

Nos. 18-1063 & 18-1078

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ALLIED
INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC**

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH HEANEY
Supervisory Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-1743

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board certifies the following:

A. Parties and Amici

1. Duquesne University of the Holy Spirit was the respondent before the Board (Case No. 06-CA-197492) and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC was the charging party before the Board and is the Intervenor before the Court.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on February 28, 2018, reported at 366 NLRB No. 27.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 6th day of November, 2018

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GLOSSARY

- “Act” National Labor Relations Act, 29 U.S.C. § 151 et seq.,
as amended
- “Amicus Br.”..... Brief filed by Amicus Curiae Association of Catholic
Colleges and Universities
- “Board” National Labor Relations Board
- “Br.” Company’s opening brief
- “JA” Joint Appendix
- “RFRA” Religious Freedom Restoration Act, 42 U.S.C. § 2000bb
et seq.
- “Union” United Steel, Paper & Forestry, Rubber, Manufacturing,
Allied Industrial & Service Workers International Union,
AFL-CIO/CLC

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Intervenor

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

INTRODUCTION

In *Pacific Lutheran University*, 361 NLRB 1404 (2014), the National Labor Relations Board announced a new standard for determining, in accordance with *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when it should decline to exercise jurisdiction pursuant to the National Labor Relations Act, 29 U.S.C. §§ 151, et seq. (“the Act”), over faculty members at self-identified religious colleges and universities. The Board determined that it will exercise jurisdiction unless a school demonstrates that it: (1) holds itself out as providing a religious educational environment; and (2) holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school’s religious educational environment. *Pacific Lutheran*, 361 NLRB at 1404.

In the representation proceeding underlying this case, a group of part-time adjunct faculty members employed at the Duquesne University of the Holy Spirit McAnulty College and Graduate School of Liberal Arts, voted overwhelmingly, in a Board-conducted election, to be represented by the United Steel, Paper & Forestry, Rubber, Manufacturing, Allied Industrial & Service Workers International Union, AFL-CIO/CLC (“the Union”). Duquesne objected, arguing that it is a religious institution exempt from the Board’s jurisdiction under *Catholic Bishop*. The Board, applying its *Pacific Lutheran* standard, rejected that argument, finding that while Duquesne holds itself out as providing a religious educational

environment, it does not hold out its part-time adjuncts as creating or maintaining a religious environment, with the exception of those teaching in the Department of Theology.

This case presents the first judicial challenge to the Board's *Pacific Lutheran* standard and its application of that standard. *Pacific Lutheran* is consistent with *Catholic Bishop* and the Act, and substantial evidence supports the Board's finding that Duquesne failed to meet that standard.

STATEMENT OF JURISDICTION

This case is before the Court on Duquesne's petition for review, and the Board's cross-application for enforcement, of a Board Decision and Order finding that Duquesne committed an unfair labor practice by refusing to bargain with the Union. 366 NLRB No. 27, 2018 WL 1137769 (Feb. 28, 2018) ("JA 176-178.")¹ The Union, which was the charging party before the Board, has intervened on the Board's behalf. The Board had jurisdiction over this matter under Section 10(a) of the Act, 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The

¹ "JA" refers to the Joint Appendix. "Br" refers to Duquesne's opening brief; "Amicus Br." refers to the brief filed by Amicus Curiae Association of Catholic Colleges and Universities. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

petition and application were timely; the Act provides no time limits for such filings.

The Board's unfair-labor-practice Order is based partly on findings made in an underlying "representation proceeding" (Board No. 06-RC-080933) used to determine whether a union represents a majority of employees in an appropriate bargaining unit. Section 9(d) of the Act, 29 U.S.C. § 159(d), provides that the record in that proceeding is part of the record before this Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding. Instead, it authorizes the Court to review the Board's actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair-labor-practice case. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

STATEMENT OF ISSUES

The ultimate issue is whether Duquesne violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the Union. Duquesne admits its refusal but claims that it is exempt from the Board's jurisdiction, challenging both the Board's *Pacific Lutheran* standard and its

application of that standard. Thus, resolution of the refusal-to-bargain issue turns on two subsidiary questions:

1. Is the Board's *Pacific Lutheran* standard for determining when to decline jurisdiction over faculty members at self-identified religious colleges and universities consistent with *Catholic Bishop* and the Act?

2. Does substantial evidence support the Board's finding that Duquesne does not hold out the McAnulty College part-time adjunct faculty members as serving any specific role in creating or maintaining Duquesne's religious educational environment, and that therefore the Board properly asserted jurisdiction and found that Duquesne violated the Act by refusing to bargain with the Union?

RELEVANT STATUTORY PROVISIONS

The Addendum contains relevant statutory provisions.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order requiring Duquesne to bargain with the Union. Duquesne challenges the Union's certification, arguing that the Board's *Pacific Lutheran* standard for determining whether to decline jurisdiction over self-identified religious colleges and universities is impermissible and because, even under that standard, it established that the Board should have declined to exert jurisdiction. The Board's findings in the representation and

unfair-labor-practice proceedings, and its conclusions and Order, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The University

Duquesne is a private university in Pittsburgh, Pennsylvania consisting of ten different schools, including the McAnulty College and Graduate School of Liberal Arts. (JA69; JA375-79.) Approximately, 6,500 undergraduate students and 3,000 graduate students attend Duquesne. (JA69; JA235.) Duquesne's faculty includes tenured professors, full-time non-tenured instructors, and adjunct professors. (JA69; JA768.)

Duquesne was founded in 1878 by Spiritans, who are members of the Congregation of the Holy Spirit, which is part of the Roman Catholic Church. (JA70; JA181.) Duquesne is organized as a nonprofit membership corporation. (JA70; JA375-79.) Under its Articles of Incorporation and Bylaws, only Spiritan priests can serve as its Members. (JA70; JA184, JA376, 384.) The Members appoint Duquesne's Board of Trustees, its President, and its officers and directors. (JA70; JA184-85, JA376.) The Members have authority to "determine or change the mission, the philosophy, objectives or purpose of the University." (JA70; JA386.) Duquesne is officially recognized as a Catholic university by the local Bishop and is listed as such in the *Official Catholic Directory*. (JA70; JA189,

JA405.) The Bishop, or the Bishop's designee, has an *ex officio* seat on Duquesne's Board of Trustees. (JA70; JA187, JA390.)

Duquesne's Mission Statement, which appears on its website and in documents including the student and faculty handbooks, reads:

Duquesne University of the Holy Spirit is a Catholic University founded by members of the Congregation of the Holy Spirit, the Spiritans, and sustained through a partnership of laity and religious. Duquesne serves God by serving students through:

- Commitment to excellence in liberal and professional education;
- Profound concern for moral and spiritual values;
- Maintaining an ecumenical atmosphere open to diversity;
- Service to the Church, the community, the nation, and the world;
- Attentiveness to global concerns.

(JA70; JA371.) Duquesne's website explains that Catholic universities are to contribute to the work of the Catholic Church through education and by uniting faith and reason. (JA70; JA1090-91.) According to Duquesne's 2013-14 Faculty Resource Guide, which is available on its website, "[a]s a Catholic University, Duquesne is dedicated to fostering an environment that invites, but does not conscript, participation in spiritual life." (JA71; JA1127.)

Duquesne disseminates its Mission and "Philosophy of Service to God through education" in its university magazine and other documents mailed out or made available on its public website. (JA71; JA238, JA576-600.) It discusses its philosophy at various events, including freshmen orientation sessions and speeches

at its graduation ceremonies. (JA71; JA216.) Duquesne holds an annual “Founders Week” that celebrates the Spiritan community through special events, during which other members of the congregation visit the campus. (JA71; JA208, JA444.)

Duquesne’s campus contains a Catholic chapel where Mass is held daily and on special occasions, including at the beginning of each academic year. (JA71; JA219.) Those religious ceremonies are advertised and open to students, faculty, and members of the public. (JA71; JA220.) On campus there is a large crucifix and other pieces of religious art and Catholic symbols, including statues of saints and the Virgin Mary, as well the University Seal, which is the symbol for the Holy Spirit. (JA71; JA199, 222-23, 239, JA446-55, 601-44.) Many campus buildings are named for Spiritan members. There are crucifixes in most classrooms and conference rooms. (JA71; JA223-24, 347.)

Duquesne requires that undergraduate students earn three credits in ethics’ courses and three credits in Theology. (JA71; JA294.) There are qualifying classes that emphasize the philosophical rather than religious aspect of those subjects. (JA71; JA294.)

B. The Faculty

In 2012, there were approximately 88 part-time adjunct professors employed in McAnulty College. (JA72; JA14.) Those adjuncts contract with Duquesne to

teach up to six credit hours each semester. (JA72; JA770, JA1109.) On average, adjunct faculty members teach just under half of student credit hours in core-curriculum subjects. (JA72; JA294.) They have no expectation of continued employment beyond the contracted-for semester. (JA72; JA1109.) Duquesne does not provide adjuncts with office space. (JA74.)

