

JUDGMENT ENTERED JANUARY 28, 2020

Nos. 18-1063 & 18-1078

IN THE
**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 AND FORESTRY, RUBBER, MANUFACTURING,
ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL
UNION, AFL-CIO-CLC,

Intervenor for Respondent.

On Petition for Review of a Decision and Order of the National Labor Relations
Board and Cross-Application for Enforcement

**RESPONSE OF PETITIONER/CROSS-RESPONDENT IN OPPOSITION
TO INTERVENOR'S PETITION FOR REHEARING EN BANC**

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March 31, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

1. The following are parties in this Court:

a. Petitioner/Cross-Respondent: Duquesne University of the Holy Spirit.

b. Respondent/Cross-Petitioner: National Labor Relations Board.

c. Intervenor for Respondent: United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC.

2. Duquesne University of the Holy Spirit is a Catholic university founded by priests and brothers of the Congregation of the Holy Spirit. Duquesne is organized under the Pennsylvania Nonprofit Corporation Law of 1988, as amended, and is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. Duquesne has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

B. RULINGS UNDER REVIEW

Duquesne University of the Holy Spirit petitioned for review of the National Labor Relations Board's February 28, 2018 final Decision and Order in No. 06-CA-197492. The Order is reported at 366 N.L.R.B. No. 27. The Order was based on an underlying representation case, No. 06-RC-080933. The Board's April 10,

2017 Decision on Review and Order in the representation case is unreported but is available at 2017 WL 1330294.

C. RELATED CASES

The Order under review has not previously come before this or any other court. The only related case involving substantially the same parties and issues of which counsel is aware is *NLRB v. Duquesne University*, No. 18-1078 (D.C. Cir.), in which the Board filed a cross-application for enforcement of its Order. On its own motion, this Court consolidated No. 18-1078 with this case.

Respectfully submitted,

/s/ Neal Kumar Katyal
NEAL KUMAR KATYAL

Dated: March 31, 2020

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GLOSSARY

NLRA or the Act:

National Labor Relations Act

NLRB or the Board:

National Labor Relations Board

The Union:

United Steel, Paper and Forestry,
Rubber, Manufacturing, Allied-
Industrial and Service Workers
International Union, AFL-CIO-CLC

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INTRODUCTION

The Panel Majority and the Panel Dissent agree on the four issues central to the outcome of this case. First, the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), strips the Board of jurisdiction over the employment relationship between religious schools and their teachers. Second,

this Court's decision in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), describes the test for determining whether the full faculty of a particular school is exempted from the Board's jurisdiction by *Catholic Bishop*. Third, in *Pacific Lutheran University*, 361 N.L.R.B. 1404 (2014), the Board purported to overrule *Great Falls*, and to create a new test for determining whether any faculty at a particular school is exempted from the Board's jurisdiction by *Catholic Bishop*. And fourth, the Board applied its new *Pacific Lutheran* test in the decision on review here. For those four reasons, it is also clear that the Board decision on review here needs to be reversed.

The concededly “narrow” disagreement between the Majority and the Dissent has to do with the “application of the [*Catholic Bishop*] exemption to *adjunct* faculty.” *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 837, 845 (D.C. Cir. 2020) (Pillard, J., dissenting). The Dissent argues that—even though *Great Falls* sets out the jurisdictional test for “full faculty”—*Great Falls* permits the Board to adopt a different jurisdictional test applicable solely to “temporary, part-time adjuncts.” *Id.* The Union agrees and has petitioned for rehearing en banc on that basis. Pet. at 1-2.

But neither the Dissent nor the Union argue that *Great Falls* or any other precedent of this Court required the Majority to adopt the Dissent's suggested test for adjunct faculty. Neither the Dissent nor the Union point to a conflict between

the Panel Decision and the precedents of this Court, the Supreme Court, or any other court. And the narrow issue raised by the Dissent and the Union does not present a question so important that it warrants the full court's attention. For those reasons, the Union fails to identify a basis for this Court to grant its petition.

