Nos. 18-1113 and 18-1158

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANHATTAN COLLEGE
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

MANHATTAN COLLEGE ADJUNCT FACULTY UNION, NEW YORK STATE UNITED TEACHERS
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 HEARING EN BANC

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UNITED STATES COURT OF APPEALS
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MANHATTAN COLLEGE	)	
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Petitioner/Cross-Respondent	)	
v.	)	Case Nos. 18-1113,
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Respondent /Cross-Petitioner	)	
and	)	
	)	
MANHATTAN COLLEGE ADJUNCT FACULTY UNION, NEW YORK STATE UNITED TEACHERS	)	
	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Manhattan College ("the College") was the respondent before the Board in the underlying proceeding (Board Case No. 02-CA-201623). The College is the Petitioner/Cross-Respondent in Case Nos. 18-1113 and 18-1158 and the Board is the Respondent/Cross-Petitioner.. Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO was the charging party before the Board in the underlying proceeding. Manhattan College Adjunct Faculty Union, New York State United Teachers ("the Union") intervened

on the side of the Board in Case Nos. 18-1113 and 18-1158 before the Court. The Union has moved for initial hearing en banc in Case Nos. 18-1113 and 18-1158; the Board's attached filing opposes the Union's petition. The Board's General Counsel was also a party before the Board in the underlying proceeding. There are no *amici curiae*.

B. Rulings Under Review

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

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court. There are two related cases:

- *St. Xavier University v. NLRB*, D.C. Cir. Nos. 18-1076, 18-1086;
- *Jorsch v. NLRB*, D.C. Cir. Nos. 20-1385.

/s/ David Habenstreit
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Dated at Washington, D.C.
this 4th day of December 2020

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INTRODUCTION

The Union-Intervenor seeks initial en banc review in the instant case, *Manhattan College*, which was previously held in abeyance pending *Duquesne University v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020) (petition for rehearing en banc denied Oct. 28, 2020). In *Manhattan College*, the Board applied a now-defunct standard to determine that it had jurisdiction over the faculty at the College, which is a self-identified religiously-affiliated college. The Board opposes the Union's request because the Board has now abandoned its previous standard in favor of this Circuit's jurisdictional test, which comports with all relevant precedent including Supreme Court caselaw.

In *Duquesne*, this Court abrogated the Board's test for asserting jurisdiction over faculty at religiously-affiliated colleges and universities, as set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014). In so ruling, this Court found that the Board's *Pacific Lutheran* test was inconsistent with this Circuit's test for determining jurisdiction set forth in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

Specifically, in *Great Falls* and *Carroll College*, this Circuit held that the Board does not have jurisdiction over faculty at a religiously-affiliated college or university if the institution (a) holds itself out to students, faculty, and the community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. *Great Falls*, 278 F. 3d at 1343-44; *Carroll College*, 558 F.3d at 572. In *Pacific Lutheran*, the Board required a religious college or university seeking to avoid the Board's jurisdiction not only to show that "it holds itself out as providing a religious educational environment," *Pacific Lutheran*, 361 NLRB at 1414, which was similar to the *Great Falls* test, but also that "it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college's or university's

religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large." *Id.* at 1414.

Soon after this Court issued its decision in *Duquesne*, the Board itself disavowed *Pacific Lutheran*, relinquishing its additional requirement that religious schools hold out faculty members themselves as performing a specific religious role in order to avert Board jurisdiction. Instead, the Board adopted the *Great Falls* test, aligning the Board's test with this Circuit's precedent. *See Bethany College*, 369 NLRB No. 98 (June 10, 2020), *petition for review sub nom. filed, Jorsch v. NLRB*, D.C. Cir. Case No. 20-1385 (Sept. 23, 2020).

Because the instant case under review applies the now-defunct *Pacific Lutheran* test—rejected by both this Court and the Board—en banc review is not warranted. The Union-Intervenor asks this Court to overrule *Duquesne*, *Carroll College*, and *Great Falls*, but its petition fails to show that these cases conflict with any Supreme Court or circuit court precedent. Indeed, Board law is now in conformity with all relevant precedent, and there is no issue of exceptional importance so as to warrant rehearing.

