

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION TWO**

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In the Matter of :
MANHATTAN COLLEGE, :
Employer, : **Case No. 2-RC-23543**
- and - :
MANHATTAN COLLEGE ADJUNCT :
FACULTY UNION, NYSUT, AFT-NEA/ :
AFL-CIO, :
Petitioner. :
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EMPLOYER’S POST-HEARING MEMORANDUM

This post-hearing memorandum is submitted on behalf of Respondent Manhattan College (the “College”) on the issue of NLRB jurisdiction.

Issue Presented

Whether Manhattan College is exempt from National Labor Relations Board jurisdiction as a religious institution under *Carroll College v. NLRB*, 558 F.3d 556 (D.C. Cir. 2009), *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Preliminary Statement

New York State United Teachers (“NYSUT,” or the “Union”) filed a petition seeking to represent Manhattan College’s adjunct part time faculty. (Board Exh. 1). A hearing was held beginning on October 27, 2010, and concluding on November 19, 2010.

At the commencement of the hearing, the Hearing Officer, over the objections of the College, entered into the record the Regional Director's prior determination in *Manhattan College and Manhattan College Faculty Coalition, New York State United Teachers*, Case No. 2-RC-21735 (November 9, 1999; Board Exh. 3). That case involved an earlier attempt by the same Union to organize the full-time faculty of Manhattan College; and in an extensive proceeding lasting from October 1996 through June 1998, the parties litigated the NLRB's jurisdiction over Manhattan College both with respect to its status religious institution under *NLRB v. Catholic Bishop of Chicago*, and with respect to the status of the faculty as "managerial employees" excluded from the reach of the National Labor Relations Act under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

In the 1999 case, the Regional Director decided, *inter alia*, that Manhattan College was not a "church-operated" institution within what he considered to be the meaning of *Catholic Bishop*, and accordingly concluded that the Board could assert jurisdiction.

Despite the facts (a) that the hearings in the prior case occurred more than twelve years ago, and (b) that there have been major evolutions in the applicable law in the intervening time, the Hearing Officer took the position, over the College's objection, that the 1999 decision should be considered part of the evidentiary record in this proceeding. The ruling to incorporate the earlier determination into this proceeding was made *despite* the Hearing Officer's acknowledgement that the Region *no longer has the original record* (which consisted of more than 38 volumes of testimony and more than 500 exhibits).

While there is no dispute that the Region is free to cite to the 1999 determination and may take notice of it in this case, we submit that incorporating a decision into an official hearing record without incorporating the factual record on which it was based constitutes

prejudicial error. Of necessity, it means that a decision in this case will be based upon presumed facts found and conclusions made more than ten years ago, but which neither the Board nor the parties can assess with reference to the actual evidence.

STATEMENT OF FACTS

Manhattan College is a non-profit, independent Lasallian Catholic college located in the Bronx, New York. It was founded as a school in 1853 by the Christian Brothers, a Catholic religious order that was created by John Baptist de La Salle, the Patron Saint of Teachers; college level classes were added 1859; and it was chartered by the New York State Board of Regents as Manhattan College in April 1863. (Resp. Exh. 16, p. 5). The College now offers undergraduate and graduate degrees in liberal arts, science, engineering, business and education.

Manhattan College is one of the six Christian Brothers colleges in the United States, a status reaffirmed by the *Sponsorship Covenant* signed between Manhattan College and the New York Province of the Brothers of the Christian Schools. (Resp. Exh. 9). The College is officially recognized as a Catholic institution in the Archdiocese of New York by its inclusion in *The Official Catholic Directory* (2010 Edition). (Resp. Exh. 2).

The non-profit status of the College is documented by a 1991 determination letter issued by the United States Department of the Treasury, Internal Revenue Service, confirming that it is exempt pursuant to § 501(c)(3) of the Internal Revenue Code. (Resp. Exh. 1).

The College holds itself out to the public and its students and staff as a Catholic entity in its literature, activities, physical campus and curriculum. (Resp. Exh. 3; Pet. Exh 2; Tr, 77-84, 99-104, 107, 111-113).

The College publicly and prominently identifies itself as a Catholic Lasallian college. The widely-disseminated current *Mission Statement* of the College states, in pertinent part, as follows (Resp. Exh. 16, front cover):

“Manhattan College, overlooking Van Cortlandt Park in Riverdale, is an independent Catholic institution of higher learning which embraces qualified men and women of all faiths, races and ethnic backgrounds. Established in 1953, the College is founded upon the Lasallian tradition of excellence in teaching, respect for individual dignity, and commitment to social justice inspired by the innovator of modern pedagogy, John Baptist de La Salle.