Duquesne hires adjuncts as the need for additional instructors arises, often at the last minute. (JA72; JA242-43, JA1109.) Duquesne does not always advertise vacancies. (JA72; JA245.) Although the University hires full-time faculty members through a specific application and interview process, adjunct faculty members are hired through a decentralized process by chairs of individual departments. (JA72; JA225, 240, JA1109.) While there is an application for adjunct employment, Duquesne does not require its use. (JA72; JA276, 279-80, 324, 344.) Some individuals submit unsolicited resumes, which creates a pool of available instructors. (JA72; JA245.) Duquesne does not ask applicants about their religious faith, or lack thereof, and does not require that they are Catholic or Christian or hold any religious belief. (JA72; JA752-53, Tr. 754, 325-26, 342-343.)

For instance, two adjunct professors who had taught at Duquesne for over six years were hired after submitting a resume in response to a newspaper ad and interviewing with their Department heads. (JA73; JA320, 323, 337, 338-340.)

Neither recalled any discussion about Duquesne's Catholic identity or mission during their interview. (JA73; JA323-24, 342-43.) Duquesne did not tell either adjunct that he would have to play a specific role in supporting the school's mission or philosophy as a condition of employment. (JA73-74; JA323-24, 342-44.)

The employment contracts between adjunct faculty members and Duquesne do not reference religious duties or Duquesne's Mission. (JA72; JA1109.) Nor do they set forth any role that adjuncts are expected to play in furthering Duquesne's Mission. (JA72; JA276, JA1109.) Adjunct faculty members are invited to attend nonmandatory functions throughout the year, including new-instructor orientation, convocation, and various campus events including Bible studies and mission trips. (JA72-3; JA236, 260-61, 334, 345-46.) One adjunct testified that he never attended an instructor orientation, convocation, bible study, or mission trip. (JA74; JA345-46.) His only activity at Duquesne is teaching one course, once a week; he has no other involvement in campus activities. (JA74; JA339.)

Duquesne has a "Part-time Faculty Mission Micro-Grant" program that provides grants of up to \$500 for approved projects that "scholarly, curricular and professional development opportunities that reflect Duquesne's mission and engage resources in Catholic intellectual tradition." (JA73; JA720-24, JA725-27.)

Adjuncts are eligible, but not required, to participate in that program. (JA73; JA317-18.)

One adjunct, who regularly taught two core courses in the English Department, included no religious or anti-religious content in either of his courses. (JA73; JA329.) He did not incorporate Catholicism into his teaching or his evaluation of students. (JA73; JA319-20, 329-30.) Duquesne did not tell him what to teach, though he submitted his syllabi to his Department head at the beginning of each semester. (JA73; JA329-30.) His syllabi did not reference Duquesne's mission or religious identity. (JA73-74; JA330.) The English courses he taught were no different than the ones he taught at a local community college. (JA74; JA319-20.) Another adjunct was allowed to design his own course. (JA74; JA349-50.) Early on in his career at Duquesne, he submitted his syllabi to his Department head, but stopped doing so regularly and no one approves his syllabi. (JA74; JA349-50.)

Students evaluate adjuncts' performance using forms that do not reference Catholicism, religion, God, the Spiritans, Duquesne's mission, or the adjunct's adherence to those issues. (JA74; JA1110-22.) One professor testified that a faculty observer has occasionally watched him teach, and provided feedback, but did not comment about religious content, or the lack thereof, or anything about Duquesne's mission or the adjunct's role in it. (JA74; JA330-31.) No student had

ever come to that professor for advice about spiritual development and no Duquesne representative had ever told him that consulting students concerning religious development was a part of his job duties. (JA74; JA332-33.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding

On May 14, 2012, the Union filed a petition to represent all part-time adjunct faculty employed by Duquesne in the McAnulty College and Graduate School of Liberal Arts. (JA353-56.) The Board conducted a mail-ballot election of the petitioned-for adjunct faculty members. The employees voted 50-9 in favor of union representation. (JA14.) Duquesne filed a motion asking the Board to order an evidentiary hearing, vacate the election, and dismiss the Union's petition, which the Union opposed. (JA357-69.)

While Duquesne's motion was pending, the Board issued its decision in *Pacific Lutheran*, announcing its new standard for determining whether to decline jurisdiction over self-identified religious colleges and universities. 361 NLRB 1404. Shortly thereafter, the Board remanded the Duquesne representation proceeding to the Regional Director to take further appropriate action consistent with *Pacific Lutheran*. (JA15.) A hearing officer conducted a hearing, and both parties filed briefs, to address whether the Board should decline jurisdiction based on the *Pacific Lutheran* standard. The Regional Director issued a decision finding that Duquesne is not exempt from the Board's jurisdiction. (JA68-80.)

Duquesne filed with the Board a request for review of that decision. A majority of the Board (Members Pearce and McFerran; then-Acting Chairman

Miscimarra dissenting) granted that request solely to exclude from the bargaining unit adjunct faculty members teaching in Duquesne's Department of Theology, finding that Duquesne holds those faculty members out as performing a specific role in maintaining its religious educational environment. (April 10, 2017 Order.)² The Regional Director certified the Union as the adjuncts' collective-bargaining representative. (JA142-43.)

B. The Unfair-Labor-Practice Proceeding

After the Union's certification, the Union asked Duquesne to bargain; Duquesne refused. (JA145, 146, 152.) Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and moved for summary judgment. (JA176.) Duquesne admitted that it refused to bargain but challenged the Board's assertion of jurisdiction. (JA176.) The Board ordered that the proceeding be transferred to itself and directed Duquesne to show cause why the motion should not be granted. (JA176.) Duquesne responded by contesting jurisdiction under *Catholic Bishop* and, for the first time, claiming that the Board's assertion of jurisdiction violated the Religious

² The dissent would have granted review, believing that there was a substantial issue regarding whether the Board lacks jurisdiction over the entire petitioned-for unit. (JA138-41.)

Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1 (2000). The Board granted the motion in its Decision and Order under review. (JA176.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On February 28, 2018, the Board (then-Chairman Kaplan, Members Pearce and Emanuel) issued a Decision and Order finding that Duquesne violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union. (JA177.) The Board found that all representation issues raised by Duquesne were or could have been litigated in the representation proceeding, and that Duquesne did not offer to adduce any newly discovered and previously unavailable evidence, or allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (JA176.) The Order directs Duquesne to cease and desist from refusing to recognize and bargain with the Union, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (JA177.) Affirmatively, the Order requires Duquesne to bargain with the Union on request over the petitioned-for adjuncts

terms and conditions of employment, embody any understanding that the parties reach in a written agreement, and post a remedial notice. (JA177.)

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The Court is not, however, "obligated to defer to an agency's interpretation of Supreme Court precedent." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

SUMMARY OF ARGUMENT

In *Pacific Lutheran*, the Board reexamined its standard for determining, in accordance with *Catholic Bishop*, when to decline jurisdiction over groups of faculty members employed by self-identified religious universities and colleges who seek union representation. The Board sought to avoid any impermissible inquiry that would implicate, as did its earlier tests, the guarantees of the First Amendment's Religion Clauses. At the same time, the Board sought to exercise its jurisdiction to the extent permissible, consistent with Congress's intent, and to meet its responsibility to protect employees' exercise of their rights under the Act.

To accommodate those issues, in *Pacific Lutheran* the Board announced that it will decline to assert jurisdiction over a group of university faculty members petitioning for union representation if the university establishes that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty members as performing a specific religious function. Those inquiries do not require or permit the Board to “troll through” a university’s beliefs or question how a university chooses to further its religious mission. *Pacific Lutheran*, 361 NLRB at 1412. Instead, a university must only establish, in the public representations it makes to students, faculty, or the public, that it is a religious body and that the petitioned-for faculty members play the “critical and unique” role in its religious educational environment that led the Court in *Catholic Bishop* to find that the Board could not assert jurisdiction over groups of parochial school teachers. 440 U.S. at 501. Those requirements, which are greatly circumscribed relative to the Board’s previously rejected standards, adhere to the teachings of *Catholic Bishop* and *Great Falls* and should be upheld.

Substantial evidence supports the Board’s findings that although Duquesne established that it holds *itself* out as creating a religious environment, it failed to establish that the petitioned-for part-time *adjunct faculty* members play a specific role in creating or maintaining that environment. Instead, it offered general and aspirational statements about the importance of faculty members in general. But

those statements do not establish that students, faculty, and the public would understand that Duquesne's adjuncts play a religious function at the school. Accordingly, the Board properly asserted jurisdiction over those faculty members. Because they voted to have the Union serve as their bargaining representative, Duquesne violated the Act by refusing to recognize and bargain upon the Union's request.