ARGUMENT

I. *GREAT FALLS*, *CARROLL COLLEGE*, AND *DUQUESNE* ARE CONSISTENT WITH SUPREME COURT AND CIRCUIT LAW

The Union seeks en banc review so that this Court can overrule *Duquesne*, *Carroll College*, and *Great Falls*. But en banc review is not warranted, as those

cases are consistent with both Supreme Court precedent and the Board's current view, and no court of appeals has taken a contrary position. Indeed, *Duquesne*'s refusal to examine whether a school publicly holds out its faculty members as playing a specific role in the school's religious educational environment "followed directly" from the Supreme Court's holding in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and other circuit precedent. *Duquesne*, 947 F.3d at 834.

In *Catholic Bishop*, the Supreme Court, seeking to avoid the risk of violating the Religion Clauses, held that the NLRA does not authorize the Board to exercise jurisdiction over teachers in a church-operated secondary school, no matter whether the school is "completely religious" or merely "religiously associated." *Id.* at 500, 507. The Court explained that teachers play a "critical and unique role . . . in fulfilling the mission of a church-operated school." *Id.* at 501. This holds true regardless of whether the teacher provides instruction in religious or secular subjects. *See id.* at 501-02. Given the vital role played by teachers, exercising jurisdiction over disputes involving teachers at a church-operated school presented a "significant risk that the First Amendment will be infringed." *Id.* at 502. Seeing "no escape from conflicts flowing from the Board's exercise of jurisdiction . . . and the consequent serious First Amendment questions that would follow," the Supreme Court held that the Board lacked jurisdiction over teachers in church-operated schools. *Id.* at 504, 507.

In the wake of *Catholic Bishop*, the Board assessed on a case-by-case basis whether it could nonetheless exercise jurisdiction over teachers at religiously-affiliated colleges and universities. Prior to adopting its test in *Pacific Lutheran*, the Board used what came to be known as its "substantial religious character" test to make that determination. *Great Falls*, 331 NLRB 1663, 1664 (2000), *vacated*, 278 F.3d 1335. After denying enforcement of the Board's "substantial religious character" test as impermissibly "intrusive" under the constitutional avoidance principles in *Catholic Bishop*, 278 F.3d at 1341-42, this Court in *Great Falls* adopted its current test, drawn partially from then-Judge Breyer's opinion in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 400 (1st Cir. 1985) (evenly divided court refusing to enforce Board's order asserting jurisdiction over religious university that holds itself out as Catholic) (en banc). As noted, the *Great Falls* test determines Board jurisdiction by looking only to how a school holds itself out to the public, is organized, and affiliated. *Great Falls*, 278 F.3d at 1343, citing *Bayamon*, 793 F.2d at 399-400, 403. As this Court explained, "this bright-line test will allow the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands." *Id*. at 1344-45. At the

same time, "this approach provides reasonable assurance that the *Catholic Bishop* exemption will not be abused." *Id.*[1]

By the time *Duquesne* reached this Court, the Board had abandoned its "substantial religious character" test and adopted its test in *Pacific Lutheran*. This Court rejected that test, explaining "although [*Pacific Lutheran*] suggests that it can avoid constitutional problems by considering only whether a religious school 'holds out' faculty members as playing a specific religious role, such an inquiry would still require the Board to define what counts as a 'religious role' or a 'religious function.'" *Duquesne*, 947 F.3d at 834-35. This would impermissibly lead to just "the sort of intrusive inquiry that *Catholic Bishop* sought to avoid," with the Board "trolling through the beliefs of the University," making determinations about its religious mission and whether certain faculty members contribute to that mission. *Id.*, citing *Great Falls*, 278 F.3d at 1341-42. Thus, *Duquesne* held that *Pacific Lutheran* was inconsistent with *Catholic Bishop* and *Great Falls*. 947 F.3d at 832-33. With that, there was no court disagreement over the test to apply to determine Board jurisdiction over faculty at religiously-affiliated schools—and a few months later, the Board aligned with this precedent in *Bethany*.

[1] This Court reaffirmed its holding in *Great Falls* in *Carroll College*, 558 F.3d at 572.

Nonetheless, the Union makes two claims that legal inconsistencies warrant en banc review. As shown below, these claims fail to demonstrate that the law concerning the Board's jurisdiction over religiously-affiliated colleges and universities is anything but uniform.

A. This Circuit's Law Applying *Catholic Bishop*'s Analysis to Higher Education Is Consistent with *Catholic Bishop* and *Tilton*

The Union seeks en banc review (U. Pet. 5-11) to examine whether *Catholic Bishop*, which involved a parochial school, applies in the university context. But as shown above, this Circuit has consistently applied the analysis of *Catholic Bishop* to teachers at colleges and universities. Indeed, the Board itself has been doing so even prior to abandoning the *Pacific Lutheran* test post-*Duquesne*. *See Pac. Lutheran*, 361 NLRB at 1407 n.4 (recognizing that *Catholic Bishop*'s instruction to avoid entanglement applies to the university context as well as parochial schools, citing *Trustee of St. Joseph's Coll.*, 282 NLRB 65, 67-68 (1986)). On the basis of such uniformity alone, this Court should reject the Union's invitation for en banc review of its precedent.

