S. Ct. 3502 (1985)*.

In order to be valid under the establishment clause, a governmental regulation must have a secular purpose, must neither inhibit nor advance religion in its primary effect, and must not foster excessive governmental entanglement with religion. *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*. [**16] There is no dispute that only the third prong is potentially implicated by the application of the MLRA to the labor relations of Hill-Murray. Hill-Murray argues that the certification of the union and the potential for a continuing relationship between Hill-Murray and the Bureau is excessive state entanglement.

The United States Supreme Court has acknowledged that "total separation is not possible in an absolute sense [and] some relationship between government [*864] and religious organizations is inevitable." *Id. at 614* (citations omitted). Hill-Murray receives limited public funds, is incorporated under state laws, and is subject to governmental regulation of fire codes, zoning ordinances, and compulsory student attendance. In analyzing an excessive entanglement claim, the "character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority" is scrutinized. *Id. at 615*.

The character and purpose of

Hill-Murray are intertwined with the Catholic religion. Catholicism is a pervasive influence at the school and while it is [**17] not possible to resolve whether the secular education or the sectarian indoctrination is the primary mission of Hill-Murray's existence, it is possible to discern that the religious aspect of Hill-Murray is inseparable from its overall purpose. The nature of the activity that is mandated by the application of the MLRA is jurisdiction by the Bureau and the ensuing obligation of the parties to negotiate in good faith about wages, hours, and conditions of employment. The resulting relationship between the state and Hill-Murray is centered on the state's authority to certify a bargaining unit, chosen by the lay employees, and on the potential power of the state to appoint a mediator and to resolve unfair labor practices through the district courts.

We believe the level of state intervention is minimal. The court of appeals declared that "the threshold act of union certification alters and impinges upon the religious character of Hill-Murray because the church is no longer the sole arbiter of religious issues." *Hill-Murray Fed'n. of Teachers, 471 N.W.2d at 379* (citations omitted). We disagree. This potential entanglement does not include the potential for the [**18] state to mandate religious beliefs nor does it contemplate that the MLRA will force the parties to agree to specific terms. The "conclusion that the state is inevitably forced to become involved in all of these issues misconceives the State's role in that process. It is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems." *Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985).*

The obligation imposed upon Hill-Murray by the application of the MLRA is the duty to bargain about hours, wages, and working conditions. We decline to categorize this minimal responsibility as excessive entanglement. Allowing lay teachers, almost all of whom are Catholic, to bargain collectively will not alter or impinge upon the religious character of the school. The first amendment wall of separation between church and state does not prohibit limited governmental regulation of purely secular aspects of a church school's operation.

V.

The Minnesota Constitution provides:

> The right of every man to worship [**19] God according to the dictates of his conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state * * *.

Minn. Const. art. I, § 16. We have construed this provision of our constitution to afford greater protection for religious liberties against governmental action than the *first amendment of the federal*

constitution. [*865] *State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).* Although neither of the parties raises the issue, we take note that Hill-Murray has "standing" to assert the constitutional protections of article I, Section 16. *See State v. Sports and Health Club, Inc., 370 N.W.2d 844, 850 (Minn. 1985) appeal dismissed, 478 U.S. 1015, 92 L. Ed. 2d 730, 106 S. Ct. 3315 (1986).* [**20] The constitutional protections afforded to "every man" extend also to churches and their educational institutions. People of many different religions often exercise their collective beliefs together in the shared faith of their church. It would be counterintuitive to deny extension of religious freedom to churches and their educational branches like Hill-Murray.

Because the Minnesota freedom of conscience clause provides more protection than the Federal Constitution, we will not follow the United States Supreme Court's limited analysis and will retain the compelling state interest balancing test. This test has four prongs: whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means. *Hershberger, 462 N.W.2d at 398; State v. Sports and Health Club, 370 N.W.2d 844, 851 (Minn. 1985).*

1. Sincerely Held Religious Belief

The education of children within a Catholic school system is a significant factor in the propagation of the Catholic faith. [**21] *See Lemon v. Kurtzman, 403 U.S. 602, 615, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971).* The issue, however, is not whether Catholic education is an integral element of the Catholic mission, but rather, whether application of the MLRA interferes with religious beliefs. We do not believe that Hill-Murray is arguing that the application of the MLRA will infringe on the rights of individual parents to educate their children in a religious school.

