

No. 18-1113

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANHATTAN COLLEGE,  
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent,

and

MANHATTAN COLLEGE ADJUNCT FACULTY UNION,  
Intervenor.

On Appeal from the National Labor Relations Board  
Case No. NLRB-02-CA-201623

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PETITION FOR HEARING EN BANC

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Intervenor Manhattan College Adjunct Faculty Union, New York State United Teachers, AFL-CIO, requests that the Court hear this case en banc for the purpose of overruling its prior decisions in *Duquesne University v. NLRB*, 947 F.3d 824 (2020), *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), and *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). *See Duquesne University v. NLRB*, 2020 WL 5551991, at \*2 (D.C. Cir., Sept. 17, 2020) (concurring opinion

of Judge Pillard suggesting that “[e]n banc review” would give the Court “an opportunity to reverse the majority’s erroneous holding” in *Duquesne University* in a case where a “party ask[s] us to revisit *Great Falls* and *Carroll College* – the cases on which the majority’s holding builds”).<sup>1</sup>

*Duquesne University* decided the following question of exceptional importance:

Whether the Religion Clauses of the First Amendment require the National Labor Relations Board to decline jurisdiction over adjunct professors at a religiously affiliated college who, by the college’s own public representations, are not required to perform any religious functions as part of their job duties.

The *Duquesne University* panel majority concluded that the answer to this question “begins and ends with our decisions in *Great Falls* and *Carroll College*.” 947 F.3d at 832. The majority read those precedents as “establish[ing] a ‘bright-line’ test for determining whether

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<sup>1</sup> Judge Pillard identified three cases that could properly present the question – the instant case, *Saint Xavier University v. NLRB*, No. 18-1076, and *Bethany College*, 369 NLRB No. 98 (June 10, 2020). *Id.* at \*4-\*5. The Board’s *Bethany College* decision is presently before the Court in *Jorsch v. NLRB*, D.C. Cir. No. 20-1385.

the NLRA authorizes the Board to exercise jurisdiction in cases involving religious schools and their teachers or faculty” under which “the Board lacks jurisdiction if the school [] holds itself out to the public . . . as providing a religious educational environment.” *Ibid.* (citation and quotation marks omitted). On that reading, “the *Great Falls* test . . . does not permit [the Board] to examine the roles played by the faculty members involved in the case.” *Id.* at 833.

*Great Falls* and *Carroll College* reviewed NLRB decisions that declined to apply the exemption for parochial school teachers created in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), to teachers at colleges “lack[ing] a substantial religious character.” *Univ. of Great Falls*, 331 NLRB 1663 (2000).” 947 F.3d at 830. *Great Falls* rejected this “substantial religious character” test on the ground that the First Amendment does not allow the Board to engage in “a dissection of life and beliefs at [a] University” to determine whether the school is “sufficiently religious.” *Great Falls*, 278 F.3d at 1343.

*Great Falls* and *Carroll College* did not present an occasion to address whether, in applying the *Catholic Bishop* exemption to college faculty, the NLRB may consider the extent to which “the university

'holds out' its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university's religious purpose or mission." *Pacific Lutheran University*, 361 NLRB 1404, 1411 (2014). Nevertheless, *Duquesne University* extends those precedents in a way that "abrogates *Pacific Lutheran University*, . . . without even acknowledging the extraordinary deference that decision paid to religious schools." 2020 WL 5551991, at \*1 (Pillard, J., concurring).

With *Duquesne University's* expansion of the *Great Falls* test, this Court's "precedent extending *Catholic Bishop*" has become completely "unmoored and increasingly untenable." *Id.* at \*2. More fundamentally, recent Supreme Court "decisions call into question the reasoning that underlies *Great Falls* and *Carroll College*" to the extent those cases "seem to hold *any* inquiry behind a religious school's public representations to be necessarily out of bounds." *Ibid.* See *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. \_\_\_, 140 S.Ct. 2049 (July 8, 2020). The instant case presents "an opportunity to reverse [*Duquesne University's*] erroneous holding," because the Court is being asked not

only to overrule that decision but “to revisit *Great Falls* and *Carroll College* – the cases on which [*Duquesne University’s*] holding builds.”

*Ibid.*

## ARGUMENT

### I. THIS COURT’S “BRIGHT-LINE” TEST FOR APPLYING *CATHOLIC BISHOP* TO THE FACULTY OF RELIGIOUSLY-AFFILIATED COLLEGES RESTS ON THE MISTAKEN ASSUMPTION THAT ALL TEACHERS AT SUCH COLLEGES OPERATE UNDER RELIGIOUS CONTROL AND DISCIPLINE.