BACKGROUND

In *Catholic Bishop*, the Supreme Court held that the NLRA does not authorize the Board to regulate the employment relationship between church-operated schools and their teachers. As the Court explained, “an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.” 440 U.S. at 500. And because the Court found “no clear expression” in the NLRA’s text, context, or legislative history “of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act,” *id.* at 504, the Court “decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses,” *id.* at 507.

The constitutional problem that the Court saw in *Catholic Bishop* was simple: If teachers in church-operated schools were covered by the NLRA, the Board would inevitably become unconstitutionally “entangle[d] with the religious mission of the school,” *id.* at 502, because “[r]eligious authority necessarily pervades the school system” at church-operated schools, *id.* at 501 (internal

quotation marks omitted), and at the same time, “nearly everything that goes on in the schools affects teachers and is therefore arguably a ‘condition of employment,’” subject to mandatory bargaining under the NLRA, *id.* at 503 (internal quotation marks omitted). For example, because religious schools may take the position that “challenged actions were mandated by their religious creeds,” an attempt by the Board to regulate the employment relationship between teachers and church-operated schools would “necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” *Id.* at 502. And “the very process of inquiry” could “impinge on rights guaranteed by the Religion Clauses.” *Id.*

In *Great Falls*, this Court announced “a ‘bright-line’ rule for determining jurisdiction” that permits the Board to decide which schools are entitled to the *Catholic Bishop* exemption “without delving into matters of religious doctrine or motive.” *Carroll Coll. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009) (quoting *Great Falls*, 278 F.3d at 1345). That “*Great Falls*” test requires the Board to decline jurisdiction over faculty at a religious university if the university “(a) holds itself out to the public as a religious institution; (b) is non-profit; and (c) is religiously affiliated.” *Great Falls*, 278 F.3d at 1347.

But in *Pacific Lutheran*, the Board announced that it would not follow *Great Falls*, and instead minted “a new test.” 361 N.L.R.B. at 1408. The Board stated

that it would decline jurisdiction over faculty at a religious university only if the university publicly represents that the petitioned-for faculty members “perform[] a specific role in creating or maintaining” the school’s religious environment. *Id.* at 1414. The Board also stated that, in applying this new test, the Board would require evidence that faculty members are held out to perform duties like “integrating the institution’s religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training.” *Id.* at 1412.

In the Board decision on review here, the Board applied its new *Pacific Lutheran* test to assert jurisdiction over Duquesne University. Duquesne’s legal name is “Duquesne University of the Holy Spirit.” It is a nonprofit membership corporation whose sole members are Spiritan priests and brothers. Its mission statement declares that Duquesne “is a Catholic University” that “serves God by serving students.” And at the crossroads of the campus stands a 25 foot tall crucifix. *See* JA70-71. Despite the school’s obvious religious mission, the Board concluded that Duquesne was not entitled to a *Catholic Bishop* exemption under the Board’s *Pacific Lutheran* test because, in the Board’s opinion, Duquesne does not hold its adjunct faculty out to the public as performing religious roles. *Duquesne*, 947 F.3d at 827.

The Panel corrected the Board’s error in attempting to overrule *Great Falls*. And because the parties did not dispute that Duquesne meets the *Great Falls* test, the Panel vacated the Board’s bargaining order. One Panel member dissented on a “narrow” ground, disagreeing with the “application of the [*Catholic Bishop*] exemption to *adjunct* faculty.” *Id.* at 837, 845 (Pillard, J., dissenting). The Dissent took the position that this Court’s precedents leave room for a different jurisdictional test applicable solely to “temporary, part-time adjuncts.” *Id.* The Majority disagreed because “[a]djuncts teach students,” and thus fulfill the same “critical and unique role” in advancing the mission of a religious school as other faculty members. *Id.* at 836 (internal quotation marks omitted).

ARGUMENT

I. THE PANEL MAJORITY AND THE PANEL DISSENT SUBSTANTIALLY AGREE ABOUT THE ISSUES IN THIS CASE.

As the Dissent itself recognized, the disagreement between the Majority and Dissent is “narrow.” *Id.* at 845 (Pillard, J., dissenting). The Panel unanimously agreed that *Great Falls* exempts religious universities from bargaining with “full” faculty members, and that the Board’s decision in *Pacific Lutheran* was wrong insofar as it disagreed with that point. *See id.* (“The parties, my colleagues, and I agree that full faculty are exempt.”). The remaining disagreement about adjunct faculty is not worthy of en banc review.