It is not the province of the court to examine the reason of religious beliefs or to resolve purely religious disputes. *See Serbian & Orthodox Diocese v. Milivojevich, 426 U.S. 696, 49 L. Ed. 2d 151, 96 S. Ct. 2372 (1976).* It is, however, proper for the courts to inquire as to whether a belief is held in good faith. *In re Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).* With this caveat in mind, we take note that the Catholic Church has a long history of support for labor unions and the right of workers to organize for the purposes of collective bargaining. [3] We do not believe that Hill-Murray is arguing that recognition of labor unions is against Catholic doctrine. What Hill-Murray is essentially arguing is that the separation of church [**22] and state prohibits the state, via the Bureau, from telling Hill-Murray what to do vis-a-vis their employees. The separation of church and state is a constitutional liberty that is subject to balancing by compelling state interests; "the liberty of conscience * * * shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state." *Minn. Const. art. I., § 16.*

3 The Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions. This is a specific application of the more general right to associate. In the words of Pope John Paul II: "The experience of history teaches that organizations of this type are an indispensable element of social life, especially in modern life."

> National Conference of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* (Washington, D.C. 1986) at 53.

Because we believe judicial intervention [**23] into the determination and interpretation of religious beliefs warrants caution, we will recognize the presence of a sincerely held religious belief.

2. The Burden on the Exercise of Religious Beliefs

Hill-Murray argues that the application of the MLRA would result in significant [*866] interference with the school's religious autonomy that would compel the school to negotiate and compromise its doctrinal positions.

The MLRA requires the parties to endeavor in good faith to reach an agreement with respect to "rates of pay, rules or working conditions in any place of employment." *Minn. Stat. § 179.06, subd. 1* (1990). Conditions of employment are not defined within the Act. Hill-Murray asserts that negotiations about conditions of employment will lead to negotiations about religion. This assertion is remote and an insufficient basis to exempt Hill-Murray from the regulatory laws of the state. Conditions of employment are specified in the more recently enacted Public Employment Labor Relations Act (PELRA). Minn. Stat. ch. 179A (1990). PERLA states, in relevant part:

> "Terms and conditions of employment" means the hours of employment, the compensation therefor including fringe [**24] benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district.

Minn. Stat. § 179A.03, subd. 19 (1990). Negotiable terms and conditions of employment are limited to exclude matters of inherent managerial policy. *See Minn. Stat. § 179A.07, subd. 1.*

We hold that matters of religious doctrine and practice at a religiously affiliated school are intrinsically inherent matters of managerial policy and therefore nonnegotiable. Terms and conditions of employment, such as those specified in PELRA and those specified in the Hill-Murray Faculty and Staff Handbook are not doctrinally related and are negotiable. Negotiations under the limits of the MLRA do not possess the tendency to undermine Hill-Murray's religious authority. Hill-Murray retains the power to hire employees who meet their religious expectations, to require compliance with religious doctrine, and to remove [**25] any person who fails to follow the religious standards set forth.

While Hill-Murray may have demonstrated that the application of the MLRA interferes with their authority as an employer, they have not established that this minimal interference excessively burdens their religious beliefs.

3. Compelling State Interests

Hill-Murray argues that the grievance procedure at the school sufficiently maintains industrial peace. One of the state's most compelling interests is to ensure the peace and safety of labor relations.

The United States Supreme Court has stated:

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 42, 81 L. Ed. 893, 57 S. Ct. 615 (1937).

We are conscious of the rationale inherent [**26] in labor relations acts and believe the legislature's intent was to institute a process that could resolve labor unrest in an orderly, efficient, and principled manner while protecting the interests of all parties involved, to the greatest extent possible. The process instituted by the state permits minimal state intervention; once the unit is certified, the parties are essentially left on their own.

In addition to protecting labor peace, the state has an interest in safeguarding the [*867] rights of association. The right of employees to collectively organize is statutorily recognized in Minnesota. The MLRA states: "Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining * * *." *Minn. Stat. § 179.10, subd. 1* (1990). Workers in the private sector are also guaranteed a first amendment constitutional right "to assemble, to discuss and formulate plans for furthering their own self interest in jobs * * *." *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531, 93 L. Ed. 212, 69 S. Ct. 251 (1949).* [**27]

We find that these goals are more than competing interests; they are overriding and compelling. The exercise of religion must not infringe on another's liberty; to do so is contrary to the construction of *article I, section 16 of the Minnesota Constitution.* The state's interests in promoting the peace and safety of industrial relations, the recognition of the statutory guarantees of collective association and bargaining, and the first amendment protection of the right of association outweigh the minimal infringement of Hill-Murray's exercise of religious beliefs.