“The mission of Manhattan College is to provide a contemporary, person-centered educational experience characterized by high academic standards, reflection on faith, values and ethics, and life-long career preparation. This is achieved in two ways: by offering students programs which integrate a broad liberal education with concentration in specific disciplines in the arts and sciences or with professional preparation in business, education and engineering, and by nurturing a caring, pluralistic campus community.”¹

The Chairman of the College’s Board of Trustees, Thomas O’Malley, testified that promoting engagement and deeper understanding of the Catholic faith and the religious values of the Christian Brothers, as well as respect for all religious beliefs, is the bedrock of the College upon which its secular activities as an institution of higher education are grounded. (Tr. 763, 773; Resp. Exh. 16, pp. 12-16).²

The College’s current By-Laws, at Article II, Section 1, provide that the Brother Provincial of the Christian Brothers for the District of Eastern North America of the Brothers of

¹ As noted below, the *Mission Statement* (together with the Board of Trustees’ Report entitled *Manhattan College Lasallian, Catholic and Independent*) is incorporated in a formal document called *Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage* (Resp. Exh. 16), the cover page of which depicts Saint John Baptist de La Salle, surrounded by other Christian Brothers, standing before a cathedral. This document is given to many applicants for employment at the College and to all new employees.

² The College’s Board of Trustees, as its governing body, is vested with the responsibility for the College’s mission, leadership, business and affairs. The By-Laws define the composition and conduct of the Board of Trustees and significant powers and limitations of the College. The Secretary of the College, Vice-President Barbara Fabé, testified extensively about the By-Laws and the activities of the Board (Tr. Pp. 54-62) and Chairman of the Board O’Malley amplified on the decision making process of the Board.

the Christian Schools, Inc. (*i.e.* the religious head of the Christian Brothers District), is to be a member of the College's Board of Trustees and, further, that members of the Brothers of the Christian Schools shall be one of the Trustees in each of the five classes of Trustees, thereby establishing that, at a minimum five members of the Board of Trustees must at all times be Christian Brothers. (Resp. Exh. 6, p. 2). Article II of the By-Laws further specifies that, "Under Canon Law, the Brother Provincial ... would be considered a 'Juridic Person'"; in other words, the religious individual empowered to exercise authority for the Christian Brothers and the Christian Brothers' institutions in the District. (*Ibid.*).

Article III of the College's By-Laws requires that one of the two Vice-Chairs of the Board of Trustees must be the Brother Provincial of the District. (Resp. Exh. 6, p. 5). Article IV of the By-Laws provides that the Vice-Chairs (one of whom must be the Brother Provincial) will be members of the Executive Committee, which is the body empowered to transact College business on behalf of the Board of Trustees between Board meetings. (Resp. Exh. 6, p. 9). The Executive Committee acts as the Nominating Committee for proposing new members of the Board of Trustees and who shall be President of the College. (*Ibid.*).

College Vice-President and Corporate Secretary Barbara Fabé confirmed that the Brother Provincial does in fact serve on the Board of Trustees, is a Vice-Chair and Board officer, and serves on the Executive/Nominating Committee. (Resp. Exh. 7; Tr. 55). She also confirmed that there are currently five Christian Brothers serving as Trustees, and that Christian Brothers serve on critical Board committees including Executive/Nominating, Finance and Audit, Student Life, and Academic Affairs and Admissions (the last of which has two Christian Brother members). (Resp. Exhs. 7, 8; Tr. 55-56). The Chairman of the Board of Trustees testified that if

he cannot attend a meeting of the Trustees or of the Executive Committee, then the Brother Provincial presides. (Tr. 774.).

The By-Laws require that, if the College is dissolved, the assets and property of the College are to be distributed, in accordance with the law, equally to the de La Salle Christian Brothers District and to another Lasallian Catholic college. (Resp. Exh. 6, p.1).

The hearing testimony established that the Trustees' commitment to the College's Catholic identity is not limited to the *Mission Statement* or the By-Laws, and that the Trustees have taken an active role in ensuring the continued Catholic mission of College. The Chairman of the Board of Trustees and the Secretary of the College both explained that the Trustees undertook a major reassessment and recommitment to the Catholic purpose of the College starting more than a decade ago, both in response to changes in the Christian Brothers Order and in response to developments in the Catholic Church. In particular, the College sought to examine its affairs in light of the Vatican's promulgation of the Apostolic Constitution *Ex Corde Ecclesiae* (meaning "*From the Heart of the Church*"; hereinafter "*Ex Corde*"), which signaled the Catholic Church's initiation of a global examination into what it means for a college to call itself Catholic. (Resp. Exh. 16, p. 9; Tr. 64).

