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Nos. 18-1113, 18-1158

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IN THE  
United States Court of Appeals  
for the District of Columbia Circuit

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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 for Respondent.

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

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

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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: Manhattan College.

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

c. Intervenor for Respondent: Manhattan College Adjunct Faculty Union, New York State United Teachers.

2. Manhattan College is a four-year higher education institution founded by the Christian Brothers, a Catholic religious order started by Saint John Baptist de La Salle, the patron saint of teachers. Manhattan College is a nonprofit corporation, incorporated in the State of New York, and is exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code of 1986, as amended. Manhattan College has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

### **B. RULINGS UNDER REVIEW**

Manhattan College petitioned for review of the National Labor Relations Board's April 27, 2018 final Decision and Order in No. 02-CA-201623. The Order is reported at 366 N.L.R.B. No. 73. The Order was based on an underlying representation case, No. 02-RC-023543. The Board's April 27, 2018 Decision on

Review and Order in the representation case is unreported but is available at 2017 WL 1434209.

### **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. Manhattan College*, No. 18-1158 (D.C. Cir.), in which the Board filed a cross-application for enforcement of its Order. On its own motion, this Court consolidated No. 18-1158 with this case.

Respectfully submitted,

/s/ Neal Kumar Katyal  
Neal Kumar Katyal

Dated: December 4, 2020

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## **GLOSSARY**

NLRA or the Act:

National Labor Relations Act

NLRB or the Board:

National Labor Relations Board

The Union:

Manhattan College Adjunct Faculty  
Union, New York State United  
Teachers, AFL-CIO

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**INTRODUCTION**

En banc review “is a discretionary procedure employed only to address questions of exceptional importance or to maintain uniformity among Circuit decisions.” *Missouri v. Jenkins*, 495 U.S. 33, 46 n.14 (1990). The grant of such review is “*not* favored.” Fed. R. App. P. 35(a) (emphasis added). En banc review

entails a “drain on judicial resources,” “expense and delay for the litigants,” and a “high risk of a multiplicity of opinions offering no authoritative guidance.” *Air Line Pilots Ass’n, Int’l v. E. Air Lines, Inc.*, 863 F.2d 891, 925 (D.C. Cir. 1988) (Ginsburg, J., concurring in the denial of rehearing en banc). *Initial* en banc review is more disfavored still. To counsel’s knowledge, where not required by statute, this Court has ordered initial en banc consideration only once in the last two decades. *See* Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 16, 2016).

The Union provides no such justification here. There is no conflict among the decisions of this Court. There is no decision of the Supreme Court abrogating this Court’s precedents. And the question presented is important only to a small subset of employees at a handful of colleges and universities. Instead, the Union urges this Court to take up the case merely “for the purpose of overruling its prior decisions.” Pet. 1. In so doing, the Union echoes a recently-filed concurrence in the denial of rehearing en banc suggesting that this Court should “reconsider” its precedents “in an appropriate case.” *Duquesne Univ. of the Holy Spirit v. NLRB*, 975 F.3d 13, 15 (D.C. Cir. 2020) (Pillard, J., concurring in the denial of rehearing en banc). But, for several reasons, this case presents a thoroughly *inappropriate* vehicle for that reconsideration. Chief among them: the Board is no longer inclined to defend the decision on review. The petition should be denied.

## BACKGROUND

The line of cases that the Union asks this Court to overrule starts with the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). There, the Court held that the National Labor Relations Act 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." *Id.* at 500. And because there was "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 problem the Court saw in *Catholic Bishop* was simple: If teachers in religious 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 "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment,'" subject to 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,” any attempt by the Board to regulate the relationship between teachers and religious schools would “necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators,” which could “impinge on rights guaranteed by the Religion Clauses.” *Id.* at 502.

The Supreme Court did not offer a test for determining whether a school is beyond Board jurisdiction. But in a series of decisions following *Catholic Bishop*, the Board developed a test that weighed, *inter alia*, the involvement of the religious group in the school’s affairs, the school’s religious mission, and whether religion plays a role in faculty appointment and evaluation to determine if it is exempt from jurisdiction. *See Livingstone Coll.*, 286 N.L.R.B. 1308, 1309-10 (1987).

In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), this Court rejected the Board’s approach, holding that it involved just “the sort of intrusive inquiry that *Catholic Bishop* sought to avoid.” *Id.* at 1341. Relying on then-Judge Breyer’s opinion in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (en banc), this Court announced “a ‘bright-line’ rule” that prevents the Board from “delving into matters of religious doctrine or motive,” *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009) (quoting *Great Falls*, 278 F.3d at 1345). The Board must decline jurisdiction over faculty at a religious college if the college “(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. This

Court reaffirmed *Great Falls* in *Carroll College*, applying the *Catholic Bishop* exemption to faculty at a religious college, even though the college had failed to raise *Catholic Bishop* before the Board because, “[a]fter our decision in *Great Falls*, *Carroll* is patently beyond the NLRB’s jurisdiction.” *Carroll Coll.*, 558 F.3d at 574.

