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

Intervenor

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

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REHEARING EN BANC

ELIZABETH HEANEY
Supervisory Attorney
JOEL A. HELLER
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-1743
(202) 273-1042

PETER B. ROBB
General Counsel
MEREDITH JASON
Acting Deputy Associate General Counsel
DAVID HABENSTREIT
Assistant General Counsel
National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Duquesne University of the Holy Spirit is the petitioner before the Court and was the respondent before the Board. The National Labor Relations Board is the respondent before the Court; its General Counsel was a party before the Board. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC is the Intervenor before the Court and was the charging party before the Board. The Association of Catholic Colleges and Universities and the Association of University Professors are amici.

B. Ruling Under Review

This case is before the Court on Duquesne's petition for review of a Decision and Order of the Board, issued on February 28, 2018, and reported at 366 NLRB No. 27. The Board seeks enforcement of that Order.

C. Related Cases

This case has not previously been before this Court or any other court. *St. Xavier University v. NLRB*, No. 18-1076, and *Manhattan College v. NLRB*, No. 18-1113, are being held in abeyance pending disposition of this case.

/s/David Habenstreit

David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of March, 2020

TABLE OF CONTENTS

Headings **Page(s)**

Statement.....1

Argument.....3

I. The panel's decision is not compelled by *Catholic Bishop* or First Amendment principles 4

II. The panel's holding that the *Pacific Lutheran* test is impermissible is inconsistent with Supreme Court and circuit precedent 10

Conclusion 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Allen v. Morton,
495 F.2d 65 (D.C. Cir. 1973) 5

Board of Education of Kiryas Joel Village School District v. Grumet,
512 U.S. 687 (1994) 8

**EEOC v. Catholic University of America*,
83 F.3d 455 (D.C. Cir. 1996) 12,13

Fratello v. Archdiocese of New York,
863 F.3d 190 (2d Cir. 2017) 11

**Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,
565 U.S. 171 (2012) 8,10,11,13

Hunt v. McNair,
413 U.S. 734 (1973) 5

**NLRB v. Catholic Bishop of Chicago*,
440 U.S. 490 (1979) 3,4,5,6,7

NLRB v. Yeshiva University,
444 U.S. 672 (1980) 16

Our Lady of Guadalupe School v. Morrissey-Berru,
No. 19-267 13

Pacific Lutheran University,
361 NLRB 1404 (2014) 1,3,7,11,12,14,15

St. James School v. Biel,
No. 19-348 13

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

**Tilton v. Richardson*,
403 U.S. 672 (1971) 5,6

University of Great Falls v. NLRB,
278 F.3d 1335 (D.C. Cir. 2002) 3,7,9,14,15

University of Southern California v. NLRB,
918 F.3d 126 (D.C. Cir. 2019) 15,16

---

[*] Authorities upon which we chiefly rely are marked with asterisks.

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 8(a)(1) (29 U.S.C. § 8(a)(1)) 1
Section 8(a)(5) (29 U.S.C. § 8(a)(5)) 1

STATEMENT

On January 28, 2020, a divided panel of this Court (Circuit Judges Griffith and Rogers; Judge Pillard dissenting) denied enforcement of a National Labor Relations Board order issued against Duquesne University. The Board had held that Duquesne violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with United Steelworkers as the representative of a unit of part-time adjunct faculty at Duquesne's McNulty College and Graduate School of Liberal Arts. The panel held that the Board lacked jurisdiction over the employees in the unit and rejected the Board's current test as set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014), for deciding whether faculty at self-identified religiously affiliated colleges and universities are exempt from the NLRA's protections and the Board's jurisdiction. Intervenor United Steelworkers petitioned for rehearing en banc, and the Court ordered a response.