Ex Corde envisioned that local norms would be established defining Catholic colleges in different countries, but that these norms would ultimately be subject to the Vatican's review; and in response, Catholic colleges in the United States undertook an examination of each institution's Catholic identity and activities. Manhattan College's engagement in the *Ex Corde* process was initiated by the Trustees in the mid-1990's, and after a series of convocations and retreats, resulted in the promulgation of a Board of Trustees Report titled *Manhattan College: Lasallian, Catholic and Independent* (the "*Trustees' Report*"). (Resp. Exh. 16, pp 9-16). Draft

versions of the *Trustees' Report* were the subject of discussion over a period of time in the College community before the final document was adopted by the Trustees in March 1999. (Resp. Exh. 16, p. 17).

The *Trustees' Report* defined the Trustees' vision of Manhattan College's Catholic purpose going forward, including: (i) more closely defining the relationship between the College and the Order of the Christian Brothers; (ii) maintaining the Catholic identity of the College while respecting the College's growing religious pluralism; (iii) refraining from attempts to undermine the tenets of the Catholic faith; (iv) enhancing Catholic identity through academic programs, with additional courses in Catholic studies and theology, and by recognizing the Catholic tradition in other disciplines and professional programs; (v) expanding Catholic liturgical and inter-faith offerings; and (vi) maintaining academic freedom which is professionally responsible, especially in theology and religious studies. (Resp. Exh. 16, p. 16).

The *Trustees' Report* on Catholic identity was considered by the Manhattan College Council for Faculty Affairs, which is an exclusively faculty body that regularly acts and speaks for the faculty on College-wide faculty matters.³ In speaking for the faculty about the Trustees' Report in the fall of 1999, the Council affirmed the College's Catholic definition as follows:

“ Consistent with this commitment to academic freedom is a professional responsibility *to recognize that Manhattan is a Catholic institution committed to Catholic values and principles and that its identity be respected by all segments of the College community.* This, of course, places no obligation whatsoever on anyone as far as their personal beliefs or religious practices are concerned. The Council recognizes the importance of Catholic intellectual tradition as an aspect of the College's identity.”

³ Professor Joseph Fahey, the Union's primary witness, testified that he has served as the head of the Council for Faculty Affairs, and described that body as the faculty's full participation in College governance. (Tr. 545).

(Resp. Exh. 16, p. 17; emphasis supplied).⁴

In addition, further demonstrating the centrality of the Catholic identity of the College, individual faculty members participated in a faculty mission seminar about the College's Catholic identity and the effect of *Ex Corde*; and five representative faculty (one from each School of the College) wrote reflections on *Ex Corde* and the College's Catholic identity, which were subsequently published by the College. (Resp. Exh. 16, pp. 30-38).

In accordance with the Trustee's conclusions in the *Trustees' Report*, the College undertook the formulation of a *Sponsorship Covenant* with the New York Province of the Brothers of the Christian Schools (de La Salle Christian Brothers) due to "the strong desire of both parties [Manhattan College and the Christian Brothers] to continue and enhance this relationship and the benefits accruing to each, as we move into the 21st century." (Resp. Exh. 9, p. 1). The *Sponsorship Covenant*, signed by the College and the Christian Brothers in December 2002, acknowledged the mutual benefits of the relationship between the Order and the College, and recognized the impending redefinition of the relationship between the College and the Christian Brothers as the number of Brothers who can serve as faculty and administrators declines significantly. The *Covenant* recognizes that evolutions in Catholic teaching, changes in the role(s) of the Catholic laity, and the growth of ecumenism all influence how Manhattan College actualizes its Catholic identity, and that the responsibility for the religious and ethical education of the students will increasingly have to be assumed by lay faculty. (*Ibid.*).

The *Sponsorship Covenant* details how the mission of the College will be implemented in harmony with its identity as a Catholic college through the following assurances:

⁴ This faculty affirmation was incorporated into the *Sponsorship Covenant* subsequently entered into by the College and the Christian Brothers in 2002: it is the opening paragraph on the *Covenant's* section on hiring practices.

- That the College will be guided by “the moral, spiritual and religious inspiration of the Catholic tradition,” with specific reference to *Ex Corde Ecclesiae*;
- That the College “derives inspiration from the religious faith and educational ideals of John Baptist de La Salle as preserved and transmitted by the Institute of the Brothers of the Christian Schools,” with specific reference to “the New York Province’s assessment guidelines recommended for all its sponsored ministries”;
- That the College will continue to be responsible for the “personal and religious development” of its students;
- That the public forums provided by the College will be “consistent with the College’s Mission.”

(Resp. Exh. 9, p. 2).