A. Neither The Dissent Nor The Union Disagree With The Central Holding Of The Majority.

1. *The Board in Pacific Lutheran purported to overrule this Court's decision in Great Falls, even with respect to "full" faculty.*

In announcing its *Pacific Lutheran* test, the Board did not limit its decision to adjunct faculty. The questions that the Board asked and answered in *Pacific Lutheran* were (1) “What is the test the Board should apply under [*Catholic Bishop*] to determine whether self-identified ‘religiously affiliated educational institutions’ are exempt from the Board’s jurisdiction?” and (2) “What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under *Catholic Bishop*?” 361 N.L.R.B. at 1405. As even the Union and the Dissent concede, this Court’s decision in *Great Falls* provides a definitive answer to those questions with respect to full faculty. *See Great Falls*, 278 F.3d at 1347. But the Board decided in *Pacific Lutheran* that it would decline jurisdiction only if the university holds out the petitioned-for faculty members—whether full faculty or adjunct faculty—as performing a religious role. 361 N.L.R.B. at 1408, 1414.

Similarly, in applying its *Pacific Lutheran* test, the Board and its Regional Directors have not limited the application of *Pacific Lutheran* to adjuncts. Rather, the Board and its Regional Directors have applied *Pacific Lutheran* in cases involving full-time faculty, *see, e.g., Seattle Univ.*, No. 19-RC-122863, 2015 WL

456610, at *1 (N.L.R.B. Feb. 3, 2015), and tenured faculty, *see, e.g., Carroll Coll.*, No. 19-RC-165133, 2016 WL 3014420, at *1 n.1 (N.L.R.B. May 25, 2016); *Bethany Coll.*, No. 14-CA-201546, 2018 WL 5676035 (N.L.R.B. Div. of Judges Oct. 31, 2018). These decisions acknowledge that “in *Pacific Lutheran* the Board declined to follow the test established by the D.C. Circuit in *Great Falls*, and instead adopted a new two-part test to determine whether the Board has jurisdiction over a religiously affiliated college or university.” *Bethany Coll.*, 2018 WL 5676035.

2. *The central holding of the Majority is that the Board cannot overrule this Court’s decision in Great Falls.*

The main holding of the Majority is *not* that the Board lacks jurisdiction over the adjuncts at religious universities. Rather, it is the simple but important proposition that the Board is bound by *Great Falls*. *See Duquesne*, 947 F.3d at 837 (“*Pacific Lutheran* runs afoul of our decisions in *Great Falls* and *Carroll College*, which continue to govern the reach of the Board’s jurisdiction under the NLRA in cases involving religious schools and their faculty members or teachers.”); *id.* at 833 (“Apparently unpersuaded by *Great Falls* and *Carroll College*, the Board used its new *Pacific Lutheran* test to assert jurisdiction over *Duquesne*.”); *id.* (“[O]ur precedent is clear: *Great Falls* is a bright-line test. . . . The Board may not ‘dig deeper’”) (citation omitted).

That holding is significant—apart from any application to adjuncts—because, on questions of statutory interpretation, the Board sometimes has room to adopt a test that differs from the Court’s. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). And the ultimate issue in this case was a question of statutory interpretation: whether faculty at religious universities are subject to the Board’s jurisdiction under the NLRA. Here, however, the Board had no room to adopt a test that differs from the one announced in *Great Falls* because “[t]he application of *Catholic Bishop*” is “an interpretation of precedent, rather than a statute,” and this Court is “not obligated to defer to an agency’s interpretation of Supreme Court precedent under *Chevron* or any other principle.” *Great Falls*, 278 F.3d at 1341 (internal quotation marks omitted). The Panel reaffirms that conclusion. *See Duquesne*, 947 F.3d at 837.