The Board agrees that rehearing en banc is warranted. The panel erred on the important question of how the Board may determine when faculty at religiously affiliated colleges and universities are exempt from the protections of the NLRA. Specifically, the panel erred in holding that the Board is prohibited from asking, as part of that analysis, whether a religiously affiliated university holds out the faculty in a petitioned-for bargaining unit as serving a role in the university's religious

mission. That holding is not compelled by (and is, in some ways, inconsistent with) Supreme Court and circuit precedent or First Amendment principles—including some of the very cases and principles the panel purported to apply. Moreover, the issue is of exceptional importance because the question of whether *Pacific Lutheran* is a permissible test impacts not just this case, but any case involving faculty at religiously affiliated universities.[1]

Although the Board is not required to consider how the university holds out the petitioned-for faculty, it is not prohibited from doing so, either. Ultimately, both approaches are permissible. Even though the holding-out inquiry has the benefit of avoiding entanglement with a university's religious beliefs without subordinating employees' NLRA rights, the panel mistakenly found it categorically foreclosed.

---

[1] Two other cases in which the Board applied *Pacific Lutheran* are currently in abeyance before the Court. *Saint Xavier Univ. v. NLRB*, Nos. 18-1076, 18-1086; *Manhattan Coll. v. NLRB*, Nos. 18-1113, 18-1158. Another case is currently pending before the Board in which parties are challenging the *Pacific Lutheran* standard. *Bethany Coll.*, Board Case No. 14-CA-201546.

ARGUMENT

The Supreme Court in *NLRB v. Catholic Bishop of Chicago* held that the NLRA did not authorize the Board to exercise jurisdiction over teachers at a parochial high school. 440 U.S. 490 (1979). In doing so, it cited the First Amendment concerns that such action would raise, including excessive governmental entanglement in the affairs of a church-operated school. *Id.* at 501-02. Applying those principles to the university setting, the Board in *Pacific Lutheran* held that it would not exercise jurisdiction over a petitioned-for bargaining unit of faculty if the university where they work (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." 361 NLRB at 1408. As part of that inquiry, the Board "will not examine faculty members' actual performance of their duties," just the university's own descriptions and public representations, taking those representations at face value. *Id.* at 1411.

The panel in this case rejected the *Pacific Lutheran* test and held that the Board lacks jurisdiction over any faculty at a university that: "(1) holds itself out to the public as a religious institution (*i.e.*, as providing a religious educational environment); (2) is nonprofit; and (3) is religiously affiliated," 947 F.3d 824, 832 (D.C. Cir. 2020)—a test that it took from *University of Great Falls v. NLRB*, 278

F.3d 1335 (D.C. Cir. 2002). Specifically, it held that the Board could not engage in any inquiry regarding the particular faculty at issue. 947 F.3d at 832-33. And it stated that its holding was dictated by *Great Falls*, which it had no power to revisit. *Id.* at 833. Dissenting, Judge Pillard would have affirmed the Board's "deferential standard" as appropriately "eliminating needless sacrifice" of NLRA protections while "extending the exemption … where called for by a religious role the school itself identifies." *Id.* at 837-38.

I. The Panel's Decision Is Not Compelled by *Catholic Bishop* or First Amendment Principles

Rehearing is warranted to correct the panel's mistaken view that Supreme Court precedent or First Amendment principles dictate that the Board cannot consider how universities hold out the faculty in a petitioned-for bargaining unit when determining whether to exercise jurisdiction over those faculty. Neither *Catholic Bishop* nor the First Amendment demands the panel's blanket approach that all faculty at all religiously affiliated universities play a religious role, irrespective of how the university itself treats them, and thus lack NLRA rights.

As Judge Pillard recognized in her dissent, 947 F.3d at 848, the panel erred in suggesting that its holding was compelled by *Catholic Bishop*. The panel's statement that its holding "follow[s] directly from *Catholic Bishop*," 947 F.3d at 834, ignores that *Catholic Bishop* involved a parochial school rather than a college or university. In numerous First Amendment cases addressing government

involvement with religious schools, the Supreme Court and lower courts have recognized that the two contexts are different, and that this difference bears on the constitutional analysis. "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Tilton v. Richardson*, 403 U.S. 672, 685 (1971) (plurality opinion); *see also Allen v. Morton*, 495 F.2d 65, 71 (D.C. Cir. 1973) (noting the "very real distinction … that exists in parochial elementary and secondary schools as compared to Church-related institutions of higher learning").