The *Catholic Bishop* exception rests on the premise that teachers in “parochial schools,” where “[r]eligious authority necessarily pervades the school system,” operate “under religious control and discipline.” 440 U.S. at 501, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971). In that setting, “the separation of the religious from the purely secular aspects of pre-college education” is impossible. *Ibid.*, quoting *Lemon*, 403 U.S. at 617. Given “the critical and unique role of the teacher in fulfilling the mission of a church-operated school,” the Court concluded that “the Board’s exercise of jurisdiction over teachers in church-operated schools” would raise “serious First Amendment questions.” *Id.* at 501 & 504.

In *Tilton v. Richardson*, 403 U.S. 672, 680 (1971), a companion

case to *Lemon*, the Court rejected “the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable.” Chief Justice Burger – the author of the Court’s opinions in both *Lemon* and *Catholic Bishop* – explained that there are “significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.” *Id.* at 685. In particular, Chief Justice Burger noted that, “by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines” and that “[m]any church-related colleges and universities are characterized by a high degree of academic freedom.” *Id.* at 686.

*Manhattan College* prominently declares that its “mission is strikingly different from that of the parochial schools and Catholic high schools where indoctrination in the faith and insistence on religious observance is seen as part of the mission,” precisely because the College’s mission requires that it “must first be a college with characteristic academic freedom for teachers to pursue research and to

present the truth as they see it with critical and professional objectivity.” *Manhattan College: Lasallian, Catholic, and Independent*, quoted in *Decision and Direction of Election*, at 13, *Manhattan College*, NLRB Case No. 02-RC-023543 (Jan. 10, 2011).<sup>2</sup> The College’s assurances in this regard made it eligible to be “an accredited institution of higher learning . . . recognized by the Middle States Association of Colleges and Schools.” *Dear Prospective Employee*, quoted in *id.* at 14. The Board’s *Pacific Lutheran University* test allows Manhattan College to claim a *Catholic Bishop* exemption for faculty in its Department of Religious Studies, while denying an exemption for those faculty members who the College holds out as possessing full academic freedom. *Decision on Review and Order*, p. 1, *Manhattan College*, NLRB Case No. 02-RC-023543 (Apr. 20, 2017).

When it comes to imposing “religious control and discipline” on teachers, *Catholic Bishop*, 440 U.S. at 501, “religiously affiliated” colleges run the gamut from those that have “freely adopted the academic freedom norms of the secular universities” to those that have

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<sup>2</sup> The Board’s orders in this case are available at: <https://www.nlr.gov/case/02-RC-023543>.

“maintained the older dogmatic approach within the entire institution, requiring faculty and sometimes students to abide by religious codes of conduct and faith.” McConnell, “Academic Freedom in Religious Colleges and Universities,” 53 *Law & Contemp. Probs.* 303, 308 (1990). In between these extremes, “[a] larger number [have] adopted various compromises with the secular position, embracing academic freedom in its essentials but taking certain steps to preserve the religious identity of the school” by “confin[ing] religious constraints to those disciplines, such as theology, where religious norms [a]re most directly relevant.” *Ibid.*

The *Duquesne University* majority does not deny that many religiously affiliated colleges generally “embrac[e] academic freedom” and “confine[] religious constraints to those disciplines, such as theology, where religious norms [a]re most directly relevant.” McConnell, 53 *Law & Contemp. Probs.* at 308. Thus, the majority suggests that “the Board could exercise jurisdiction over a religious school that formally and affirmatively disclaims any religious role for certain faculty members.” *Duquesne University*, 947 F.3d at 835 n.2.

The established means by which a religious college disclaims

religious control over faculty members is public declaration that it “has adopted the *1940 Statement of Principles on Academic Freedom and Tenure* . . . of the American Association of University Professors and of the Association of American Colleges.” *Manhattan College Faculty Handbook*, sec. 2.10.1.<sup>3</sup> See *Tilton*, 403 U.S. at 681-82 (relying on the *1940 Statement*). The *1940 Statement* allows religious colleges to formally make a commitment that “[t]eachers are entitled to freedom in the classroom” subject only to those “[l]imitations of academic freedom because of religious or other aims of the institution [that are] clearly stated in writing at the time of the appointment.” Academic Freedom ¶ 2.<sup>4</sup>

The “limitations clause” was included in the *1940 Statement* at the insistence of the Association of American Colleges (AAC), a co-sponsor of the Statement that included many religious colleges among its membership. Metzger, “The 1940 Statement of Principles on Academic Freedom and Tenure,” 53 *Law & Contemp. Probs.* 3, 22-24 & 32-36 (1990). What religious colleges sought by the inclusion of the

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<sup>3</sup> Available at: <https://inside.manhattan.edu/governance/Faculty%20HANDBOOK%207-18-2016%20v2.pdf>

<sup>4</sup> Available at: <https://www.aaup.org/file/1940%20Statement.pdf>.

“limitations clause” in the *1940 Statement* was the option to “require faculty members to adhere to creeds” provided “that such requirements be made known to candidates for positions before they sign on.”

Metzger, 53 Law & Contemp. Probs. at 24. A religious college may “impose such demands” without “violating the rules of academic freedom” in the *1940 Statement* only if “it makes its doctrinal demands crystal clear in the original terms of employment.” *Id.* at 33.