3. *The Dissent and the Union do not disagree with the Majority’s holding that Great Falls remains good law.*

The Panel unanimously agreed that *Catholic Bishop* and *Great Falls* exempt religious universities from bargaining with “full” faculty members. *See id.*; *see also id.* at 845 (Pillard, J., dissenting). The Dissent does not call for *Great Falls* to be overruled, nor does it argue that *Great Falls* is inconsistent with the Supreme Court’s decision in *Catholic Bishop*. To the contrary, the Dissent cites these cases with *approval* throughout its opinion. Similarly, the Union’s petition does not call for the Court to reconsider these precedents. All parties (save, perhaps, the Board)

are in agreement, then, that the central holding of the Majority is correct: insofar as the Board purported to overrule *Great Falls* with *Pacific Lutheran*—by requiring universities to show that petitioned-for faculty members, *including full faculty*, perform a religious role—the Board needed to be reversed.

B. The Narrow Disagreement Between The Majority And The Dissent With Respect To Adjunct Faculty Does Not Warrant En Banc Review.

The Dissent’s “narrow” disagreement with the Majority is that, in the Dissent’s view, the Supreme Court and this Court’s precedents did not involve adjuncts, and this Court should craft a different rule to apply only to that sub-category of faculty members. *Id.* at 845 (Pillard, J., dissenting). That disagreement does not warrant en banc consideration for two reasons.

First, the Majority decided that narrow issue correctly. As the Majority explained, the reasoning that controlled in *Catholic Bishop*, *Great Falls*, and *Carroll College* is equally applicable to adjunct faculty. “[A] teacher remains a teacher,” *Catholic Bishop*, 440 U.S. at 501, “regardless of the roles played by the teachers involved in a case,” *Duquesne*, 947 F.3d at 834. And “Board-mandated bargaining involving *any* teachers at religious universities would likely concern the whole of school life, including the religious mission, for nearly everything that goes on in the school affects teachers and is therefore arguably a condition of employment.” *Id.* (internal quotation marks and citation omitted). “Parsing the

adjuncts' terms of employment" therefore "misses the forest for the trees." *Id.* at 836 (internal quotation marks omitted).

And second, neither the Dissent nor the Union contend that any error on the Majority's part in interpreting this Court's precedent is a serious one. The Dissent *chooses* to "read [this Court's] prior cases' references to the 'institution,' *Great Falls*, 278 F.3d at 1347, and the 'school,' *Carroll Coll.*, 558 F.3d at 572, to decide only whether the entity is sufficiently religious such that teachers in roles comparable to those in *Catholic Bishop* fall outside the NLRA." *Duquesne*, 947 F.3d at 846 (Pillard, J., dissenting). But the Dissent does not argue that this Court's prior cases *require* that result. Nor does the Union. For that reason, en banc review is unwarranted.

II. THE PANEL DECISION IS CONSISTENT WITH THIS COURT'S AND THE SUPREME COURT'S OTHER PRECEDENTS.

The Union identifies no conflicts between the Panel decision and precedents of this Court, the Supreme Court, or any other court. Instead, the Union argues that there is tension between the Panel decision and dicta from *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality op.), and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). Pet. at 8-11. And the Board argues that there is tension between the Panel decision and this Court's decision in *University of Southern California (USC) v. NLRB*, 918 F.3d 126, 129 (D.C. Cir. 2019), which relied on the Supreme Court's decision in *NLRB v.*

Yeshiva University, 444 U.S. 672, 690 n.31 (1980). Board Resp. at 15-16. The Union and the Board are wrong.

A. *Tilton* Does Not Suggest That The Concerns Identified In *Catholic Bishop* Are Diminished In Higher Education.

In *Tilton*, the Supreme Court upheld a federal law granting money to universities—some of which were “governed by Catholic religious organizations”—for the construction of academic facilities. 403 U.S. at 686 (plurality op.). In deciding that the aid created little risk of unconstitutional entanglement, the Court made three observations. First, the Court noted that at “church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education.” *Id.* at 687. Second, the Court stressed that its decision was motivated by a bright line that the Court had drawn in its precedent between “teachers” and “services, facilities, or materials.” *Id.* “[T]eachers,” the Court explained “are not necessarily religiously neutral,” meaning that “greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction,” than would be necessary where state aid funds construction. *Id.* at 687-688. And third, the Court explained that the aid at issue was “a one-time, single-purpose construction grant,” creating “no continuing financial relationships or dependencies” between the colleges and the government. *Id.* at 688.