The *Covenant* sets forth a blueprint for promoting and strengthening the College’s Catholic identity that addresses both the hiring process for faculty and staff, and the importance of educating members of the College community about the College’s Lasallian Catholic identity and involving them more fully in supporting that identity:

- The “Hiring Practices” section requires that all appointment letters and annual contracts are to include “an agreement to respect the College’s Catholic identity and the Lasallian Tradition”; and that the Provost and Vice President for Human Resources shall discuss with each interviewed applicant the College’s Catholic and Lasallian identity and the mission of the College.
- The “Hiring Practices” section further establishes that, should there be no Christian Brother suitable to be the next President of the College, the Trustees shall choose “someone strong in the knowledge and practice of the Catholic faith and who understands and values the Lasallian Tradition”; and, further, that the President must study the Lasallian Tradition, must be an active member of the Lasallian Association of College and University Presidents and the Association of Catholic Colleges and Universities, and must participate in meetings and events of the Catholic Archdiocese of New York.
- Finally, the *Covenant* requires the appointment by the College of a Vice-President for Mission, to be a “qualified Lasallian Educator,” to be appointed by the President in consultation with the Brother Provincial,

whose duty shall be “to assist the President and the College community in its understanding and realization of the College’s Mission and Lasallian Catholic identity,” specifically including the creation of a College-wide body to encourage and monitor “all the varied endeavors relevant to ensuring that the Lasallian Catholic character of Manhattan [College] thrives.”

(*Id.*, at p. 3).

In order to maintain the understanding and appreciation of the Catholic and Lasallian core values of the College, the *Covenant* requires that the Christian Brothers Community at the College assist in promoting orientation of new staff and faculty to the Catholic mission, and assist with student materials about the Catholic mission. An emphasis on College events that promote the understanding of Catholic Lasallian educational practice, philosophy and spirituality is required by the *Covenant*, as is the offering of Catholic liturgical events and Masses in collaboration with the Campus Ministry staff. Finally, the agreement commits the College to fund the obligations and commitments of the *Covenant* and to provide for the use of College facilities by the members of the Christian Brothers Community at Manhattan College.

(*Id.*, at p. 5).

So that it would reflect the consensus of the College community and embody a relationship that would be readily supported, the *Sponsorship Covenant* was widely reviewed in draft form across campus prior to being finalized and adopted by the College. There was testimony from witnesses not only for the College, but also for the Union, that confirmed the campus-wide process undertaken to commit to the *Sponsorship Covenant* and the College’s continued strong commitment to its Catholic identity. (Tr. 64, 606).

Dr. William Merriman served as Interim Provost (chief academic officer) of the College in the spring of 2010, had previously been Dean of Education at the College, and returned to the Dean’s position in the fall of 2010. He testified at length about his involvement

in the hiring process in his capacities both as Provost and Dean, and confirmed that in interviewing candidates for full-time faculty positions and academic administrative positions, he personally discussed the College's Catholic mission and Catholic identity with these candidates. He further testified that when he served as Interim Provost, the President of the College regularly participated in the interviews of candidates for full-time faculty positions, and in the discussion of the College's Catholic mission. (Tr. 304-306).

Dr. Merriman did not, as Provost, interview candidates for adjunct positions. However, he did issue the appointment letters for adjunct faculty when any individual was hired to teach as a part-time instructor for a semester. That appointment letter, which must be signed by the prospective adjunct faculty member, requires that the adjunct faculty member agree to fulfill the obligations outlined in the College's Mission Statement.⁵ (Tr. 307; Resp. Exh. 37).

Vice-President Barbara Fabé testified that she (or the Director of Personnel who works on Ms. Fabé's staff) interviews every candidate for a staff (non-teaching) position at the College (ranging from security guards to vice-presidents); that these interviews include discussions with the candidates about the College's Catholic identity; and confirmed that each candidate receives material about the College's Catholic identity. (Tr. 95-97).

Vice-President Fabé testified that the entirety of the hiring process reflects the Catholic identity of the College. (Tr. 77-78). The Mission Statement for Ms. Fabé's Office of Human Resources states that the mission of her office is founded on the ideas of John Baptist de La Salle (Resp. Exh. 11), and advertisements for job openings explicitly identify the College as a Catholic institution. She testified that the recent recruitment advertisements for the Executive Vice-President and Provost and the Vice-President for Student Life contain a number of refer-

⁵ The letterhead on the appointment letter identifies Manhattan College as "A Lasallian Catholic College since 1853." (*Ibid.*).

ences to the Catholic identity of the College: the advertisements invite applications from candidates who are attracted to a college with a Catholic identity, and advise that candidates must be able to embrace the College's Lasallian tradition. (Tr. 78-83; Resp. Exhs. 12, 13). The advertisement for the Vice-President for Student Life further requires that the candidate "is able to assure that the College's Catholic and Lasallian values remain the foundation for the student life experience." (Resp. Exh. 13). Positions are advertised on the Jesuit Association of Student Personnel Administrators ("JASPA") job site, which is a source for job postings for Catholic educators. (Tr. 81-82; Resp. Exh. 13).