For example, the *Catholic Bishop* Court observed that, in the parochial-school context, "'[r]eligious authority necessarily pervades the school system.'" 440 U.S. at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)). And such schools "'hav[e] control of [students'] total education.'" *Tilton*, 403 U.S. at 685-86 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970)). By contrast, in "'church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education.'" *Hunt v. McNair*, 413 U.S. 734, 746 (1973) (quoting *Tilton*, 403 U.S. at 687). College courses "by their very nature … tend to limit the opportunities for sectarian influence." *Tilton*, 403 U.S. at 686. These distinctions led the Court to find that, for purposes of determining the constitutionality of government action at

religious schools, impermissible entanglement with religion was less likely at colleges or universities than at parochial schools. *See, e.g.*, *id.* at 685-86.

It was against that backdrop of distinguishing between parochial schools and universities in First Amendment entanglement analysis that the Court decided *Catholic Bishop*. The Court's decision must be understood in that context. The panel thus erred in pointing to *Catholic Bishop*'s observation regarding "the critical and unique role of the teacher in fulfilling the mission of a church-operated school" as a definitive rejection of Board jurisdiction over any teacher at any religiously affiliated educational institution. 947 F.3d at 834 (quoting *Catholic Bishop*, 440 U.S. at 501). Indeed, the *Catholic Bishop* Court itself couched that observation as following from "decisions involving … parochial schools." 440 U.S. at 501. By contrast, as Judge Pillard explained, "the Supreme Court has never passed on how the size, complexity, heterogeneity, and academic freedom that characterize many religious institutions of higher education might differentiate them from the parochial schools in *Catholic Bishop*." 947 F.3d at 839. Unlike Judge Pillard, the panel failed to acknowledge, let alone grapple with, that difference.

Thus, to the extent *Catholic Bishop* can be read as instructing that all teachers at a religiously affiliated school are exempt from the Board's jurisdiction—without regard to how the school holds them out—that categorical

approach applies only to parochial schools. The panel erred in believing that such an approach must be imported unqualifiedly into the university setting.[2]

The panel likewise erred in holding that First Amendment principles dictated its conclusion that the Board cannot consider how religiously affiliated universities hold out the petitioned-for faculty. 947 F.3d at 834-36. The First Amendment does not require courts and the Board to assume that all religiously affiliated universities treat all of their faculty as part of their religious educational environment. Nor does it demand presuming that all academic aspects of a religiously affiliated university are part of that university's religious mission. Those assumptions are premised on a particular view of religious education. Rather than requiring the government to act as if all faiths share similar practices, the First Amendment honors the fact that not all religions are the same by allowing for variances in religious thought and custom. *Great Falls* emphasized that point, explaining that an underlying principle of the Establishment Clause is "not to prefer some religions (and thereby some approaches to indoctrinating religion) to others." 278 F.3d at 1346 (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982));

---

[2] The Board recognizes that *Catholic Bishop*'s instruction to avoid entanglement applies to the university context as well as parochial schools. *Pac. Lutheran*, 361 NLRB at 1407 n.4 (citing *Trustee of St. Joseph's Coll.*, 282 NLRB 65, 67-68 (1986). But that recognition does not mean that the exact same analysis is required in both contexts.

see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 707 (1994) (instructing that "neutrality as among religions must be honored").