The Union highlights the first part of *Tilton*'s analysis (the distinction between pre-college and college education), *see* Pet. at 8-9, but the Union ignores the second and third parts of *Tilton*'s analysis (the distinctions between teachers and services, facilities, or materials, and between one-time aid and ongoing relationships). The latter parts of the *Tilton* Court's analysis show why *Great Falls*, *Carroll College*, and *Duquesne* came out differently from *Tilton*. With respect to the second part of the *Tilton* analysis, this Court's cases involve teachers, not services, facilities, or materials. And teachers can never be entirely separate from the school's religious mission. *See Tilton*, 403 U.S. at 687-688 (plurality op.). And with respect to the third part of the *Tilton* analysis, this Court's cases involve an ongoing relationship between religious universities and the Board, not a one-time transaction. That ongoing relationship increases the risk that the Board will become enmeshed in the school's religious life. *See id.* at 688. In sum, then, the risk of government entanglement with religion is greater in *Great Falls*, *Carroll College*, and *Duquesne* than was true in *Tilton*.

Perhaps that is why, even though *Tilton* was decided well before *Great Falls* and *Carroll College*, those cases did not distinguish between pre-college and college education. *See, e.g., Great Falls*, 278 F.3d at 1344 (noting that its test applies to any "school, college, or university [that] holds itself out publicly as a

religious institution”). In this context, *Tilton*’s distinction between pre-college and college education is irrelevant.

B. *Hosanna-Tabor* Is Not In Tension With *Great Falls*.

In *Hosanna-Tabor*, the Supreme Court considered the principle that the First Amendment bars certain suits concerning the employment relationship between a religious institution and one of its ministers. In holding that the teacher at issue fell within this “ministerial exception,” the Court noted that the Church “held [the teacher] out as a minister,” and that her “job duties reflected a role in conveying the Church’s message and carrying out its mission.” 565 U.S. at 191-192. In justifying its *Pacific Lutheran* test, the Board seized on this language in *Hosanna-Tabor* to argue that if the Supreme Court could “explore[] the teacher’s job functions and training” in one employment context, then the Board could do the same in another. 361 N.L.R.B. at 1413-14. The Union makes a similar argument. Pet. at 10-11.

But *Hosanna-Tabor* and *Catholic Bishop* come from two separate lines of cases that differ in important ways. To name just a few: First, the *Catholic Bishop* exemption is a jurisdictional question, *see Catholic Bishop*, 440 U.S. at 504-507, while the “ministerial exception” is “an affirmative defense to an otherwise cognizable claim,” that an employer may or may not choose to assert, *Hosanna-Tabor*, 565 U.S. at 195 n.4. Because claims barred by the “ministerial exception”

would otherwise be cognizable, it makes sense that the Court permits more searching review under *Hosanna-Tabor*'s exception than under *Catholic Bishop*'s exemption.

Second, *Catholic Bishop* applied the doctrine of constitutional avoidance, *see* 440 U.S. at 504-507, while *Hosanna-Tabor* forbids only those government actions that actually violate the First Amendment, *see* 565 U.S. at 181. Because *Catholic Bishop* also applies where there *might be* a First Amendment violation, it makes sense that the Court permits more searching review under *Hosanna-Tabor*'s exception than under *Catholic Bishop*'s exemption.

Third, the NLRA is a prospective statute, governing bargaining over a variety of as-yet-unknown conditions of employment, while Title VII and the ADA are retrospective, remedying individual employment decisions that involved unlawful discrimination. Because the test for exempting religious decisions under Title VII and the ADA is necessarily focused on the individual bringing suit, it makes sense that the Court permits more searching review under *Hosanna-Tabor*'s exception than under *Catholic Bishop*'s exemption.