The College's multi-part employment application package (Resp. Exh. 14) has an illustration of a church steeple with a crucifix and identifies the College as a Lasallian Catholic institution. Page 4 of the application is a which statement applicants must sign, one part of which requires the applicants to agree that "if I am employed, I will read and abide by the Mission Statement of Manhattan College." (*Ibid.*). The major insert in the application is a multi-page document that starts with the College's *Mission Statement*, which all candidates must also sign and submit. The *Mission Statement* is, in turn, attached to copies of (a) the 1999 Board of Trustees Report *Manhattan College: Lasallian, Catholic and Independent* on the College's Catholic identity, (b) the 1999 statement of the Council for Faculty Affairs affirming that Manhattan College is a Catholic College, and (c) a description of the *Characteristics of the Lasallian School* written by Brother Luke Salm.

Vice President Fabé testified that every applicant for a position is supposed to complete the application and related paperwork at her office (although she acknowledged that there may be occasions when an individual does not complete all of the steps of the process or all of the paperwork). (Tr. 97-99). She testified that the College has been requiring applicants to

sign a commitment to abide by the *Mission Statement* for more than a decade, and has been giving out the current insert to the employment application packet for a number of years. (Tr. 84-86). For the past two years, the College has been providing most job applicants with the publication *Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage* (Resp. Exh. 16), which, she testified, was prepared specifically for informing prospective employees about the College's Catholic nature. (Tr. 130-135; Resp. Exh. 16, p. 3). The publication includes, at page 47, a receipt page to be signed by the applicant acknowledging that he/she has read the material and "will respect the Lasallian culture of Manhattan College." The Office of Human Resources collects and maintains the receipt pages, the signed *Mission Statements* and the job applications. (Tr. 134-136).

Thus, the record shows that the College utilizes a number of means to communicate to prospective applicants and job candidates that Manhattan College is a Catholic college with a strong commitment to its Catholic Lasallian identity; that it seeks individuals who are attracted to a Catholic institution; and that applicants must be willing to respect, and affirmatively commit to respecting, the College's Catholic mission. Adjunct faculty member Michael Ewing, who testified on behalf of the Petitioner, stated that he had received *Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage* from his Department Chair when he was hired; that he had received the insert with his job application which included the College's *Mission Statement, Manhattan College: Lasallian, Catholic and Independent*, and Brother Luke's *Characteristics of the Lasallian School*; and that he completed the application. (Tr. 700-701).

New employees are also required to attend a College-wide New Employee Orientation Program which is intended to provide them with information about the College and also,

as Vice-President Fabé testified, seeks to give them an understanding of the Catholic life of the College so they may participate in it and promote it. (Tr. 136-141).⁶ The Orientation Program begins with a prayer, and each new full-time employee is given a copy of *The Arches of the Years* by Brother Gabrielle Costello (about the history of Manhattan College) and *The Work is Yours* (Brother Luke Salm’s study of John Baptist de La Salle). (Tr. 97-104). As Dr. Merriman testified, Brother Luke, a legendary professor at Manhattan College, had undertaken a scholarly examination of de La Salle’s beliefs and teaching principles, and had authored a seminal book on the subject which became a respected work in Catholic education. (Tr. 247-248).

For many years, then-President (now President *Emeritus*) Brother Thomas Scanlan made a detailed presentation at the New Employee Orientation Program which directly addressed the Catholic identity of the College. (Tr. 137-139; Resp. Exh. 17). His speech, which continues to be published on the College’s website, introduces the College’s history, the history of the Christian Brothers, and a clear statement of the religious mission of the institution:

“And Saint La Salle would say to you, you don’t have just a job. You don’t even have just a career. And you don’t even have just a profession of which we are all proud of our professional associations. None of this was negative, but a career is richer than a job, and a profession is richer than a career—but he said something else. He said every one of you are ministers because you share in doing God’s work. And you are God’s proprietors after the parents who bring this life into being and help this child grow and develop. That’s the role of educators. To help students flourish and grow in all of the areas of their life to reach their potential. And he said in that sense very much, you, we together, are sharing in the work appropriation with the student’s families and with God. Therefore, you are ministers.”⁷

(Resp. Exh. 17, p 2).

⁶The Union entered the attendance sheets for New Employee Orientation for 2008-2009 and 2009-2020 as exhibits.