As Judge Pillard recognized, "religious institutions of higher education are not all religious in the same way." 947 F.3d at 849. The First Amendment does not require the Board to assume that all religiously affiliated universities have the same view of religious education, particularly when some of those universities might not ascribe to it themselves. Just as courts and the Board should not assume that faculty who teach secular topics are not part of a university's religious educational environment, they likewise need not assume that such faculty *are* part of that environment. Some religiously affiliated universities might well believe that faculty who are otherwise indistinguishable from faculty at secular institutions rather than particular to the faith are not part of the school's religious mission. The panel erred in failing to recognize that *Pacific Lutheran* advances First Amendment values by "afford[ing] schools leeway to delineate for themselves the scope of the academic teaching corps that embodies their religious mission." 947 F.3d at 838 (Pillard, J., dissenting); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (discussing religious body's right to "control … the selection of those who will personify its beliefs").

Just as the First Amendment does not require the Board to assume that faculty further a religious mission, it does not prevent the Board from considering

whether the university holds them out as serving such a role. As *Great Falls* explained, considering whether a university makes public representations of religiosity is a "useful inquiry" for determining whether the NLRA exemption applies without any impermissible examination into whether the university "sincerely holds this view." 278 F.3d at 1344. The holding-out inquiry also ensures that petitioned-for faculty are on notice that the university considers them part of its religious educational environment. Without such notice, they would not have been presented with a knowing choice when they accepted the job whether to take on that function. And because those faculty members had no notice that they were serving a role in the university's religious educational mission, they likewise had no notice that they were losing the protections of the NLRA.[3]

[3] The benefits of considering how a university holds out the petitioned-for faculty are illustrated by the facts of this case, which, as Judge Pillard emphasized, involves part-time adjunct faculty. The petitioned-for adjuncts have only a tangential relationship with Duquesne—they are hired on a one-off basis by individual departments, have limited physical presence on campus, and serve no role in faculty governance. Moreover, no public representations or aspects of the hiring process mentioned any religious role or connection to Duquesne's religious mission. Yet, despite these faculty's peripheral position with the university, the panel's decision ascribes to them an "undisclosed religious agency for the university's leadership" and, as a result, "removes their NLRA coverage." 947 F.3d at 848 (Pillard, J., dissenting).

II. The Panel's Holding That the *Pacific Lutheran* Test Is Impermissible Is Inconsistent with Supreme Court and Circuit Precedent

Rehearing is also warranted because the panel's decision is inconsistent with Supreme Court and circuit precedent regarding the application of employment laws at religiously affiliated institutions. Those cases have adopted tests that are similar to, or even more searching than, the Board's "holding out" inquiry regarding faculty. Yet the panel did not even acknowledge that precedent, let alone explain why the Board's deferential standard is impermissible under the First Amendment when those arguably more intrusive inquiries are constitutionally allowable.

In particular, the panel's holding that the Board is prohibited from conducting any inquiry into how a religiously affiliated employer holds out its employees conflicts with *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The Court in that case recognized a ministerial exception to Title VII and explained what factors it would consider to determine whether an employee fell within that exception. The very first consideration the Court looked to in its analysis was whether the employer "held [the employee] out as a minister." *Id.* at 191. That is, the Court adopted the very inquiry that the panel here said was impermissible.

Moreover, the Court went on to evaluate a series of other considerations beyond how the employer held out the employee, including the employee's job duties, her "role in conveying the Church's message and carrying out its mission,"

and "the important religious functions she performed for the Church." *Id.* at 192. It noted the relevance of considering "the nature of the religious functions performed" by the employee in question. *Id.* at 194; *see also id.* at 198 ("[C]ourts should focus on the function performed by persons who work for religious bodies.") (Alito, J., concurring); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017) (same). For each of those considerations, the Court looked at the employee's actual work performance (for example, how often she led prayer services or taught religious subjects). 565 U.S. at 192. The inquiry the Court adopted in that case is thus more searching than the Board's *Pacific Lutheran* test, where the Board looks only to whether the employer holds out the employee as serving a religious role or function, not the extent to which she actually serves that role or function in practice. *See Pac. Lutheran*, 361 NLRB at 1411. The Board's test thus poses less of a risk that courts or the Board will evaluate the religious nature of employees' roles. If the more searching *Hosanna-Tabor* test is constitutionally permissible, then the Board's less intrusive inquiry a fortiori is permissible.