Finally, Duquesne maintains that the Board's conduct also violates the Religious Freedom Restoration Act. It failed, however, to litigate that issue before the Board in the representation proceeding that resulted in the Union's certification. As a result, the Court is precluded from reviewing that issue.

ARGUMENT

I. THE BOARD'S *PACIFIC LUTHERAN* STANDARD IS CONSISTENT WITH THE ACT AND DOES NOT RUN AFOUL OF THE FIRST AMENDMENT'S RELIGION CLAUSES, THE SUPREME COURT'S DECISION IN *CATHOLIC BISHOP*, OR THIS COURT'S DECISION IN *GREAT FALLS*

In *Pacific Lutheran*, the Board articulated a new test for determining when it will decline to assert jurisdiction over faculty members at self-identified religious colleges and universities. 361 NLRB 1404, 1404-14 (2014). The Board explained the need to ensure that its assertion of jurisdiction, and the test for deciding whether to do so, does not violate the Free Exercise Clause or the Establishment Clause of the First Amendment ("the Religion Clauses"). *Id.* at 1406. The Board

also adhered to the teachings of *Catholic Bishop*, in which the Supreme Court, emphasizing the “key role” played by teachers in church-operated schools, declined to construe the Act as providing jurisdiction over those teachers. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). And the Board remained cognizant of the need to avoid the risks of entanglement discussed by this Court in *Great Falls*, which included “refrain[ing] from trolling through a person’s or institution’s religious beliefs.” 278 F.3d at 1341-42 (internal quotation omitted). With these guidelines in mind, the Board sought to carry out its congressionally charged duty to vindicate employees’ “fundamental right” to engage in self-organization and collective bargaining. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

The result is a two-part test, drawn in part from this Court’s decision in *Great Falls*, which seeks to ensure, based solely on a university’s public representations, that a university is a bona-fide religious institution and that the petitioned-for faculty members play a specific role in creating or maintaining the university’s religious educational environment. *Pacific Lutheran*, 361 NLRB at 1404. If a university meets that test, it is exempt from the Board’s jurisdiction. *Id.* By limiting its inquiry to how a university holds out itself and its employees seeking to exercise the rights guaranteed to them in the Act, the Board avoids engaging in any intrusive examination of a university’s exercise of its religion,

thereby avoiding the pitfalls of its earlier attempts to delineate a standard for assessing when to assert jurisdiction over a religious university. In so doing, the Board seeks to exercise its “fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,” *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).

A. *Catholic Bishop* Instructs that a Jurisdictional Determination Should Focus on the Relationship between the Teacher and the Church

In *Catholic Bishop*, the Supreme Court held that the Board may not assert jurisdiction over teachers at parochial schools. 440 U.S. at 497-507. Engaging in a constitutional-avoidance analysis, the Court determined that “the Board’s exercise of jurisdiction in that circumstance would give rise to serious constitutional questions.” *Id.* at 501. It reached that decision after first reviewing its Establishment Clause jurisprudence involving aid to parochial schools, where it placed great emphasis on “the critical and unique role of the teacher in fulfilling the mission of a church-operated school.” *Id.* It explained that “[t]he key role played by teachers in ... a [church-operated] school system has been the predicate for [its] conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools.” *Id.* The Court reasoned that it could not “ignore the danger that a teacher under religious control and discipline poses to the separation

of the religious from the purely secular aspects of precollege education.” *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)).

In short, the Court focused on not only the nature of the institution, but also “the importance of the teacher’s function” at the institution, *id.* at 501, cautioning that the “church-teacher relationship in a church-operated school” cannot be ignored, *id.* at 504. The Court did not, however, set forth a test for determining in the future if a petitioned-for group of university faculty members is exempt from the Board’s jurisdiction. *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009).

B. *University of Great Falls* Criticized the Board’s Previous Jurisdictional Standard for Allowing a Constitutionally Impermissible Inquiry into a University’s Religious Beliefs

In the wake of *Catholic Bishop*, the Board sought to develop a framework for deciding whether to decline jurisdiction over university faculty members. In *Great Falls*, this Court rejected the Board’s post-*Catholic Bishop* standard, which had asked whether a religion-affiliated school had a “substantial religious character.” 278 F.3d at 1339-40. The Court found the Board’s inquiry was impermissibly intrusive, as it required the Board to “mak[e] determinations about [a university’s] religious mission, and that mission’s centrality to the [university’s] ‘primary purpose.’” *Id.* at 1342.

The Court concluded that *Catholic Bishop* and intervening decisions of the Supreme Court, which prohibit intrusive governmental inquiries into religious beliefs, “require[] a different approach.” *Id.* at 1343. It found useful a standard proposed by an amicus curiae that was drawn partially from the First Circuit’s decision in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 400 (1985) (evenly divided court refusing to enforce Board’s Order asserting jurisdiction over religious university that holds itself out as Catholic) (en banc). Under that proposal, the Court would exempt from the Board’s jurisdiction an institution that (1) “holds itself out to students, faculty and community as providing a religious educational environment”; (2) “is organized as a nonprofit”; and (3) “is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.” *Great Falls*, 278 F.3d at 1343 (citing *Bayamon*, 793 F.2d at 399-400, 403). The *Great Falls* Court adopted the first two prongs and explained that it need not “reach the full expanse” of the third prong given that the University of Great Falls was affiliated with the Catholic church. *Id.*

The Court found that approach avoids “constitutional infirmities” because it does not inquire into an institution’s “motives or beliefs,” question “the centrality of beliefs or how important the religious mission is to the institution,” or “ask[] how effectively the institution is at inculcating its beliefs....” *Id.* at 1344. Yet it

allows the Board to ensure that a university claiming an exemption is a “bona fide religious institution[.]” *Id.* The first prong’s “holds itself out” inquiry tests a university’s sincerity in claiming an exemption. That approach “serve[s] as a market check” because a university, by holding itself out publicly as a religious institution, “will no doubt attract some students and faculty” while dissuading others. *Id.* Further, the second prong’s non-profit requirement is consistent with the Supreme Court’s “distinction between non-profit institutions and profit-making businesses that may be owned by or affiliated with religious institutions.” *Id.*

C. The *Pacific Lutheran* Standard Vindicates the Section 7 Rights of Employees and Avoids Unconstitutional Entanglement

In passing the Act in 1935, Congress “declared [it] to be the policy of the United States” to protect the free flow of commerce “by encouraging ... collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing....” 29 U.S.C. § 151. Congress empowered the Board to prevent interference with those rights and entrusted it with “[t]he responsibility to adapt the Act to changing patterns of industrial life.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). In carrying out those responsibilities, the Board does not lightly decline jurisdiction over groups of employees and thereby deny them the Act’s protections. *See NLRB v. Reliance Fuel Co.*, 371 U.S. 224, 313 (1963) (noting the Supreme Court “has consistently declared” that “Congress intended to and did vest

in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.”)

In *Pacific Lutheran*, the Board was mindful not only of the Court’s criticism of its previous standard as expressed in *Great Falls*, but also of its duty to assert the broad jurisdiction entrusted to it by Congress. Attentive to these principles, and concerned with the real possibility that employees serving only a secular function could be denied the Act’s protection, the Board created a two-part standard that avoids an intrusive inquiry into an institution’s religiosity without going “too far in subordinating” employees’ NLRA rights. See *Pacific Lutheran*, 361 NLRB at 1409. That standard adopts and applies the *Great Falls* “holding out” inquiry to both the university and the petitioned-for faculty, avoiding the potential entanglement with a university’s religious beliefs that a more intrusive inquiry can cause while following the Supreme Court’s instruction to examine the role a teacher plays at the school.

- 1. The first step of the *Pacific Lutheran* standard avoids an intrusive governmental inquiry by adopting the *Great Falls* requirement that a university must hold itself out as providing a religious educational environment**

The first step in deciding whether to decline jurisdiction is to determine whether religious rights are even implicated. *Id.* at 1409. To do so, the Board adopted the first prong of the *Great Falls* test, which seeks to corroborate a university’s claim that it is an exempt religious institution by reviewing whether it

“holds itself out to students, faculty, and community as providing a religious educational environment.” *Id.* (quoting *Great Falls*, 278 F.3d at 1343). That can be shown through materials such as handbooks, mission statements, corporate documents, course catalogs, and documents published on a university’s website. *Id.* That inquiry does not delve into a university’s religious character, question the sincerity of a university’s religious beliefs, or otherwise impose a heavy burden on the institution seeking an exemption. *Id.* This prong, as the Court explained in *Great Falls*, “avoids asking how effective the institution is at inculcating its beliefs, an irrelevant inquiry that permeate[d] [prior Board jurisdictional tests.]” *Id.* at 1407 (quoting *Great Falls*, 278 F.3d at 1343).