Moreover, as this Court recognized in *Duquesne*, then-Judge Breyer, writing for half of the en banc court in *Bayamon*, convincingly explained that "'the language of *Catholic Bishop* itself does not distinguish colleges from primary and secondary schools," and the risk of "state/religion entanglement . . . would seem as great in

colleges as in secondary schools.'" *Duquesne*, 947 F.3d at 830 (quoting *Bayamon*, 793 F.3d at 401). This Court also found persuasive then-Judge Breyer's description of why the entanglement risk was not alleviated in the university setting, noting that "'[u]nfair labor practice charges would seem as likely; the Board's likely scrutiny would seem at least as intense; the necessary distinctions between religious and labor matters would seem no easier to make; and whether one could readily 'fence off' subjects of mandatory bargaining with a religious content would seem similarly in doubt.'" *Duquesne*, 947 F.3d at 830 (quoting *Bayamon*, 793 F.3d at 403). It was this risk of entanglement which led then-Judge Breyer to conclude that the Board's attempt to assert jurisdiction over religiously-affiliated colleges and universities resulted in inevitable unconstitutional entanglement and was an unlawful effort "to tread the path that *Catholic Bishop* forecloses." *Bayamon*, 793 F.2d at 402.

Relying primarily on *Tilton v. Richardson*, 403 U.S. 672 (1971), however, the Union claims (U. Pet. 5-7) that there are relevant distinctions between secondary and higher education. But the distinctions discussed in that very different case are not relevant for purposes of determining Board jurisdiction over teachers in religious schools. In its plurality opinion in *Tilton*, the Supreme Court upheld a federal law granting money for the construction of academic facilities to some universities which were "governed by Catholic religious organizations." 403 U.S. at 686. To be sure, in deciding that the aid created little risk of unconstitutional entanglement, 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. But its decision was also motivated by a bright line that the Court had drawn in its precedent between "teachers" and "services, facilities, or materials." *Id*. The Court explained that teachers "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 687-88.

The Court's distinction between teachers and services, facilities, or materials is significant given that teachers are the focus of the constitutional issue here. This is consistent with this Court's decision in *Duquesne*, which emphasized the teaching of *Catholic Bishop* that "[n]o matter the subject taught, 'a teacher remains a teacher,' and 'a teacher's handling' of even secular subjects may implicate the school's religious mission." *Duquesne*, 947 F.3d at 834 (citing *Catholic Bishop*, 440 U.S at 501).

The Union's related claim (U. Pet. 6-10) that greater academic freedom in religious colleges and universities justifies a more searching Board jurisdictional standard was reasonably rejected by this Circuit. As this Court said in *Duquesne*, "a commitment to academic freedom does not become 'any less religious' simply because secular schools share the same commitment, nor because it advances the

school's religious mission in an 'open-minded' manner as opposed to "hard-nosed proselytizing." *Duquesne*, 947 F.3d at 836 (citing *Great Falls*, 278 F.3d at 1346). Finally, contrary to the Union, nothing in any of this Circuit's decisions "denies religious colleges" the "ability to adopt their own principles of academic freedom." (U. Pet. 10-11.) This Circuit has simply held that such declarations of principle do not demonstrate that a college or university's faculty is subject to Board jurisdiction.[2]

In sum, the type of school (secondary vs. college) and type of teaching (religious vs. secular) are false dichotomies for the purpose of assessing Board jurisdiction over teachers at religious schools. And in any event, the Union has not demonstrated any inconsistency among the courts that have applied *Catholic Bishop* in this context.

[2] The Union seems to suggest that this Circuit has also restricted religious colleges' freedom by deciding that the Board must decline jurisdiction over types of teachers at religious schools whom the college publicly represents "are not required to perform religious functions as part of their job duties." (U. Pet. 2.) This incorrectly frames the issue decided by *Duquesne*; indeed, as the Union itself acknowledges elsewhere (U. Pet. 8), *Duquesne* explicitly left that question open. *See* 947 F.3d at 835 n.2 (stating "we do not address whether the Board could exercise jurisdiction over a religious school that formally and affirmatively disclaims any religious role for certain faculty members").