⁷ *Ibid.*

Brother Thomas's speech clearly identifies what the College expects from staff: "We want people to understand that our Lasallian Catholic identity is our identity." (*Id.*, at p. 4). Quoting a professor of Religious Studies at the College that "Catholicness involves a commitment to examine and engage with the particular history of said text that broadly defines the Catholic tradition," the speech goes on to explain that "[t]he Catholic institution is one where students have the opportunity to grapple with the history, practices, teachings and documents that have shaped the church and characterized Catholic peoples," so that they can reflect on their own values. (*Ibid.*). Brother Thomas' speech concludes with an invitation to new staff to become involved in realizing the College's Catholic mission. That responsibility, he explains, had belonged to the religious employees on campus for decades (the Christian Brothers), but now needs to be assumed by committed individuals:

"Now all people are invited to participate in the charisma, in the mission, in the identity of the college. **** [I]t will not continue—the college and this strong charisma and rich heritage – unless there are people ... who accept the invitation and join in and help to keep this core of what we are alive and well and vibrant and operating."

(*Id.*, at p. 5).

Vice President Fabé testified that the recently appointed President of Manhattan College, Dr. Brennan O'Donnell, has assumed responsibility for the presentation on Catholic identity at New Employee Orientation Program. (Tr. 140-141). President O'Donnell's initial address to the employees was reflective of the speech he made at his inauguration, where he stated that the keynote concept for Manhattan College is the phrase from John Baptist de La Salle, "*Domine, opus tuum*" ("Lord, the work is yours") as an invocation and a dedication for the Manhattan College community to continue its commitment to the core Catholic beliefs in shaping its goals and activities. (Resp. Exh. 18).

The hiring of Dr. O'Donnell to succeed Brother Thomas Scanlan as President of Manhattan College – an issue which is specifically addressed by the *Sponsorship Covenant* – was consistent with the articulated Catholic identity of the College. In his testimony, the Chairman of the Board of Trustees affirmed that, if an appropriate Christian Brother candidate was not a strong option, the Board was committed to finding an individual who was knowledgeable about and committed to Catholic practices and beliefs, and who would be willing to maintain the robust Catholic mission of Manhattan College. (Tr. 756-757). He testified that the Brother Provincial served on the Search Committee, and participated actively in the candidate interviews. (Tr. 758-760). During the search process, all of the candidates were questioned about their understanding of the Catholic nature of the College, and about how they would undertake to promote and sustain it. The Brother Provincial usually handled questions about Catholic theology and religious issues. After each candidate was interviewed, the Committee members discussed their assessments of the candidate, and Board Chair O'Malley testified that the Provincial expressed his views candidly to the Committee. It was clear to the Chair that in order to get the requisite two-thirds Board vote for any candidate, the candidate would need the support of the Provincial. Mr. O'Malley explained that he himself was asked to assume the Chairmanship of the Board to help shepherd the College through the search for a new President who would be dedicated to maintaining the College's Catholic identity. (Tr. 756-760).

Indeed, Chairman O'Malley made a point of explaining that when the candidate was presented to the entire Board for the requisite two-thirds vote, the vigorous support of the Brother Provincial and of retiring President Brother Thomas Scanlan was the most persuasive factor. The Board determined that Dr. O'Donnell had the necessary background and expertise in Catholic higher education and in Catholic studies; that he was fully committed to promoting the

Catholic identity of Manhattan College; and that he engaged with the Christian Brothers of the Manhattan College community. (Tr. 758). At his inauguration, which was attended by Cardinal McCarrick and Bishop Walsh, as well as by Brother Provincial Malloy, President O'Donnell was presented with the College's charter by the Chairman of the Board of Trustees and with the *Sponsorship Covenant* by the Brother Provincial. (Resp. Exh. 10, p. 7; Tr. 72).

Chairman O'Malley made it clear in his testimony that the Board of Trustees is deeply committed to the Catholic identity of Manhattan College. Mr. O'Malley, who is a 1963 graduate of Manhattan College, had served on the Board of Trustees for a full fifteen-year term from 1987 through 2002, and rejoined the Board as Chair in 2005. (Tr. 751-752). He testified that the Board devoted attention to preserving and enhancing the Catholic nature of the College, and that the Trustees were solidly committed to maintaining it as a Catholic college affiliated with the Christian Brothers. (Tr. 752-753). Of the thirty-eight Trustees, an overwhelming number are Catholic: five Trustees are Christian Brothers, one Trustee is a Deacon, approximately thirty are lay Catholics and approximately two are non-Catholics. Mr. O'Malley stated that the Trustees take the position that essential elements of the College's Catholic identity include the daily availability of the Catholic Mass; the Catholic liturgical activities that are a regular part of campus life; the availability of the Catholic sacraments; the requirement for all students to take three courses (nine credits) in religious studies, one of which course must be in Catholic Studies; the continued presence of the Christian Brothers on campus; and the prevalence on campus of Catholic art, religious objects and symbols. (Tr. 752, 762-763, 772-774).