For all of these reasons, it is unsurprising that neither the Supreme Court nor this Court has ever indicated that those two lines of cases overlap. Despite being decided after *Catholic Bishop*, *Hosanna-Tabor* never cites *Catholic Bishop*. Similarly, this Court did not mention the ministerial exception, which the Court

had already recognized in *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996), when it decided *Great Falls*.¹

C. USC And Yeshiva Do Not Support Distinguishing Among Faculty With Respect To Their Religious Roles.

In *Yeshiva*, the Supreme Court held that faculty at colleges and universities may be managerial employees exempt from the protection of the NLRA. 444 U.S. at 680-682. And in *USC*, this Court held that “non-managerial subsets may exist within a faculty entrusted with managerial authority,” and those differences can be relevant to the appropriate application of the managerial exception. 918 F.3d at 129. But the managerial-exception cases—much like the ministerial-exception cases—have no relevance in this context. Nothing in *Catholic Bishop* turned on the leadership of teachers within a school. Indeed, the bargaining units at issue in *Catholic Bishop* included both “full-time and regular part-time” teachers and excluded those in leadership positions like the “dean of studies,” and “director of student activities.” 440 U.S. at 493 n.5. Instead, the Court’s reasoning in *Catholic Bishop* turned on the teacher’s role as an educator, and the inevitability of unconstitutional entanglement with religion if the Board were to supervise the employment relationship between teachers and religious schools. *Id.* at 501.

¹ For the same reasons, this Court need not defer ruling on the Union’s petition until the Supreme Court decides the ministerial-exception cases currently pending before that Court. *See* Pet. at 11.

III. THE PETITION DOES NOT OTHERWISE PRESENT A QUESTION OF EXCEPTIONAL IMPORTANCE.

A. The Board Has Been Inconsistent In Defending *Pacific Lutheran*.

The Panel decision invalidated a decision of the Board, yet the Board itself did not petition for rehearing en banc. *See Qassim v. Trump*, 938 F.3d 375, 376 (D.C. Cir. 2019) (Millet, J., Pillard, J., and Edwards, S.J., concurring in denial of rehearing en banc) (noting the Government’s “telling” decision not to “file[] a petition for rehearing en banc . . . voicing any of the concerns that the dissenting opinion raises”). Only once this Court called for a Response to the Union’s petition did the Board try to suggest that en banc review is appropriate.

Even more telling, the Board’s General Counsel has taken the position before the Board that *Pacific Lutheran* “fails to adequately respect the religious rights of [religious] institutions,” and has “urge[d] the Board to adopt the D.C. Circuit’s three-part inquiry set forth in *Great Falls*.” Response to Sur-Reply at 1-2, *Manhattan Coll.*, No. 02-CA-201623 (N.L.R.B. Feb. 21, 2018).² Indeed, a majority of the Board (two of the three members) have stated that they “express no opinion” on whether *Pacific Lutheran* “was correctly decided.” JA176 n.1. The

² Available at <https://www.nlr.gov/case/02-CA-201623> (last visited Mar. 31, 2020).

Board's shifting position on *Pacific Lutheran* is itself a sufficient reason to deny rehearing en banc.

B. The Panel Decision Permits Religiously Affiliated Colleges To Distinguish Among Faculty.

The Union argues that the Panel Decision will prohibit religious colleges from distinguishing among faculty if they wish to do so. Pet. at 12-18. That is incorrect. As the Dissent acknowledges, the Majority and the Dissent “agree that a religious school should be able to decide that its adjunct faculty are *not* encompassed within the *Catholic Bishop* exemption.” *Duquesne*, 947 F.3d at 846 (Pillard, J., dissenting) (citing the Majority at 835 n.2). The Panel Decision merely reaffirms *Great Falls*' holding that the Board cannot “troll[] through the beliefs of the University,” in order to make that decision for the University. *Great Falls*, 278 F.3d at 1342.

CONCLUSION

For the foregoing reasons, the Union's petition should be denied.

Respectfully submitted,

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Dated: March 31, 2020

CERTIFICATE OF COMPLIANCE

1. This document complies with word limit set forth in this Court's March 2, 2020 order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,894 words.

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/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I certify that on March 31, 2020, the foregoing Response of Petitioner/Cross-Respondent to Intervenor's Petition for Rehearing En Banc was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Neal Kumar Katyal
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