

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.

MOTION TO GOVERN FUTURE PROCEEDINGS

In accordance with the Court's Order of March 3, 2020, Intervenor Manhattan College Adjunct Faculty Union, New York State United Teachers, AFL-CIO, hereby files this Motion suggesting the governance of future proceedings in this case.

1. On October 26, 2020, the Intervenor filed a petition requesting that this case be heard en banc for the purpose of overruling this Court's 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”). The Intervenor requests that the petition be granted and that further proceedings in this case be conducted in front of the en banc Court.

2. If the petition is denied, the Intervenor requests that this case be remanded to the National Labor Relations Board for further proceedings. There are two matters in particular that the Board needs to address on remand.

First, the Board needs to consider whether Manhattan College satisfies the test set forth by this Court in *Great Falls*. The Regional Director found that, “[w]hile the College may well be affiliated with the Church and take pride in its historical relationship with the Church, the College’s public representations clearly demonstrate that it is not providing a ‘religious educational environment’ and therefore, even under the D.C. Circuit test, the Board should exercise jurisdiction over the College.” Decision and Direction of Election at 23, *Manhattan*

College, NLRB Case No. 02-RC-023543 (Jan. 10, 2011).¹ The Regional Director later found that the College had made the “minimal . . . threshold showing” as to its religious environment required by the first prong of the *Pacific Lutheran University* test. Supplemental Decision and Order at 11 (Aug. 26, 2015). But she did not contradict her initial finding that the College could not show the more vigorous “sorts of ‘market checks’ contemplated by the D.C. Circuit.” Decision and Direction of Election at 23.

Second, even were the NLRB to ultimately determine that the College does meet the *Great Falls* test, the Board should consider whether the College “formally and affirmatively disclaims any religious role for certain faculty members.” *Duquesne University*, 947 F.3d at 835 n.2. The panel majority in *Duquesne University* suggested that this would be a constitutionally permissible test for which faculty members are exempt from NLRB jurisdiction. The exemption defined in this Court’s decisions does not rest on the terms of the NLRA but on the requirements of the First Amendment. If there is a constitutionally

¹ The Board’s orders in this case are available at: <https://www.nlr.gov/case/02-RC-023543>.

permissible test that would permit the Board to assume jurisdiction over the faculty at issue in this case, the Board has a duty to assume jurisdiction.

Respectfully submitted,

/s/ James B. Coppess

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

1. This motion complies with the type-volume limitations of Rule 27(d)(2), F.R.A.P., because this petition contains 515 words.

2. This motion 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 28, 2020, the foregoing Motion to Govern Future Proceedings was served on all parties or their counsel of record through the CM/ECF system.

/s/ James B. Coppess
James B. Coppess