The Board set forth several principles that would guide its analysis of how a university holds itself out. It explained that a university’s “contemporary presentation” of itself is likely to be more productive than founding documents and historical tradition. *Id.* at 1409. And in determining whether an institution is exempt, the Board will “err on the side of being overinclusive....” *Id.* at 1410 (quoting *Great Falls*, 278 F.3d at 1343).

Neither Duquesne nor Amicus challenge the Board’s adoption of this prong. Duquesne does, however, unjustly criticize the Board for not adopting the *Great Falls* standard in its entirety. Duquesne’s criticism ignores that the Board reasonably defended and explained that decision and that the Board did not

outright reject the remaining *Great Falls* prongs, but instead found a place for them in its new standard. The Board properly recognized that the second prong of the *Great Falls* approach – an entity’s nonprofit status – provided an objective way of differentiating between a church’s religious mission and profit-making ventures. The Board’s new test does not treat that as a separate requirement but rather a consideration relevant to how a university holds itself out. *Id.*³

Similarly, the Board reasonably determined that it was unnecessary to adopt the third prong of *Great Falls* requiring that an institution be “affiliated with ... a recognized religious organization” or similar entity, which as discussed (p. 22), the Court never fully endorsed. *Id.* at 1410. The Board explained that it would consider such affiliation, but not require it because that might amount to denominational preference by exempting only institutions affiliated with certain religious groups while denying the exemption to interdenominational or nondenominational institutions. *Id.* That would violate the fundamental Establishment Clause principle “that one religious denomination cannot be officially preferred over another.” *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Thus, Duquesne wrongly condemns the Board’s determination to

³ Factoring-in nonprofit status, while not making it a requirement, is consistent with the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, where the Supreme Court found that just as nonprofit corporations may further individual religious freedom, so too may for-profit corporations. 134 S. Ct. 2751, 2769 (2014).

forgo part of *Great Falls* and to instead develop a standard that respects both the First Amendment and the Board's broad jurisdiction.⁴

2. Requiring a university to hold out its petitioned-for faculty members as performing a religious function ensures that faculty who are indistinguishable from their counterparts at nonreligious schools are not unnecessarily denied their Section 7 rights

If a university establishes, as a threshold requirement, that it holds itself out as providing a religious educational environment, therefore implicating potential constitutional concerns, the Board then looks to whether the university holds out the petitioned-for faculty members as performing a specific role in creating and maintaining that environment. *Pacific Lutheran*, 361 NLRB at 1410. The Board reasonably found that this Court's rationale for examining how a university holds itself out extends to consideration of how it holds out its faculty members. *Id.* at 1412. Just as the holding out principle "helps to ensure that the exemption is not given to wholly secular institutions," it also helps ensure that the exemption does not apply to "wholly secular" faculty members and thereby deprive them of the Act's protections. *Great Falls*, 279 F.3d at 1344. Similarly, both considerations serve as a "market check," for a university's decision to hold itself out as a

⁴ The Board had no occasion to address the Court's *Great Falls* standard until it issued *Pacific Lutheran*. While the D.C. Circuit reaffirmed its *Great Falls* rationale in *Carroll College*, in that case the college did not argue to the Board that it was exempt under *Catholic Bishop*; it raised that issue for the first time before this Court. 558 F.3d at 570-71.

religious institution, and to hold out its faculty members as serving a specific religious function, will come at a cost, as they may attract some potential students and faculty applicants but dissuade others from applying to attend or teach at the school. *Pacific Lutheran*, 361 NLRB at 1412 (discussing *Great Falls*, 278 F.3d at 1344). The focus of the inquiry is therefore “whether a reasonable prospective applicant would conclude that performance of their faculty responsibilities would require furtherance of the university’s religious mission.” *Id.*

The Board’s focus on the faculty is consistent with *Catholic Bishop*, where, as discussed above (p. 19-20), the Supreme Court placed great emphasis on the school-teacher relationship, rather than on only the nature of the institution. Amicus is therefore wrong in claiming (Amicus Br. 10) that the Board’s inquiry must begin and end with determining whether it can assert jurisdiction over an institution as a whole. Likewise, Amicus goes too far with its claim – which has no support in the record – that adjuncts, “whether they even acknowledge it[], directly advance the Church’s evangelistic witness” (Br. 18), and have “some intrinsically religious responsibility” (Br. 20). That claim requests essentially a per se exemption for any individual who stands in front of a classroom, which goes too far in subordinating employees’ labor rights. Moreover, asserting jurisdiction over faculty members performing wholly secular functions is consistent with the Board’s assertion of jurisdiction over non-teacher employees at religious

institutions. *Pacific Lutheran*, 361 NLRB at 1411 n.11 (listing cases). Thus, the Board's application of the *Great Falls* holding out requirement to faculty is faithful to *Catholic Bishop's* instruction to recognize the teacher's role in fulfilling a church-operated school's mission, 440 U.S. at 501, and ensures that Section 7 rights are enjoyed by faculty who are filling an entirely secular role. *Pacific Lutheran*, 361 NLRB at 1412.

Application of the "holding out" requirement to faculty also avoids past mistakes made in the Board's previous standards for determining when to assert jurisdiction over religious-affiliated universities. In marked contrast to *Pacific Lutheran's* limited "holding out" inquiry, the Board's previous standard "consider[ed] such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Univ. of Great Falls*, 331 NLRB 1663, 1664-65 (2000). The critical element of the *Pacific Lutheran* standard, which avoids potential entanglement, is that the Board is only looking at Duquesne's own public representations about the role played by its petitioned-for faculty members. The holding out requirement, as this Court has recognized, eliminates any need to "troll[] through [Duquesne]'s religious beliefs." *Great Falls*, 278 F.3d at 1341-42 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). The

Board has explained that, under its limited inquiry, it will not examine the actual functions performed by employees or the university's actual beliefs and will not seek to determine whether and how the university is fulfilling its religious mission. *Pacific Lutheran*, 361 NLRB at 1411. Put another way, it will not question whether the school is "sufficiently religious," as Duquesne and Amicus claim at length.⁵ See Duquesne Br. 3, 4, 33, 37; Amicus Br. 2, 6, 9, 11, 23.

The Board's general parameters for this analysis establishes the limited and non-intrusive nature of its inquiry. At the outset, the Board will take a university's public representations about its faculty members at face value, although it will consider additional evidence presented by the parties that is relevant to demonstrating whether faculty members perform a religious function. *Id.* at 1412 & n.13. The Board also explained that general or aspirational statements that faculty members are expected to, for example, support the goals or mission of the university, without specificity as to how that affects their job functions, will not suffice. *Id.* at 1412. The University must instead show, through its public representations, that faculty plays a religious role, rather than a role that any faculty member would be expected to fulfill at any university. *Id.* The Board will

⁵ The "holding out" inquiry – which eliminates any need to dig deeper into an institution's public representations – thus sets this case apart from those cited by Amicus (Amicus Br. 13 n.2), which did not involve a similarly limited inquiry, but instead examined inquiries that could potentially lead to impermissible "trolling through" religious beliefs.

thus decline jurisdiction if the evidence shows that faculty members serve a religious function, which can be demonstrated, for example, by integrating religious teaching into coursework, serving as religious advisors, propagating religious tenets, or engaging in religious indoctrination or training. *Id.* at 1412. Likewise, it will decline jurisdiction if the university's representations show, for instance, that it requires "faculty to conform to religious doctrines or to particular tenets or beliefs in a manner that is specifically linked to their duties as faculty members." *Id.* In short, the Board will not question a university's good faith or otherwise second guess its statements, thereby avoiding the type of intrusive inquiry that was fatal to the Board's earlier standard.⁶ *Id.* at 1412-13.

The *Pacific Lutheran* standard does not require line drawing between religious and secular activities, nor does it give the Board, as Amicus argues (Amicus Br. 12), "the power to decide what does and does not advance a school's 'religious purpose or mission.'" The Board will leave those determinations for a

⁶ Amicus argues that the *Pacific Lutheran* standard "deem[s] a school's 'religious purpose or mission' advanced only by those things that the Board itself considers 'religious,'" which includes, as listed above, "integrating religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training." Amicus Br. 11-12 (quoting *Pacific Lutheran*, 361 NLRB at 1412). But Amicus overreads the Board's decision, which provided those tasks as possible *examples* of the religious functions that a faculty member could serve; the list was not exhaustive or exclusive. Nor were those listed tasks meant, as Amicus suggests (Amicus Br. 11), to require that a university hold out faculty members as having an "overtly and identifiably 'religious' function."

university to answer through its public representations, and decline jurisdiction if those representations establish that petitioned-for employees play a specific role in creating or maintaining its religious environment. While that requires more than general or aspirational assertions, it does not require a university to prove, or invite the Board to ask, how that religious function specifically advances the university's religious mission or beliefs.