The Chairman further testified that the Catholic identity of the College is clearly understood by the public, because 65% of the students at the College are Catholic whereas the

population in the metropolitan area from which enrolled students came is only 35% Catholic; a disparity which, he testified, can only be explained by the fact that Catholic students seek out the College for its clear Catholic mission and Catholic environment. (Tr. 762-763).

Testimony about the Vice-President for Mission (a position required by the *Sponsorship Covenant* to reinforce the centrality of the College's efforts to support its Catholic identity) was given by the primary witness for Petitioner Union, Professor Joseph Fahey, as evidence of the Catholic identity and Catholic culture of Manhattan College. (Tr. 731). Through Dr. Fahey, the Union put into evidence a section of the *Faculty Handbook* containing the job description of the Vice-President for Mission, which provides that the Vice-President will preserve, initiate and integrate programming that maintains and promotes the College's Catholic and Lasallian identity; will develop new programs and maintain existing programs on Catholic purposes across the College, including in admissions, academic affairs, student life, human resources and alumni affairs; and will be the liaison to outside organizations regarding the Catholic mission. (Pet. Exh. 5). The Chairman of the Board testified that the current Vice-President for Mission, Brother James Wallace, is responsible for those duties. (Tr. 768). He also testified about the Trustees' discussions about the qualifications for the Vice-President for Mission's position: "We [the Trustees] always felt that having a senior member of the administration, a Vice-President for Mission, did separate us from many other institutions, because our mission was a relatively clear one. We were a Catholic institution." (*Ibid.*)

Vice-President Fabé testified about the ongoing presence of the Christian Brothers at Manhattan College, and she identified approximately eight to ten Brothers who continue to teach and/or serve as administrators. (Tr. 34-35; Resp. Exh. 4). The Christian Brothers continue to maintain a Residence for the Brothers on the College campus, which houses Brothers who

work at the College, Brothers who have retired from positions at the College, and Brothers who work in the neighboring community for the Order; these twenty-four Brothers are referred to as the Manhattan Christian Brothers Community, and they are invited to attend campus events, especially those relating to the Lasallian and the Catholic purposes of the College. (Tr. 44-45; Resp. Exh. 5).

Father George Hill is a Catholic priest employed by the College. Mr. O'Malley testified that, as Chairman of the Board, he speaks frequently with Father Hill, and that the Trustees' view of Father Hill's role is that Father Hill "operates ... as a parish priest within the college, because he is the person who, for the most part, says Mass at the college. He also functions in a counseling position on a relatively intense basis, and counsels students on a regular basis.... He would tell you that relationships are his big issue, ethical and moral issues are a frequent item that he deals with." (Tr. 769). Dr. Merriman testified that Father Hill also becomes involved with students who want to marry on campus. (Tr. 281-282).

The academic program at Manhattan College supports the Catholic identity at the College with a requirement that all students take nine credits (three courses) in Religious Studies. The nine-credit requirement had applied for many years but recently the faculty, with the support of the Trustees, modified the requirement to provide that at least one of the courses must be in Catholic studies, which is intended to make sure that all graduates have an understanding of Catholicism. (Pet. Exh. 2, pp. 93, 100, 104, 134, 155; Tr. 298-300).⁸ No other College-wide curriculum requirement is as large as nine credits; by way of contrast, the required English requirement for most Schools and majors at the College is a single three-credit course. (Pet. Exh. 2, pp. 93, 155; Tr. 298). In addition to the courses on Catholic Studies offered by the

⁸ Prior to this modification, it was not mandated that one of the three required courses deal with Catholicism, although courses dealing with Catholicism are far and away the largest group of courses offered by the Religious Studies Department. (Pet. Exh. 2, pp. 278-283),

Religious Studies Department, a number of courses have been developed in other departments which focus on Catholic Studies materials, in particular in the Fine Arts Department, including Art 260 (“Monasticism and the Arts”), Art 321 (“Medieval Art”) and Music 240 (“The Catholic Mass and its Music”). (Pet. Exh. 2, pp. 216-219;Tr. 542-543). There was also testimony about the inclusion of a Catholic focus on ethical behavior in a number of the Schools at the College, including the professional programs in business and engineering, so that Manhattan graduates will not only be knowledgeable professionals but in their actions would adopt the ethical and moral approaches inherent in Lasallian values. (Tr. 326-327).

