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815 16th St. NW  
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202-637-5000  
aflcio.org

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June 12, 2020

Mark J. Langer, Clerk  
United States Court of Appeals  
for the District of Columbia Circuit  
United States Courthouse, Room 5523  
333 Constitution Avenue, NW  
Washington, DC 20001

Re: *Duquesne University v. NLRB*, No. 18-1063

Dear Mr. Langer:

Duquesne University has submitted *Bethany College*, 369 NLRB No. 98 (2020), overruling *Pacific Lutheran University*, 361 NLRB 1404 (2014). The University suggests that, because “[t]he Board . . . has now disavowed the *Pacific Lutheran* test . . . the [pending] petition for rehearing en banc [in this case] should be denied.” Katyal to Langer (June 11, 2020), p. 2.

*Bethany College* rests solely on a construction of judicial precedents applying the Religion Clauses of the First Amendment. “[T]he Board . . . has no expertise in matters of constitutional interpretation” and “is entitled to no judicial deference when interpreting [judicial] precedent on such matters.” 369 NLRB No. 98, p. 5.

*Bethany College* reflects the Board’s current view that, under the Religion Clauses, “the two-part test *Pacific Lutheran* test is fatally flawed because its required analysis, at step two, of whether faculty members at religiously affiliated institutions of higher learning are held out as performing a specific religious function entails an impermissible inquiry into what does and what does not constitute a *religious function*.” 369 NLRB No. 98, p. 5. That First Amendment question is presented by the pending petition for rehearing and should be decided by this Court. Pet. 1.

As the Board itself noted, a closely related issue is pending in *Our Lady of Guadalupe v. Morrissey-Berru*, No. 19-267, where the Supreme Court has been urged by the United States to hold that “whether an employee ‘performs an important religious function’ is the ‘most important’ criterion” in determining the scope of the “ministerial exception” from the federal employment laws. NLRB Resp., p. 14, quoting United States Br. 13-14. *See* Pet. 4 n. 1 & 11.

Whether the *Pacific Lutheran University* test “entails an impermissible inquiry into what does and what does not constitute a *religious function*,” 369 NLRB No. 98, p. 5, under the Religion Clauses is a constitutional issue for the judiciary to decide. The Board’s revised views on that question as stated in *Bethany College* have no bearing on the pending petition for rehearing.

Respectfully submitted,

/s/ James B. Coppess

James B. Coppess

Counsel for intervenor

cc: All counsel of record (via CM/ECF)