Judge Pillard recognized that point in her dissent. As she explained, the Board's *Pacific Lutheran* test is "substantially more deferential to religious schools than the Supreme Court's inquiry in *Hosanna-Tabor*" and thus "give[s] a wider berth to schools' religious freedom than did the inquiry the Supreme Court

established." 947 F.3d at 843-44. The comparison is relevant because *Hosanna-Tabor*'s evaluation of the scope of Title VII coverage "responded to parallel First Amendment concerns" as those at issue when determining whether the Board may exercise jurisdiction over faculty at a religiously affiliated university. *Id.* at 844. Accordingly, the Board's test "gives ample protection to school leadership's free-exercise rights." *Id.* The panel majority did not address this point and did not acknowledge *Hosanna-Tabor* at all.

Moreover, this Court uses a similar analytical approach to ministerial-exception cases, including in the university context. Specifically, the Court has held that "the ministerial exception encompasses all employees of a religious institution … whose primary functions serve its spiritual and pastoral mission." *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996). In *Catholic University*, the Court looked to the "responsibilities" and "primary duties" of the faculty member at issue. *Id.* And it focused on the details of her particular department and the role it played in the mission of the church with which the university was affiliated. *Id.* at 463-64. The panel's holding here that the Board must exempt *all* faculty at a religiously affiliated university from NLRA coverage, regardless of their function, is inconsistent with that approach. And again, the Board's *Pacific Lutheran* test is less intrusive than the analysis in *Catholic University* because it is limited only to how the university holds out the faculty.

These cases also reveal as unfounded the panel's concern that *Pacific Lutheran* will require the Board or courts to determine whether faculty "play sufficiently religious roles." 947 F.3d at 834-35. *Hosanna-Tabor*'s and *Catholic University*'s focus on an employee's religious roles and functions make clear that courts already consider such evidence in a constitutionally permissible way, without crossing the line into whether those roles or functions are "sufficiently religious." Moreover, the question of whether a university has held out the petitioned-for faculty as serving a religious function will not be as unbounded as the panel insisted. In a concurring opinion in *Hosanna-Tabor*, Justices Alito and Kagan identified "roles of religious leadership, worship, ritual, and expression" as examples of "objective functions that are important for the autonomy of any religious group." 565 U.S. at 200.

It is worth noting that the Supreme Court has before it this term two consolidated cases involving the ministerial exception. *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267; *St. James School v. Biel*, No. 19-348. The question at issue in those cases is whether courts must examine other factors in addition to an employee's job functions in determining whether the exception applies. All parties agree that the inquiry *does* include the employee's job functions. *See* Pet. Br. 36 (exception applies "where a plaintiff has important religious functions"); Resp. Br. 23 (analysis involves "looking to the nature of the

religious functions the employee performs"). Indeed, the Solicitor General as amicus in support of the employers argues that whether an employee "performs an important religious function" is the "most important" criterion. United States Br. 13-14. That approach is "faithful to … the purposes of the First Amendment." United States Br. 17.