In addressing certain public representations, the Board explained that a university's representation pledging commitment to diversity and academic freedom puts forth the message that religion has no bearing on faculty members' job duties or responsibilities. *Pacific Lutheran*, 361 NLRB at 1411. Duquesne challenges (Br. 36) the Board's treatment of that representation as running afoul of this Court's statement in *Great Falls* that the *Catholic Bishop* exemption cannot be limited to schools that "have no academic freedom." 278 F.3d at 1346. But Duquesne overlooks the Board's accompanying explanation that by extolling academic freedom, a university is requiring "members to comply with norms shared by both a religion and wider society," and is calling on faculty to fill a role that it "would be expected to fill at virtually all universities." *Pacific Lutheran*, 361 NLRB at 411-12. Imposing a norm shared by wider society militates against finding that faculty members are held out as performing any specific religious role.

The Board's test does not, as Duquesne (p. 32) and Amicus (Amicus Br. 19, 22) claim, require that a university engage in hard-nosed proselytizing or promote its religious beliefs with an iron fist. Indeed, the Board explicitly considered and rejected any such requirement. *Pacific Lutheran*, 361 NLRB at 1412, n.14, 1413. Duquesne may further its mission with a velvet glove or in any manner it chooses. But if petitioned-for faculty members play a specific role in maintaining its religious environment, it is not unduly intrusive to ask the university to point to some public representation of that role before denying employees their fundamental labor rights.

Finally, as the Board pointed out, its inquiry examining how a university holds out its faculty members finds support in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). *Pacific Lutheran*, 361 NLRB at 1413. There, the Court reviewed the permissible scope of inquiry into whether an employee of a religious organization was entitled to the nonstatutory "ministerial exception," grounded in the First Amendment's Religion Clauses, which would bar suit under the American with Disabilities Act. In finding that the exception applied, the Court took into account the fact that the employer "held [the employee] out as a minister," *Hosanna-Tabor*, 565 U.S. at 191, and examined the specific "religious functions she performed for the Church," *id.* at 192. While the Court declined to adopt a "rigid formula" for

deciding when an employee qualifies as a minister, *id.* at 190, it considered factors including the employee’s religious training and the job duties she performed, which “reflected a role in conveying the church’s message and carrying out its mission.” *Id.* at 191-92; *see also, id.* at 198 (Alito, J., concurrence) (in assessing ministerial exception, “courts should focus on the function performed by persons who work for religious bodies”). The Board’s inquiry here does the same.⁷

3. The Board did not engage in an intrusive inquiry during the representation hearing

Duquesne claims that the Board’s test creates religious entanglement because “the Board inevitably must troll through the beliefs of the University and make determinations about its religious mission.” (Br. 37 (cleaned up).) To illustrate its point, it asserts (Br. 39) that the Hearing Officer who presided over the representation hearing “allowed precisely the types of intrusive and entangling questions that have repeatedly troubled courts.” The record does not, however, bear that out. For instance, Duquesne suggests it was improper for the Union to ask a Duquesne official about Pope Francis’s public statements recognizing the “Italian Union of Educators.” But, when the Union attempted to delve further and ask how that statement affected Duquesne’s mission, the hearing officer sustained

⁷ Duquesne’s suggestion (Br. 29) that the Court only considered those factors to show that its determination that the employer was a minister “was not a close call” finds no support in the decision.

Duquesne's objection on relevance grounds. (JA229.) Likewise, the Union's asking an official how an atheist teaching a class on planets could contribute to Duquesne's religious mission was a reasonable follow-up question to the witness's testimony that "a course can participate in the religious mission of the university, even if it's not a theology course." (JA315.) The Union's question (JA295-96) asking an official how Duquesne defines the term "ecumenical" was likewise reasonable because, as Duquesne establishes throughout its brief (pp. 11, 16, 32, 37, 49), that term appears in Duquesne's mission and faculty handbook, and in the church's guidelines set forth in *Ex Corde Ecclesiae*. See Br. 39. Asking for a definition of a frequently used term is different from inquiring, for instance, into why a university would consider certain activities to be ecumenical. Moreover, when the Union asked a different official whether he agreed that the definition provided was "a fair statement of that philosophy," the hearing officer sustained Duquesne's objection, explaining that the Union "shouldn't be going into the underlying nature of religion, and how [Duquesne] practices religion, in th[e] hearing." (JA303.)

Amicus complains (Amicus Br. 12) that the Hearing Officer should have allowed a Duquesne official to interpret the faculty handbook during his testimony. But precluding a witness from going behind Duquesne's public representations, in order to offer a subjective interpretation of policy, is precisely how the *Pacific*

Lutheran standard appropriately avoids the type of intrusive inquiry that is forbidden under *Catholic Bishop* specifically and under First Amendment jurisprudence generally.

Moreover, the record is replete with additional instances in which, standing by the critical “holding out” inquiry, the Hearing Officer sustained objections to intrusive questions from both parties. For example, the Hearing Officer (JA214) prohibited Duquesne’s counsel from asking one of its own witnesses whether the Bishop of the Catholic Diocese of Pittsburgh impacts Duquesne’s curriculum. And the Hearing Officer (JA281-82) prohibited union counsel from asking on cross examination whether an official would have concerns if a Muslim student complained that an adjunct was purposefully disrespectful of Islamic faith in class. In short, Duquesne is wrong to assert that there is anything “inevitably” (Br. 37) or “inherent[ly]” (Br. 40) improper about inquiring into how a college or university holds out its faculty members.

In sum, the Board’s *Pacific Lutheran* inquiry, by accepting at face value a university’s own representations, does not subject a university to any intrusive inquiry. Indeed, the Board’s exclusion of Duquesne’s Theology Department from the unit demonstrates the limited nature of the Board’s inquiry. The Board based that exclusion on Duquesne’s public representations demonstrating that department’s specific role in maintaining Duquesne’s religious environment, and

the Board made no intrusive inquiry, examining only “the University’s presentation of those courses to the faculty, students and public at large.” (JA138 n.1.)

4. Entanglement is not inevitable once the Board exercises jurisdiction

Pacific Lutheran also ensures that the Board will avoid entanglement when, after determining that it has jurisdiction over a religiously-affiliated university, it acts to exercise that jurisdiction. Duquesne speculates that the Board’s exercise of jurisdiction inevitably will cause improper entanglement because “impermissible issues will inevitably arise in the process of collective bargaining” (Br. 41), and “as a result of adverse employment actions” (Br. 43). But as explained in *Pacific Lutheran*, the Board’s finding that a university does not hold out faculty members as performing a religious function minimizes any concern that the Board’s adjudications of disputes will implicate sensitive First Amendment concerns. 361 NLRB at 1413. Moreover, arguments that future Board action could implicate the University’s religious mission are premised on a misunderstanding of the Act.

a. The Board’s adjudication of collective-bargaining disputes will not entangle the Board in a university’s religious mission

Although Congress has conferred on the Board the authority to resolve certain bargaining disputes, it does not follow that doing so with respect to a

religious university will “inevitably” entangle the Board in the university’s religious mission. Under the Act, an employer is not obligated to agree to any bargaining proposals. The duty to bargain is fulfilled when parties “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). That obligation “*does not compel either party to agree to a proposal or require the making of a concession.*” *Id.* (emphasis added). Rather, the Act “is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.” *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 401-02 (1952). Accordingly, although Duquesne is required to come to the bargaining table and discuss mandatory terms and conditions of employment in good faith, it cannot be obligated to agree to any specific bargaining proposals.

Duquesne expresses concern (Br. 41) that mandatory bargaining subjects may include many topics that relate to its ability to carry out its mission, including wages and hours; hiring, discipline, and termination criteria; the faculty evaluation process; eligibility for research grants, and dress codes. But it offers no explanation as to how bargaining over those subjects with respect to adjuncts, who have no specific role in maintaining a religious environment, is more problematic than its obligation to bargain over those subjects with unions representing its non-teaching employees. *See* Br. 2 (conceding that “Consistent with Catholic

teachings, Duquesne collectively bargains with unions representing non-faculty staff”).

Duquesne speculates (Br. 41-42) that if it unilaterally takes certain actions, such as requiring that faculty members include religious requirements in curriculum, pledge to incorporate Duquesne’s religious mission into coursework, integrate mission-related elements in syllabi, or attend orientation sessions, or if it refuses to bargain over such actions, it may be subject to unfair-labor-practice charges. But the Board’s *Pacific Lutheran* standard answers that concern because it makes clear that it will decline jurisdiction over a dispute that “require[s] or permit[s] [it] to decide any issues of religious doctrine.” 261 NLRB at 1413 n.19. Thus, if Duquesne represents that a bargaining topic is a matter of religious principle, the Board will not question that assertion.