4. Least Restrictive Alternatives

In the event it is possible to achieve these compelling interests through less restrictive, alternative means, article I, section 16 dictates the use of that alternative. *State v. Hershberger, 462 N.W.2d at 399.* Hill-Murray argues that the voluntary grievance procedure is a less restrictive alternative to mandatory good faith negotiations. The nature of the voluntary grievance procedure is just that -- voluntary. The nature of collective bargaining is unique; other alternatives pale in comparison and remain unable to effectuate the strength of collective action. [**28] Collective bargaining allows the individual "David" to negotiate against the employer "Goliath."

We reiterate an earlier point that the valid subjects of negotiation are those purely secular conditions of employment such as those specified in

PELRA and the Hill-Murray Faculty and Staff Handbook. Doctrinal and religious issues are matters of inherent managerial policy and are nonnegotiable. We believe that explicitly limiting the items of negotiations to those specifically enumerated conditions of employment is the best way to achieve the purpose and spirit of the Minnesota Constitution, the legislative intent behind the authorization of collective bargaining, and the rights of association.

VI.

Finally, Hill-Murray argues that because the court of appeals did not reach the issues related to unit determination, they are not now properly before this court. They further argue that even if the issues are properly before this court that the Bureau's unit determination was inappropriate. We disagree and conclude that the matter is properly before us and that the unit determination by the Bureau is supported by the record. The Bureau's order articulated the consideration for unit [**29] determination and noted:

> Because it is the union which is seeking to establish rights under the statute -- and since the standard is "an" appropriate unit, rather than the "most" appropriate unit -- when confronted with employer-union contentions over the boundaries of the appropriate unit, it is customary for administrative agencies to examine the proposals of the union first. It is only when the union's proposals are rejected as "inappropriate" that it becomes necessary to examine those presented by the employer.

See also Morand Bros. Beverage Co. v. NLRB, 91 N.L.R.B. 409, 418 (1950) ("There is nothing in the statute [NLRA] which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate. [*868] ") *enforced, 190 F.2d 576 (7th Cir. 1951)* (emphasis in original).

While all of the employees of Hill-Murray possess a mutual goal of fostering the religious development of the students with whom they come into contact, a review of the record indicates that the Bureau's unit determination was an appropriate unit.

Reversed.

DISSENT BY: [**30] COYNE

DISSENT

COYNE, Justice (dissenting).

I respectfully dissent. I believe that for many parents the decision to enroll their children in religiously affiliated private schools is a matter of conscience; a decision that sometimes exacts considerable personal sacrifice. Without doubt the State of Minnesota has an interest in the application of the principles articulated in the Minnesota Labor Relations Act and in the availability of the collective bargaining process. Certainly, the rights to engage in collective bargaining and to be represented by an exclusive representative are important to workers and are deserving of governmental protection and encouragement. If, however, that interest collides with the constitutional guarantee of rights of conscience, it seems to me that the interest in the collective bargaining process must yield.

Article I, section 16 of the Minnesota Constitution

provides in part:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; * * * nor shall any control of or interference with the rights of conscience be permitted * * * *

Despite this constitutional restriction on interference with [**31] the rights of conscience, the Bureau of Mediation Services exercised jurisdiction over Hill-Murray High School, a coeducational high school operated by the Catholic Archdiocese of St. Paul/Minneapolis, and mandated collective bargaining between Hill-Murray High School and Hill-Murray Federation of Teachers, which the Bureau designated as the exclusive representative of the teachers employed by the school. In so interjecting itself into the relationship between the school and its teachers, the Bureau has empowered the teachers, through their governmentally designated representative, to control or interfere with the rights of conscience by making the continued operation of the school prohibitively expensive.

Certainly, organized labor holds the power to force closure of the employer's enterprise by enforcing contractual demands which an employer cannot meet. When the enterprise in question is a commercial enterprise, it is only fitting that the collective work force which produces the product or performs the service which the employer markets should have such power. When, however, the enterprise is oriented to religion, not commerce, the power to force closure is the power to control [**32] or interfere with constitutionally protected rights of conscience. Here, it is the state, through the intervention of the Bureau of Mediation Service which has empowered the teachers.

This is not to say that the state's mandate to the school to enter into the collective bargaining process with the Federation has forced closure of the school or of any other religiously affiliated school. Neither is it to assert that closure is the inevitable result of the collective bargaining process. The teachers, through their exclusive representative, may elect never to exercise the power conferred upon them by the Bureau's decision. It is simply to recognize that the state, which has interjected itself into the matter by asserting jurisdiction, has empowered the Federation to control or interfere with rights of conscience in violation of *article I, section 16 of the Minnesota Constitution*. Accordingly, I would affirm the decision of the court of appeals.