Five years later, in *Pacific Lutheran University*, 361 N.L.R.B. 1404 (2014), the Board nevertheless announced that it would not follow *Great Falls* and minted “a new test.” *Id.* at 1408. The Board stated that it would decline jurisdiction over faculty at a religious college only if the college publicly represents that the faculty members “perform[] a specific role in creating or maintaining” the school’s religious environment, *id.* at 1414, such as “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 *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020), this Court rejected the Board’s attempt to overrule *Great Falls*, explaining that “*Pacific Lutheran* runs afoul of our precedent by claiming jurisdiction in cases that we have placed beyond the Board’s reach.” *Id.* at 833. 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 *Duquesne* majority disagreed, ruling that adjuncts fulfill the same “critical and

unique role” in advancing the mission of a religious school that the Supreme Court found significant in *Catholic Bishop*. *Id.* at 836 (internal quotation marks omitted).

This Court declined to reconsider *Duquesne* en banc. The dissenting panel member, concurring alone in the denial of rehearing en banc, suggested that this Court should “reconsider” its precedents interpreting *Catholic Bishop* “in an appropriate case.” *Duquesne*, 975 F.3d at 15 (Pillard, J., concurring in the denial of rehearing en banc). In the concurrence’s view, although “the [Supreme] Court’s recent ministerial exception decisions suggest *Catholic Bishop*’s core holding—that parochial high school teachers are exempt from NLRA coverage—remains on firm foundation substantively,” “*Catholic Bishop* rests on an outmoded form of constitutional avoidance.” *Id.* at 15-16.

In the Board decision on review here (which predates this Court’s decision in *Duquesne*), the Board applied the *Pacific Lutheran* test to assert jurisdiction over adjunct faculty at Manhattan College. *See Manhattan Coll.*, 366 N.L.R.B. No. 73, 2018 WL 2003450, at \*1 (N.L.R.B. Apr. 27, 2018). There is no doubt that Manhattan College meets the *Great Falls* test, and the Union does not argue otherwise. Manhattan College is a non-profit, it “consistently identifies itself as a Lasallian Catholic institution,” and it “publicly describes those values as inspiring the education it provides.” Supplemental Decision and Order at 3, 12, *Manhattan Coll.*, No. 02-RC-023543 (N.L.R.B. Aug. 26, 2015).

The Union has nevertheless filed a petition for initial en banc consideration, arguing that this Court should take up the case “for the purpose of overruling its prior decisions” in *Great Falls*, *Carroll College*, and *Duquesne*. Pet. 1.

## ARGUMENT

### I. INITIAL HEARING EN BANC IS UNWARRANTED.

“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless . . . necessary to secure or maintain uniformity of the court’s decisions; or . . . the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a). And, although this Court has not articulated a separate standard for initial en banc review, initial hearing en banc is *such* extraordinary relief that, excluding those cases in which initial hearing en banc is required by statute, this Court has ordered initial hearing en banc only once in the past twenty years. *See Order, West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 16, 2016).

Here, the Union makes no argument that en banc consideration is necessary to maintain the uniformity of this Court’s decisions. To the contrary, in arguing that this Court should grant hearing en banc to overrule a line of cases stretching back 20 years, the Union effectively concedes that there is no conflict among this Court’s precedents. Instead, the Union grounds its request for hearing en banc in the dubious proposition that the Board’s decision here presents a question of exceptional importance. Pet. 2 & n.1. For at least three reasons, it does not.

*First*, the Union’s primary argument appears to be that a single member of this Court expressed disagreement with the outcome in *Duquesne*. But the fact that a member of the *Duquesne* panel dissented from that decision, and then wrote a separate opinion concurring in the denial of rehearing en banc, does not justify en banc review. “[W]hile Rule 35 looks to preserving the uniformity of a circuit’s decisions, the courts agree that the availability of *en banc* rehearings to cure intra-circuit conflicts does not justify a vote for reconsideration by the entire court merely because a judge disagrees with the result reached by the panel.” *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir. 1981) (Robinson, J., dissenting) (alterations and internal quotation marks omitted). Otherwise en banc hearings would become the norm, instead of the exception.

Hearing en banc would be particularly inappropriate here because the *Duquesne* dissent was “narrow.” *Duquesne*, 947 F.3d at 845 (Pillard, J., dissenting). The *Duquesne* dissent agreed with the panel majority that *Catholic Bishop* strips the Board of jurisdiction over the employment relationship between religious schools and their teachers; that *Great Falls* describes the test for determining whether the full faculty of a particular school is exempted from the Board’s jurisdiction by *Catholic Bishop*; and that *Pacific Lutheran* purported to overrule *Great Falls*. The *Duquesne* dissent merely disagreed with the panel majority’s “application of the [*Catholic Bishop*] exemption to *adjunct* faculty.” *Id.* at 837 (Pillard, J., dissenting).