Moreover, if Duquesne wishes to modify adjuncts’ terms and conditions of employment so as to impose religious-based requirements, such changes may alter the Board’s analysis regarding how Duquesne holds out those adjuncts. The Board may find that they, like the adjuncts in Duquesne’s Department of Theology, should be exempted from the Board’s jurisdiction because they perform a specific role in maintaining Duquesne’s religious educational environment.

Duquesne also expresses concern (Br. 43) that employees could strike or engage in other activity to force Duquesne to “capitulate” on undefined “mission-

related issues.” But again, neither the Union nor the Board could compel Duquesne to agree to objectionable proposals, and Duquesne could permanently replace employees who strike in an effort to obtain favorable terms and conditions of employment. *See Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1137 (D.C. Cir. 2015). The fact that faculty members, in the exercise of their Section 7 rights, could engage in a work stoppage is not reason to deny them the Act’s protections. *See NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 489 (1960) (good-faith bargaining and “the availability of economic pressure ... exist side by side”).

b. The Board’s authority to adjudicate unfair labor practices involving adverse employment actions will not cause entanglement

Duquesne also maintains (Br. 43-46) that impermissible issues could arise from unfair-labor-practice charges challenging adverse-employment actions that a university takes for religious reasons. As discussed, if adjuncts are not held out as creating or maintaining a university’s religious environment, adjudicating unfair-labor-practice charges brought by them or on their behalf is no different than adjudicating charges brought by or for nonteaching staff.

Putting aside that fact, Duquesne’s challenge to the Board’s exercise of jurisdiction over disputes arising out of adverse employment actions ignores the express limitation that *Pacific Lutheran* places on the Board. Specifically, the test forbids the Board from deciding “any issues of religious doctrine.” *Pacific*

Lutheran, 361 NLRB at 1413 n.19. As the Board explained, it “will decline jurisdiction” over the petitioned-for group “so long as the university’s public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations.” *Id.* For instance, the Board agreed that it would decline jurisdiction over a group of faculty members if they “accepted ecclesiastical sources of dispute resolution or waive the right to dispute resolution in any other forum as a condition of employment.” *Id.*

Even if the Board asserts jurisdiction over the petitioned-for group, and Duquesne raises a religious-based defense to a particular adverse-employment action, the Board would not decide any religious-based issue. For instance, if Duquesne dismisses an adjunct for taking a position hostile to the university’s religious beliefs, the Board’s standard would lead it to decline jurisdiction over that dispute so long as Duquesne’s public representations indicate that adjuncts, “as a term and condition of employment,” were expected to comply with, or not contravene, those beliefs. *Id.*⁸ In other words, it would not question the sincerity

⁸ The Provost testified that Duquesne “forbids adjunct faculty from being ‘hostile’ to its religious mission,” and Duquesne posits that its enforcement of that “hostility” line could risk an unfair-labor-practice charge. (Br. 44-45.) But Duquesne does not point to any public representation establishing that requirement as an express term and condition of the adjuncts’ employment. Notably, the faculty handbook provision establishing discipline for misconduct is applicable only to *faculty* members, requiring the forfeiture of *tenure* for “[m]isconduct or for [i]ncompetence.” (JA776 n.2.) Duquesne has pointed to no similar provision

of Duquesne’s religious-based defense. While the Board would, under that schema, need to investigate an adverse action in order to determine whether to assert jurisdiction, that conduct would not risk undue entanglement. As the Supreme Court explained in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, a governmental agency “violates no constitutional rights by merely investigating the circumstances of [a] discharge ... if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.” 477 U.S. 619, 628 (1986). The Court noted that “[e]ven religious schools cannot claim to be wholly free from some state regulation.” *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

The Board’s agreement not to assert jurisdiction over disputes that would require the Board to decide issues of religious doctrine eliminates Duquesne’s concern (Br. 43-44) that “the Board and the courts will necessarily be called upon to adjudicate the good faith of the university’s religious justifications for [taking a] challenged employment action.” *See also* Amicus Br. 13 (speculating that Board will “insert itself into ... sensitive areas ... [which] would run counter to the whole thrust of the Religious Clauses”). And while the Board will not decline jurisdiction generally based on a university’s “[g]eneralized statements that faculty

applicable to *adjuncts*, undermining any suggestion (Br. 17, 45, 49, 50) that adjuncts are subject to the same terms.

members are expected to, for example, support the goals or mission of the university,” *Pacific Lutheran*, 361 NLRB at 1411, that does not mean, as Duquesne suggests (Br. 44-45), that the Board will necessarily assert jurisdiction over a university’s enforcement of that requirement if the enforcement involves a matter of religious doctrine. Nor will the Board, as Duquesne speculates (Br. 44), “second-guess whether [a] university acted in the good faith pursuit of its religious mission.”

In conclusion, the *Pacific Lutheran* standard acknowledges that the Board must give a wide berth when issues implicating religious beliefs arise, and that it “must not impinge on a university’s religious rights and must avoid the type of intrusive inquiry forbidden by *Catholic Bishop*.” 361 NLRB at 1408. Yet while recognizing the privileged status that the Religion Clauses hold, the Board seeks to ensure that it does not “needlessly impair employees’ rights.” *Id.* By focusing only on how a university holds out itself and its petitioned-for faculty members, and agreeing not to assert jurisdiction over disputes that turn on religious doctrine, the *Pacific Lutheran* standard serves both purposes.

II. DUQUESNE IS NOT EXEMPT FROM THE BOARD'S JURISDICTION

The Board properly asserted jurisdiction over Duquesne and certified the Union, rendering Duquesne's refusal to bargain a violation of Section 8(a)(5) and (1) of the Act.⁹ Substantial evidence supports the Board's finding that, under *Pacific Lutheran*, Duquesne failed to establish that it is exempt from the Board's jurisdiction. Moreover, Duquesne's failure to raise its RFRA challenge to the Board's jurisdiction during the representation proceeding precludes the Court from considering that issue.

A. Duquesne Does Not Hold Out the Petitioned-For Adjunct Faculty Members as Performing a Religious Function

It is undisputed that Duquesne met the threshold inquiry of establishing the first *Pacific Lutheran* prong – that it holds itself out as providing a religious educational environment. As the Board explained (JA77), Duquesne introduced voluminous evidence establishing that fact, and adjuncts would certainly be aware of Duquesne's religious environment. As to the second prong, however, the Board found that “there is scant evidence that adjuncts are expected to act in any way to advance [Duquesne]'s religious message or to do anything with regard to it, other

⁹ An employer violates Section 8(a)(5) of the Act by “refus[ing] to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). A refusal to bargain in violation of Section 8(a)(5) derivatively violates Section 8(a)(1), 29 U.S.C. § 158(a)(1). See *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

than to not be openly hostile to it.” (JA77.) Substantial evidence thus supports the Board’s finding that Duquesne failed to establish that it holds out the petitioned-for adjunct faculty members as performing a religious function.

The record fails to show that “a reasonable prospective employment applicant ‘would conclude that performance of their faculty responsibilities would require furtherance of [Duquesne]’s religious mission.’” (JA76 (quoting *Pacific Lutheran*, 361 NLRB at 1412).) Duquesne introduced a good deal of evidence concerning its hiring process for full-time faculty members. The record reveals, however, that those procedures are not used for hiring adjuncts. Rather, Duquesne uses a decentralized system in which individual department chairpersons are in charge of hiring. The record contains no evidence from department chairs regarding how hiring is accomplished and what information is communicated to applicants. (JA72.) What it does show is that while Duquesne has an application for adjuncts, which includes a question on how an applicant “would support and contribute to the University Mission,” it is seldom used. Instead, individuals submitted unsolicited resumes that create a pool of available instructors. (JA72.)

Duquesne has pointed to no public representations indicating that successful candidates are expected to support, or even be knowledgeable about, Duquesne’s religious environment. (JA77.) It rarely advertised job vacancies, showing only one instance in which it did so between 2012 and the 2015 hearing. That

advertisement identified Duquesne as a Catholic university but did not reference any role that the successful applicant would play in furthering Duquesne's religious identity. (JA72, 77.)

The same is true once Duquesne hires an adjunct faculty member. Those adjuncts, as the Board found (JA77), would be aware of Duquesne's religious environment, but awareness is not the equivalent of creating and maintaining that environment. (JA77.) There is record evidence that faculty members, in a broad sense, may be charged with certain responsibilities for contributing to Duquesne's religious environment, but the record contains no representations that adjuncts in fact have any such responsibilities. (JA77.) The failure to draw that connection is critical, for the record provides ample evidence that adjuncts, who have only semester-long contracts containing no fringe benefits and no expectation of continued employment, lack the same standing as full-time, tenured and tenure-track faculty members. (JA73.)