“In practice, the limitations clause was taken to mean that religious colleges and universities were free to adopt their own principles of academic freedom without interference or censure by the academic community, so long as those principles were clearly announced in advance.” McConnell, 53 Law & Contemp. Probs. at 307-08. This allowed “secular and religious universities [to] coexist, each operating within its own understanding of the principles needed for the advancement of knowledge.” *Id.* at 308.

This Court’s “bright-line” test denies religious colleges the ability to “adopt their own principles of academic freedom” by treating all faculty members as though they were subject to doctrinal demands. *Ibid.* The *Pacific Lutheran University* test, by contrast, recognizes the

commitment made by those religious colleges that adhere to the *1940 Statement* by distinguishing those faculty members who are expressly subject to “doctrinal demands” from those guaranteed complete “freedom in the classroom.” *1940 Statement*, Academic Freedom ¶ 2.

II. THIS COURT’S “BRIGHT-LINE” TEST RESTS ON THE MISTAKEN UNDERSTANDING THAT THE FIRST AMENDMENT’S RELIGION CLAUSES FORBID ANY INQUIRY INTO THE RELIGIOUS ROLE PLAYED BY EMPLOYEES IN APPLYING RELIGIOUS EXEMPTIONS FROM FEDERAL LAW.

The *Great Falls* test, as explicated in *Duquesne University*, rests entirely on the proposition that the NLRB may not “examin[e] whether faculty members play religious or non-religious roles” – or even whether their college asserts that they play religious roles – because “doing so would only risk infringing upon the guarantees of the First Amendment’s Religious Clauses.” 947 F.3d at 833 (citation and quotation marks omitted).<sup>5</sup> That understanding of the Religion Clauses

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<sup>5</sup> The National Labor Relations Board’s recent decision not to exercise “jurisdiction over religious schools in matters involving faculty members” likewise rests entirely on the premise that doing so “would impermissibly present a significant risk that the protections set forth in the Religion Clauses of the First Amendment of the Constitution would be infringed.” *Bethany College*, 369 NLRB No. 98, p. 1 (June 10, 2020), pet. for rev. pending, *Jorsch v. NLRB*, D.C. Cir. No. 20-1385. As the Board itself acknowledges, it has “no expertise in matters of constitutional interpretation” and thus is “entitled to no judicial

is refuted by the Supreme Court's decision *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. \_\_\_, 140 S.Ct. 2049 (July 8, 2020).

*Our Lady of Guadalupe* addressed “whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith.” 140 S.Ct. at 2055. The answer given by the Supreme Court is that “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.” *Id.* at 2069.

In so holding, the Court observed that “[t]his does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to . . . the selection of the individuals who play certain key roles.” *Id.* at 2060. To identify those individuals, “[w]hat matters, at bottom, is what an employee does.” *Id.* at 2064. Thus, in concluding that the employment law claims of two

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deference” on that score. *Id.* at 5.

teachers came within this First Amendment exemption, the Court stressed that “they both performed vital religious duties” in that they “provide[d] instruction about the Catholic faith, . . . prayed with their students, attended Mass with students, and prepared the children for their participation in other religious activities.” *Id.* at 2066.

If the First Amendment allows a federal court to determine whether an employee “perform[s] vital religious duties” in applying the Ministerial Exception to federal employment discrimination laws, *ibid.*, it certainly allows the NLRB to determine whether a college holds out certain faculty members as performing such duties in applying the *Catholic Bishop* exemption.

## CONCLUSION

The Court should hear this case en banc and enforce the decision of the National Labor Relations Board.

Respectfully submitted,

/s/ James B. Coppess  
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CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES

A. Parties and Amici.

Manhattan College was the respondent before the Board (Case No. 02-CA-201623) and is the petitioner before the Court. The National Labor Relations Board is the respondent before the Court; its General Counsel was a party before the Board. Manhattan College Adjunct Faculty Union, New York State United Teachers, AFL-CIO was the charging party before the Board and is the intervenor before the Court.

B. Ruling Under Review.

The case under review is a Decision and Order of the Board, issued on April 27, 2018, reported at 366 NLRB No. 73.

C. Related Cases.

This case has not previously been before this Court or any other court. *St. Xavier University v. NLRB*, D.C. Cir. No. 18-1076, and *Jorsch v. NLRB*, D.C. Cir. No. 20-1385, are related cases.

Respectfully submitted,

/s/James B. Coppess

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE  
REQUIREMENTS

1. This petition complies with the type-volume limitations of Circuit Rule 35(b) because this petition contains 2,296 words, excluding the parts of the petition exempted by Fed. R. App. P.32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point type in a Century font style.

/s/ James B. Coppess  
James B. Coppess

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, the foregoing Petition for Hearing En Banc was served on all parties or their counsel of record through the CM/ECF system.

/s/ James B. Coppess  
James B. Coppess