In other words, the *Duquesne* dissent disagreed with the majority's application of the law to the factual context presented. Further emphasizing the narrow space between the majority and the dissent, the *Duquesne* dissenter *concurred* in the denial of rehearing en banc in that case. Indeed, this case is on all fours with *Duquesne*, and if the Court found that *Duquesne* did not warrant en banc consideration, it is hard to see why this case would be a more appropriate vehicle.

*Second*, as this Court implicitly recognized when it denied rehearing en banc in *Duquesne*, the petition here does not raise an issue of exceptional importance. Indeed, the question presented in this case is a far cry from the questions that have prompted this Court to grant en banc consideration in the absence of a conflict in the past. This case does not present a question regarding national security or wartime conduct, *see, e.g., Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (rehearing en banc regarding crimes triable by military commission), does not implicate the separation of powers, *see, e.g., Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (rehearing en banc regarding Congressional committee's standing to seek judicial enforcement of subpoena), and does not touch on an administrative program that will re-shape an industry, *see, e.g., Order, West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 16, 2016) (initial hearing en banc to consider challenges to EPA's Clean Power Plan).

Instead, this is a case about whether the NLRB can, consistent with the First Amendment rights of a Catholic college against government interference with its religious mission, assert jurisdiction over the employment relationship between the college and its adjunct faculty. That hyper-specific question may be of great importance to the parties to this case and a small subset of employees at other religious colleges and universities, but it does not present an issue of great *public importance*. To be sure, this case implicates the First Amendment rights of religious higher-educational institutions. But to say that “every [First Amendment] case is important, . . . does not mean that every issue presented in a [First Amendment] case is necessarily one of *exceptional* importance.” *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1337 (11th Cir. 2013) (Wilson, J., dissenting) (emphasis altered).

## **II. THIS COURT’S DECISIONS IN *GREAT FALLS*, *CARROLL COLLEGE*, AND *DUQUESNE* ARE COMPELLED BY AND CONSISTENT WITH SUPREME COURT PRECEDENT.**

The Union identifies no conflict between the precedents of this Court and the Supreme Court. Nor could it. *Great Falls*, *Carroll College*, and *Duquesne* “followed directly from *Catholic Bishop*.” *Duquesne*, 947 F.3d at 834. Instead, the Union argues that there is tension between this Court’s decisions and dicta from the Supreme Court’s decisions in *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality op.), *see* Pet. 5-9, and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), *see* Pet. 11-13.

That purported tension falls far short of meeting Rule 35’s standard for en banc review. *See United States v. Moore*, 110 F.3d 99, 99 (D.C. Cir. 1997) (Sentelle, J., concurring in denial of rehearing en banc) (“[W]e should not waste the assets of the court on an *in banc* proceeding unless the panel decision at least (a) is erroneous and (b) establishes or maintains a precedent of some importance.”). Moreover, even if such tension—as opposed to an outright conflict—could merit en banc review, this Court should not grant en banc review here because *Tilton* and *Guadalupe* are, in fact, consistent with *Great Falls*, *Carroll College*, and *Duquesne*.

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

In *Tilton*, the Supreme Court upheld a federal law granting money to both religious and secular colleges for the construction of academic facilities. 403 U.S. at 676 (plurality op.). 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 that was not the basis for the Court’s decision. Instead, the Court stressed that its decision was motivated by a 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. Moreover, the Court explained, 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, *see* Pet. 6, but ignores the rest. The latter parts of *Tilton*’s analysis show why *Great Falls*, *Carroll College*, and *Duquesne* came out differently from *Tilton*. Unlike *Tilton*, this Court’s cases involve teachers—not services, facilities, or materials. And teachers cannot be entirely separate from the school’s religious mission. *Tilton*, 403 U.S. at 687-688. And unlike *Tilton*, *Great Falls* and its progeny involve an *ongoing* relationship between religious colleges 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 here than was true in *Tilton*.

**B. *Guadalupe* Does Not Suggest That The First Amendment Permits The Board To Engage In A Searching Review Of The Relationship Between A Religious School And Its Teachers.**

In *Guadalupe*, the Supreme Court addressed the scope of the “ministerial exception” recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). In *Hosanna-Tabor*, the 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.” *Hosanna-Tabor*, 565 U.S. at 191-192. The Union points to that analysis to argue that the Board can similarly parse the employment relationship at issue here. *See* Pet. 11-13.