Duquesne's other materials made available to adjuncts likewise provide no support for finding that Duquesne holds out adjuncts as performing a religious function; none suggest that they are expected to serve as religious advisors to students, engage in religious training, educate students about religion, or conform to tenets of Catholicism in the course of their teaching duties. There is no mention in their employment contracts or elsewhere that they hold religious responsibilities.

(JA77-78.) Adjuncts are not evaluated on the basis of any religious functions.

(JA78.) Duquesne makes no claim on its website or in its publications that adjuncts play any role in contributing to Duquesne's mission or religious environment. (JA77.) Simply put, Duquesne never informs adjuncts that they are charged with any religious duties. (JA77-78.)

There is no merit to Duquesne's assertion that it has "put forth substantial evidence that it holds out its adjunct faculty as playing an integral role in carrying out its religious mission." (Br. 46 (citing Br. 8-18).) A review of the evidence cited reveals that Duquesne holds *itself* out as an institution, but there is "scant evidence" showing how Duquesne holds out its adjunct faculty members. (JA77.) For instance, the Board, in assessing the threshold "holds itself out" question (JA76-77), accounts for the religious art and symbols throughout campus (discussed by Duquesne at Br. 8-9), the Bible study groups, service projects, and availability of mission work (Br. 9), and its orientations, convocations, and celebrations that emphasize its religious mission (Br. 9). Likewise, the Catholic doctrine that Duquesne (Br. 10-11) delved into during the hearing and throughout its brief, including its discussion of the *Ex Corde Ecclesiae* (Br. 10-11), establishes

its institutional philosophy and objectives. But those materials do not indicate what, if any, specific religious function adjuncts carry out.¹⁰

Duquesne places emphasis (Br. 11) on the “General Goals and Student Learning Outcomes” of its “Core Curriculum,” but quotes the only 2 enumerated goals that mention religion while ignoring the ten others that do not.¹¹ It suggests that because adjuncts teach some Core Curriculum credit hours, they are advancing those two listed goals, but it fails to point to any representations indicating that the adjuncts are expected to do so. *See also* Amicus Br. 21. And although Duquesne may attempt now to draw a connection between its mission and the many

¹⁰ Amicus also devotes considerable portions of its brief to inviting the Court to engage in the same type of intrusive inquiry that it insists the Board’s standard requires. Rather than point to evidence of how Duquesne holds out its adjunct faculty members, it delves into Catholic doctrine to explain that the church supports workers’ labor rights, just not the Board’s assertion of jurisdiction (Amicus Br. 4-6), and it details the church’s educational philosophy (pp. 15-20). The Court should resist Amicus’ invitation to inquire into the tenets of Catholicism, as such an intrusive inquiry has no place in the Board’s analysis.

¹¹ Duquesne points to the goals of ensuring students are able to “(5) Explain how religion can inform personal, societal, and professional life through study of and reflection on theological sources and questions”; and “(8) Identify some of the unique perspectives provided by faith and reason in the pursuit of truth.” However, among the many other goals are ensuring that “students are able to (1) Demonstrate critical, creative, and constructive thinking and communication – written and verbal – informed by the humanities and the social and natural sciences; (2) Recognize the diverse ways of knowing intrinsic to the intellectual disciplines and some significant ways in which they foster self-growth, broader understanding, and self-initiated learning; and (3) Demonstrate literacy and problem-solving ability in quantitative, qualitative, and scientific analysis.” JA1090-91.

enumerated goals that do not mention religion, it has not shown how it represents to prospective and current adjuncts or students that adjuncts play a specific role in drawing those connections. Similarly, Duquesne has not established, through its public representations, its claim (Br. 12) that adjunct faculty members are responsible for promoting students' "Ethical, Moral, and Spiritual Development," and achieving other performance outcomes that Duquesne links to its mission. The assertion that they have such responsibilities is undermined by Duquesne's decentralized hiring process, its lack of review of course syllabi, and the testimony that at least one adjunct teaches the same courses at Duquesne as he teaches at secular schools.

Moreover, Duquesne's statement that adjunct applicants are expected to support its religious mission in order to be hired does not show that those employees, once hired, play a specific role in furthering or maintaining that mission. Duquesne suggests (Br. 49) that it may take an adverse action against an adjunct faculty member for breaching that expectation (although there is no evidence that has ever happened). However, as discussed above (pp. 40-41), the Board has explained that it would not assert jurisdiction over any unfair-labor-practice-charges filed in response to that adverse action if the University's public representations indicated that adjuncts must comply with, or not contravene,

certain tenets as a term and condition of employment. *Pacific Lutheran*, 361 NLRB at 1413 n.19.¹²

Nor does Duquesne's additional evidence (Br. 37) establish how Duquesne holds out its adjuncts. It cites (Br. 16-17, 37) the Faculty Handbook, which defines academic freedom as "subject to the principles and values expressed in" Duquesne's mission, but does not address the Board's explanation that "[g]eneralized statements that faculty members are expected to, ... support the goals or mission of the university are not alone sufficient" to establish that those faculty members are held out as performing a specific religious function, *Pacific*

¹² Duquesne (Br. 49-50) relies on a Regional Director's decision declining to exercise jurisdiction in *Carroll College*, No. 19-RC-165133 (Jan. 19, 2016), available at <http://apps.nlr.gov/link/document.aspx/09031d4581f95787> (last visited Sep. 17, 2018). There, the Regional Director, applying *Pacific Lutheran*, found that the college held out faculty as performing a specific religious function because a faculty handbook stated the college may discharge faculty members for serious cause, including "continued serious disrespect for the Catholic character or mission" of the college. *Id.* slip op. at 12-13. But that decision has no precedential value because the Board denied a request to review the decision in an unpublished order. *Carroll Coll.*, 19-RC-165133, 2016 WL 3014420, at *1 (May 25, 2016). "[T]he Board did not effectively make the regional director's decision its own, which would have required the Board to *grant* review and then to *adopt* the decision," *Watkins Sec. Agency of DC, Inc.*, 357 NLRB 2337, 2338 (2012) (emphasis in original), nor did it publish its decision, *Associated Charter Bus Co.*, 261 NLRB 448, 450 n.7 (1982) (*unpublished* decision affirming regional director's decision after grant of review has "no binding precedential value"). And, in any event, unlike *Carroll College*, Duquesne's handbook provides for termination of *tenured*, not adjunct, faculty for "Serious Misconduct," including "failure to observe the principles" of Duquesne's mission statement (JA776 n.2). Duquesne points to no equivalent provision applicable to *adjunct* faculty.

Lutheran, 361 NLRB at 1411. Likewise, it explains (Br. 16, 37) that under the Faculty Handbook, all faculty members, including adjuncts, are expected to “respect the religious and ecumenical orientation of the University,” but fails to recognize that agreeing *to respect* Duquesne’s religious environment is not the same as *playing a specific role* in creating or maintaining it. And the handbook does not, as the Board points out (JA77), mention religion in connection with adjunct duties. Duquesne suggests (Br. 16) that under the Faculty Handbook, adjunct faculty are expected to “subscribe to the teachings of the Roman Catholic Church,” but the context of that quotation (JA760) and Duquesne’s admission that adjuncts are not required to be Catholic, demonstrates that the cited portion of the handbook refers to Duquesne as an institution, not to adjuncts.

Duquesne also discusses (Br. 15, 37) the “Faculty and Staff Expectations” wallet card distributed at orientation, which includes the expectations that adjunct faculty “[a]ccept and commit to the values expressed in the mission statement” and “strive to incorporate [Spiritan values] into [their] daily work.” However, Duquesne does not require that adjuncts attend orientation or that adjuncts or others be made aware of that card or its aspirational statement. And, finally, Duquesne states (Br. 12, 38, 49) that it “looks at faculty performance outcomes on key areas, including promoting students’ ethical, moral and spiritual development,” but it does not indicate how, or if, it measures those outcomes with respect to

adjuncts, and as discussed, adjuncts are not themselves evaluated based on their success or failure at doing so.

In sum, Duquesne has failed to point to public representations that adjuncts perform a specific religious function. Instead, Duquesne committed the very error that *Catholic Bishop* and the First Amendment forbids: it engaged in a searching examination of the tenets of Catholic faith and how the Church views the role of an educational institution like Duquesne. Thus, while insisting (Br. 36) that the Board has a “cramped conception of what constitutes a religious function,” *see also* Amicus Br. 3, Duquesne ignores that the limited nature of the Board’s “holding out” inquiry is not only appropriate, but necessitated by *Catholic Bishop* to ensure that only faculty members who play a “critical and unique role ... in fulfilling” Duquesne’s mission” are denied their rights protected by the Act. *See Catholic Bishop*, 440 U.S. at 501.