In addition to its inconsistency with the ministerial-exception cases, the panel's holding that the Board cannot consider how universities hold out the petitioned-for faculty also creates tension with *Great Falls* itself. The Board adopted the "holding out" approach to the jurisdictional inquiry from *Great Falls*. As noted above, both *Great Falls* and *Pacific Lutheran* require that a university seeking the exemption "holds itself out … as providing a religious educational environment," 278 F.3d at 1343; 361 NLRB at 1408, and *Pacific Lutheran* also requires that the university "holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment," 361 NLRB at 1408. The panel found the latter impermissible because it "would still require the Board to define what counts as a 'religious role' or a 'religious function.'" 947 F.3d at 834-35. But that argument applies equally to the *Great Falls* test. Under the panel's understanding of the holding-out inquiry, courts and the Board applying *Great Falls* would have to define what counts as a "religious educational environment." Yet the *Great Falls*

Court saw nothing wrong with engaging in its holding-out analysis when deciding whether the Board has jurisdiction. The panel did not explain why, if that inquiry is constitutionally permissible in the context of the institution as a whole, the same inquiry as to the role of specific faculty in *Pacific Lutheran* is constitutionally deficient. Instead, the panel forbids the type of analysis that *Great Falls* requires.

In any event, the panel's view of the holding-out inquiry is not correct. Neither *Great Falls* nor *Pacific Lutheran* involve evaluating actual practice, only the university's public representations. The holding-out analysis thus leaves it to the school to define its religious environment, roles, and functions; the analysis simply requires that the university actually do so.[4]

Finally, the panel's insistence that courts and the Board must treat all faculty at a religiously affiliated university the same for purposes of NLRA coverage is in tension with this Court's statement, albeit in a different context, that "faculties are heterogenous." *Univ. of S. Cal. v. NLRB*, 918 F.3d 126, 129 (D.C. Cir. 2019).

---

[4] The Board does not dispute that *Great Falls* is a permissible test, just contends that it is not the *only* permissible test. Moreover, the panel erred in concluding that *Great Falls* compelled its holding. The panel emphasized *Great Falls*' use of the phrase "bright-line test," but the Court used that phrase to distinguish the open-ended, multi-factor "substantial religious character" test it was rejecting. *See* 278 F.3d at 1341. *Pacific Lutheran* is not a multi-factor test and, of course, was not before the Court in *Great Falls*. The en banc court thus would not need to disturb *Great Falls* to rule for the Board in this case. To the extent *Great Falls* does dictate the panel's holding, however, the en banc court would not be bound by that aspect of the opinion.

"[S]ubsets may exist" that have different relationships to the university, and those differences can be relevant for NLRA-coverage purposes. *Id.* The Supreme Court, too, has recognized that some faculty members at a university could be included in a collective-bargaining unit even if other faculty at the same university could not. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 n.31 (1980).[5]

****

The panel erred in holding that the Board is categorically prohibited from considering whether a religiously affiliated university holds out its faculty as serving a role in its religious educational mission. Rehearing is warranted to correct the panel's reading of Supreme Court precedent and First Amendment principles, align this area of the law with related jurisprudence, and avoid depriving employees at universities throughout the country of the NLRA rights they would otherwise enjoy.

---

[5] Although *Yeshiva University* involved the exception to NLRA coverage for managerial employees rather than the exception for employees of religiously affiliated universities, it is worth noting that Yeshiva University itself is a religious university. *See* 444 U.S. at 675 n.2 (noting that the university has theological programs, a School of General Jewish Studies, and a yeshiva program); *see also* Yeshiva University, About, https://www.yu.edu/about. The Court nonetheless explained that "there may also be faculty members at Yeshiva … who properly could be included in a bargaining unit." 444 U.S. at 690 n.31.

CONCLUSION

The Board respectfully requests that the Court grant the petition for rehearing en banc and, if the Court grants rehearing, enforce the Board's order in full.

s/ Elizabeth Heaney
ELIZABETH HEANEY
Supervisory Attorney

s/ Joel A. Heller
JOEL A. HELLER
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-1743
(202) 273-1042

PETER B. ROBB
General Counsel

MEREDITH JASON
Acting Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board
March 2020

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1063, 18-1078
	)	
v.	)	Board Case No. 06-CA-197492
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that the foregoing document contains 3,818 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2016.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of March 2020

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1063, 18-1078
	)	
v.	)	Board Case No. 06-CA-197492
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, 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 certify the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of March 2020