B. This Circuit's Case Law Is Not Inconsistent with *Our Lady of Guadalupe*

The Union is also wrong (U. Pet. 11-13) that there is an impermissible tension between this Circuit's rejection in *Duquesne* of *Pacific Lutheran*'s "holding-out" inquiry, as applied to faculty, and the recent Supreme Court decision in *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049, 2064 (2020), which permits courts to examine "what an employee does."[3] The decisions in *Duquesne* and *Our Lady of Guadalupe* share the principle that "[j]udicial review of the way in which religious schools discharge th[eir] [educational] responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Our Lady of Guadalupe*, 140 S. Ct. at 2055. This shared rationale undergirds both decisions, demonstrating their common objective of avoiding the unconstitutional entanglement that accompanies an inquiry into religious views. Each decision, however, uses different means to achieve that end, with such differences being necessitated by the different statutory contexts that each case addresses.

As the Union correctly observes (U. Pet. 12-13), *Our Lady of Guadalupe* allows the examination of whether an employee performs vital religious duties in

[3] *Our Lady of Guadalupe* addressed the scope of the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), that bars, on First Amendment grounds, Title VII employment discrimination suits brought on behalf of ministers against their religious institutions.

order to assess whether to apply the "ministerial exception" to bar an employee's discrimination suit against her religious employer. *Our Lady of Guadalupe*, 140 S.Ct at 2063-64. The Union then pivots to the conclusion that if such an inquiry is permissible in the Title VII arena, it should be equally allowable in the Board's jurisdictional analysis. But the inquiry used to determine "an affirmative defense to an otherwise cognizable claim," *Hosanna-Tabor* 565 U.S. at 195 n.4, should not also be used to determine whether the Board can "assert jurisdiction over schools . . . placed outside the Board's powers." *Duquesne*, 947 F.3d at 833. The former inquiry "necessarily involves determining . . . the [employee's] . . . function," whereas the latter considers a jurisdictional bar. *Pacific Lutheran*, 361 NLRB at 1445 n.3 (Member Johnson, dissenting); *Cf. Duquesne*, 947 F.3d at 846 (recognizing ministerial exception "is a waivable affirmative defense, not a jurisdictional bar" (Pillard, J., dissenting)).

Thus, the permitted inquiry into the role of an employee in order to assess an affirmative defense to an otherwise cognizable employment discrimination claim in *Our Lady of Guadalupe* is meaningfully different from this Circuit's preclusion of such an inquiry by the Board under the jurisdictional bar established in *Catholic Bishop*. The treatment of the inquiry in each case is not impermissibly inconsistent, given the singular purpose of each inquiry and the different statutes involved.

Accordingly, *Our Lady of Guadalupe* does not provide grounds for en banc review of this Circuit's precedent.

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

As discussed, the instant case applies the Board's now-abandoned *Pacific Lutheran* test to determine Board jurisdiction over faculty at religiously-affiliated schools. The Board has since replaced that test with this Circuit's *Great Falls* test, bringing its jurisprudence into conformity with this Circuit's case law after years of criticism from this Circuit. Given that there is no longer a conflict between this Circuit—or any circuit—and the Board, reviewing this Circuit's precedent is not an issue of exceptional importance.

Moreover, the Board's rejection of *Pacific Lutheran* in *Bethany* after deciding *Manhattan College* renders this case a less than optimal vehicle for consideration of any change in precedent. The Union, as an intervenor technically in support of the Board, is asking the Court to enforce a Board order that is premised on a standard that the Board itself has since deemed "fatally flawed" because it "impermissibly present[s] a significant risk that the protections set forth in the Religion Clauses of the First Amendment . . . would be infringed." *Bethany*, 369 NLRB No. 98, slip op. at 1, 5. Indeed, the Board has joined the College in asking this Court to grant the College's petition for review, vacate the Board's Order, and deny the Board's petition for enforcement in this case.

In sum, the Union seeks the extraordinary relief of en banc review in a case applying an obsolete Board standard—a standard the Board abandoned in order to embrace an analysis that conforms with this Court's precedent and is consistent with all circuit and Supreme Court precedent that has considered the issue. Under these circumstances, en banc review is not warranted.

CONCLUSION

For the foregoing reasons, the Union's petition for en banc hearing should be denied.

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National Labor Relations Board
December 2020

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	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 35(e), the Board certifies that the foregoing document contains 2,985 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, DC
this 4th day of December 2020

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Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 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 using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
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