B. The Court Cannot Consider Duquesne’s Untimely RFRA Argument

Duquesne argues (Br. 55) that the Board’s assertion of jurisdiction violates RFRA. But Duquesne failed to litigate its RFRA claim before the Board in the representation proceeding that resulted in the Union’s certification, choosing instead to do so for the first time in the unfair-labor-practice proceeding testing that certification. Duquesne’s RFRA-based challenge therefore came too late, and the Board, upon finding that Duquesne “ha[d] not raised any issue that [wa]s properly

litigable in th[e] unfair labor practice proceeding,” properly granted the General Counsel’s motion for summary judgment. (JA176 (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941))). Its failure to raise the RFRA argument at the proper time during the Board proceeding precludes the Court from reviewing the claim that the Board’s bargaining order violates RFRA.

1. A party must raise all available arguments during the representation proceeding

“It is well established that, in the absence of newly discovered evidence, or some other special circumstances requiring reexamination of the decision in the representation proceeding, [an employer] is not entitled to relitigate in a subsequent refusal-to-bargain proceeding representation issues that were *or could have been* litigated in the prior representation proceeding.” *Thomas-Davis Med. Ctrs., P.C. v. NLRB*, 157 F.3d 909, 912 (D.C. Cir. 1998) (emphasis added) (citations omitted). More specifically, under the Board’s rules, “[f]ailure to request review” with the Board of a Regional Director’s findings “shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.” 29 C.F.R. § 102.67(g) (formerly § 102.67(f)). That process ensures that the Board retains authority to make the final administrative decision in the representation proceeding. *See Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760, 762 (3d Cir. 1997) (discussing origin of the Board’s rule). The non-relitigation rule

serves the dual objectives of “avoiding undue and unnecessary delay in representation elections” and “safeguard[ing] the results of a representation proceeding from duplicative, collateral attack in a related unfair labor practice proceeding.” *Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008) (internal quotation and citation omitted).

Because “a refusal-to-bargain unfair labor practice proceeding addresses a charge based on the record made at the earlier representation proceeding, a party must raise all of [its] available arguments in the representation proceeding rather than reserve them for an enforcement proceeding.” *Id.* (citations omitted). There are “only limited exceptions” to this rule, which include the discovery of new evidence, special circumstances that require reexamination of the representation-proceeding decision, or a change in governing law. *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1381 (D.C. Cir. 1999); *see also Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 74 (D.C. Cir. 2015).

“[I]n the absence of an abuse of discretion by the Board in applying the non-relitigation rule, a representation issue not previously litigated is not properly before the court upon a petition for review of an order in the unfair labor practice proceeding.” *Pace Univ.*, 514 F.3d at 23 (citing *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1152 (D.C. Cir. 2000); *id.* at 24 (citing 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by

the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”)). “Judicial enforcement of the rule ... protects the integrity of the administrative process by requiring a party to develop all arguments and present all available, relevant evidence at the representation proceeding, rather than remain silent and ultimately defeat unionization on grounds asserted for the first time in the ensuing unfair labor practice proceeding.” *Id.* at 24 (quotation omitted); *see also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[s]imple fairness to those who are engaged in the task of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice”); *accord Ritz-Carlton Hotel*, 123 F.3d at 763.

2. Duquesne’s failure to raise its RFRA argument in the Board’s representation proceeding precluded it from doing so in the related unfair-labor-practice proceeding, so the issue was not preserved for judicial review

It is indisputable that Duquesne could have asserted its RFRA argument as a defense to the Union’s representation petition. *See Carroll Coll., Inc.*, 345 NLRB 254, 258-60 (2005) (rejecting on the merits employer’s argument, raised in representation proceeding, that RFRA requires its exemption from the Act); *Ukiah Adventist Hosp.*, 332 NLRB 602 (2000) (same). Instead, Duquesne challenged only the Board’s jurisdiction, arguing that it is exempt under *Catholic Bishop*, as

discussed above. It made just a passing reference to RFRA, stating in a footnote in its post-hearing brief to the Regional Director (JA45), which it repeated in its request for review to the Board (JA112), that “[a]lthough the Board need not reach this issue, the [*Pacific Lutheran*] test, depending on its application, could also substantially burden Duquesne’s free exercise rights in violation of [RFRA].” But a “fleeting reference” to an issue in a representation proceeding “is not tantamount to litigating specific concerns as is contemplated by the [Board’s] non-relitigation rule.” *Pace Univ.*, 514 F.3d at 25.

It was only after the Board rejected Duquesne’s *Catholic Bishop* argument in the representation proceeding that Duquesne sought to argue, in the related subsequent unfair-labor-practice proceeding, that the Board’s actions violate RFRA. But that came too late. Because its statutory duty to bargain derives from the Board’s certification of the Union in the representation proceeding, it was incumbent on Duquesne to raise its available defenses in that proceeding. *See Ukiah Adventist Hosp.*, 332 NLRB at 603 (“It is well settled that should a union become certified as the collective-bargaining representative of the Employer’s employees, the Employer is legally obligated to bargain with the union or risk legal sanctions under the provisions of the National Labor Relations Act.”). After all, as the Supreme Court noted in *Pittsburgh Plate Glass*, the representation proceeding and the related unfair-labor-practice proceeding “are really one.”

313 U.S. at 158; *accord NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 571 (D.C. Cir. 1970).

Duquesne's failure to properly raise RFRA in this case would not preclude it from asserting RFRA as a defense to a specific charge that it refused to bargain over a mandatory bargaining subject, or that it violated employees' Section 7 rights in some other manner such as through an adverse employment action. *See Pacific Lutheran*, 361 NLRB at 1413 n.19; *Family Serv. Agency San Francisco*, 163 F.3d at 1381 (explaining party is not barred from relitigating representation issues in later unfair-labor-practice case that is unrelated to the proceeding in which the waiver occurred); *see generally, Carroll Coll.*, 345 NLRB at 259 ("[h]ypothetical transgressions advanced by the Employer or the mere potential for transgression is not enough to satisfy RFRA's substantial burden component.") As this Court explained in *Great Falls*, because "RFRA presents a separate inquiry from *Catholic Bishop*," "even if the act of collective bargaining would not be a 'substantial burden' [under RFRA], RFRA might still be applicable if remedying a particular NLRA violation would be." 278 F.3d at 1347.

In sum, a party is not free to slowly dole out arguments in various stages of the Board's proceedings when those arguments were available in the representation proceeding. *See, e.g., Spectrum Health--Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) ("to preserve objections for appeal a party must raise

them in the time and manner that the Board’s regulations require”). It was therefore reasonable for the Board to find (JA176) that Duquesne failed to raise any “properly litigable” issues in the unfair-labor-practice proceeding. That failure precludes this Court’s review of Duquesne’s RFRA defense.

CONCLUSION

The Board respectfully requests that the Court deny the petition for review and enforce the Board’s Order in full.

s/ Elizabeth Heaney

ELIZABETH HEANEY

Supervisory Attorney

National Labor Relations Board

1015 Half Street, S.E.

Washington, D.C. 20570

(202) 273-1743

(202) 273-2989

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

November 2018

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DUQUESNE UNIVERSITY OF THE)
HOLY SPIRIT)
))
Petitioner/Cross-Respondent)
))
v.)
))
NATIONAL LABOR RELATIONS BOARD)
))
Respondent/Cross-Petitioner)
))
and)
))
UNITED STEEL, PAPER & FORESTRY,)
RUBBER, MANUFACTURING, ALLIED)
INDUSTRIAL & SERVICE WORKERS)
INTERNATIONAL UNION, AFL-CIO/CLC)
))
Intervenor)
_____)

**Case Nos. 18-1063,
& 18-1078**

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12,884 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 6th day of November, 2018

STATUTORY ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT
Petitioner/Cross-Respondent
v.
NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner
and
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC
Intervenor

Case Nos. 18-1063, & 18-1078

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. § 151, et. seq.

Table listing sections of the National Labor Relations Act and 29 C.F.R. § 102.67(g) with corresponding page numbers (e.g., Section 1 (29 U.S.C. § 151) ... 2).

NATIONAL LABOR RELATIONS ACT

Section 1 of the NLRA (29 U.S.C. § 151): Findings and Policies.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

...

- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....

Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections

* * *

(c) Hearings on questions affecting commerce; rules and regulations

- (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board ... by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees ... wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection

(e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * *

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

* * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside....

* * *

29 C.F.R. § 102.6: Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

* * *

(g) Finality; waiver; denial of request.

The regional director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

* * *

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**DUQUESNE UNIVERSITY OF THE)
HOLY SPIRIT)**

Petitioner/Cross-Respondent)

v.)

**Case Nos. 18-1063,
& 18-1078**

NATIONAL LABOR RELATIONS BOARD)

Respondent/Cross-Petitioner)

and)

**UNITED STEEL, PAPER & FORESTRY,)
RUBBER, MANUFACTURING, ALLIED)
INDUSTRIAL & SERVICE WORKERS)
INTERNATIONAL UNION, AFL-CIO/CLC)**

Intervenor)

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 6th day of November, 2018