But the fundamental principle underlying *Guadalupe* and *Hosanna-Tabor*—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,” *Guadalupe*, 140 S. Ct. at 2055—is consistent with *Catholic Bishop* and this Court’s interpretation of it in *Great Falls*, *Carroll College* and *Duquesne*. Both lines of cases provide protection for religious rights against encroachment from secular authorities. And to the extent that *Hosanna-Tabor* and *Catholic Bishop* differ in their approach to government scrutiny of religion, those differences make sense. *Hosanna-Tabor* and *Catholic Bishop* come from separate lines of cases that differ in important ways.

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* requires the Board to avoid even the risk of 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 focused on the individual bringing suit, it is obvious that this inquiry will require a more searching review under *Hosanna-Tabor*.

Thus, it is unsurprising that neither the Supreme Court nor this Court has ever indicated that those two lines of cases overlap. Indeed, neither *Hosanna-Tabor* nor *Guadalupe* even cites *Catholic Bishop*.

**III. IN ANY EVENT, THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR THIS COURT TO RECONSIDER *GREAT FALLS, CARROLL COLLEGE, OR DUQUESNE*.**

In any event, the Board Decision on review here would make a poor vehicle for this Court's reconsideration of its precedents, for at least three reasons.

**A. The Board Has Now Overruled *Pacific Lutheran* And Adopted The Test Set Out In *Great Falls*.**

First, as the Board now acknowledges, the *Pacific Lutheran* test on which the Order in this case rests “is fatally flawed because its required analysis . . . 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”—an approach that is “irreconcilable with the holding, rationale, and purpose of *Catholic Bishop*.” *Bethany Coll.*, 369 N.L.R.B. No. 98, 2020 WL 3127965 (June 10, 2020), *petition for review filed sub nom. Jorsch v. NLRB*, No. 20-1385 (D.C. Cir. Sept. 23, 2020). The Board's disinterest in defending *Pacific Lutheran* is itself a sufficient reason to deny hearing this case en banc. *C.f. Qassim v. Trump*, 938 F.3d 375, 376 (D.C. Cir. 2019) (Millett, 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”).

**B. Because Adjunct Faculty Teach, They Are At The Heart Of The *Catholic Bishop* Exemption.**

The *Duquesne* concurrence suggests that this Court should consider “how the NLRA’s application to distinct categories of employees is limited by the Religion Clauses.” *Duquesne*, 975 F.3d at 16 (Pillard, J., concurring in the denial of rehearing en banc). As the concurrence admits, “*Catholic Bishop*’s holding is binding on this court,” and “the [Supreme] Court’s recent ministerial exception decisions suggest *Catholic Bishop*’s core holding—that parochial high school teachers are exempt from NLRA coverage—remains on firm foundation substantively.” *Id.* However, the concurrence questions whether “the wide range of non-teaching staff that religious educational institutions employ,”—including, for example, “information technology support staff, cafeteria workers, or campus security”—“should simply be equated with the parochial-school teachers in *Catholic Bishop*.” *Id.* at 16-17.

But hearing this case en banc would not permit this Court to reach the questions raised by the concurrence. This case is about teachers—a union of adjunct faculty members—not IT staff, cafeteria workers, or campus security. And as this Court explained in *Duquesne*, the reasoning that controlled in *Catholic Bishop* is equally applicable to adjuncts, because “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. Thus, to the extent this Court wants to consider “how the NLRA’s application to distinct categories of employees is limited by the

Religion Clauses,” *Duquesne*, 975 F.3d at 16 (Pillard, J., concurring in the denial of rehearing en banc), this Court should wait for a vehicle involving a union that includes non-teaching staff.

**C. *Duquesne* Permits Religious Colleges To Distinguish Among Faculty.**

In a final attempt to convince the Court that this case is worthy of en banc review, the Union argues that the bright-line test articulated in the *Great Falls* line of cases somehow “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.” Pet. 10 (internal quotation marks omitted). But contrary to the Union’s contentions, this Court’s precedent permits religious colleges to distinguish among faculty—for example, by claiming the *Catholic Bishop* exemption only for the faculty in the religion department—if they wish to do so. As the *Duquesne* dissent acknowledged, the panel majority and the dissent “agree[d] 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 majority op. at 835 n.2). *Duquesne* merely reaffirms *Great Falls*’ holding that the Board cannot make that decision for the school. *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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## CERTIFICATE OF COMPLIANCE

1. This document complies with word limit set forth in this Court's November 2, 2020 order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,900 words.

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/s/ Neal Kumar Katyal  
Neal Kumar Katyal

**CERTIFICATE OF SERVICE**

I certify that on December 4, 2020, the foregoing Response of Petitioner/Cross-Respondent in Opposition to Intervenor's Petition for Initial Hearing 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  
Neal Kumar Katyal