The College also has established College-wide academic “Core Goals,” competencies and learning objectives, described in the College catalogue, which all students are expected to achieve by graduation. Among these core goals and competencies are the following:

- “Religious and ethical awareness”;
- “Assess conduct and make decisions based on ethical concerns and transcendent moral values as articulated in Christianity and other religious and philosophical traditions”; and
- “Understand that Manhattan is a Catholic institution, committed to respect for individual dignity and social justice.”

(Pet. Exh. 2, p. 22; *see* also Tr. 536-540).

A consistent element in the testimony was the nature of the College’s response to the declining number of Christian Brothers. As Dr. Merriman testified, Manhattan College’s staff and faculty historically included substantial numbers of Christian Brothers, and during that earlier period, the actualization of the Catholic character of the College was considered primarily to be the responsibility of the Brothers. As the number of Christian Brothers in North America declined (a pattern which has affected in many other religious orders), Catholic colleges such as Manhattan needed to address how they would maintain a Catholic identity with a

declining number of “religious” as active participants. Consistent with developments in other institutions of, and affiliated with, the Catholic Church, a greater role was necessarily envisioned for committed lay Catholics to assume in fostering and sustaining the Catholic nature of organizations, including Catholic colleges. (Tr. 251-263). Mr. O’Malley testified that the Trustees are confident that Manhattan College would sustain its Catholic identity even with few active Christian Brothers:

“I think Manhattan College could remain a Catholic College with no Christian Brothers on the campus. Catholicism isn’t about a bunch of people running around wearing a collar. Catholicism is about people who have a particular way [of] worshipping God, a particular belief. I attend a Parish in Connecticut where currently we have 900 young boys and girls in religious studies, and as I recall we have about 60 people teaching religion there, and of the 60 people I think there’s one person who has a [religious] vocation[. A] a vocation within the Catholic Church is not limited to those who wear a collar. The people make up the Catholic Church, Catholic – the position of Catholic is universal. So it’s the people that make up the church, it’s not the hierarchy, it’s not the Brothers or the Sisters or the priests, it’s the people, and I believe Catholicism goes on with or without the clergy.”

(Tr. 767-769) (text corrected for obvious transcription errors as indicated by brackets).

Dr. Merriman testified about Manhattan College’s programs promoting greater involvement with the study of Catholic beliefs and intellectual traditions, as well as Lasallian concepts and principles, that have expanded over the last decade in response, in part, to the declining physical presence of the Brothers. The College, consistent with *Ex Corde Ecclesiae* and the *Sponsorship Covenant*, sought to define the role that could be assumed by lay faculty and staff in maintaining and strengthening the College’s Catholic mission. Dr. Merriman identified a number of programs and activities that were a part of this effort, including the Lasallian Education Committee, the Formation programs and the numerous campus activities and events

designed to promote the Catholic identity of the College. (Resp. Exhs. 15, 25, 34, 35, 38: Tr. 251, 254-263).

Dr. Merriman described his own three-year participation in one of the Formation programs, the Buttimer Institute of Lasallian Studies, which was held summers in California, and which educated faculties and staff of Catholic institutions about Lasallian beliefs and practices so that the participants could share that knowledge at their home institutions. (Tr. 257-258). The program is open to those involved in school- or college-level Lasallian ministries. (Resp. Exh. 38). Based on his experience at Buttimer, Dr. Merriman developed a course for undergraduate and graduate students which he taught at Manhattan College about Saint John Baptist de La Salle. (Tr. 258). A number of other faculty and staff members from Manhattan participated in the Buttimer Institute, including faculty from the Departments of Economics, Mechanical Engineering, Psychology, Mathematics and Computer Science, Fine Arts and Physical Education, as well as staff from the Offices of Career Development, Alumni Relations and the Campus Ministry. (Resp. Exh. 38).

Dr. Merriman also participated in the Lasallian Social Justice Institute, a Formation program focusing on service to the economically disadvantaged, relating it to the teachings and beliefs of Saint John Baptist de La Salle. Faculty from the Departments of History, Education, Chemistry and Management/Marketing, as well as staff from Campus Ministry, have attended the Lasallian Social Justice Institute. (Resp. Exh. 38). A major Lasallian Catholic value imparted to students at Manhattan College is the importance of service to those who are vulnerable (Resp. Exhs. 20, 26), and a program such as the Social Justice Institute enables faculty and staff to communicate this value more effectively to students. (Tr. 235-238). Manhattan College's staff person from Campus Ministry and Social Justice, Lois Harr, not only

attended the Lasallian Social Justice Institute, but became a presenter and facilitator at the Institute for 2007 and 2008. (Resp. Exh. 38).

A number of other faculty and staff have also attended other Formation programs, including the Lasallian Leadership Institute, the International Lasallian University Leadership Program at the Christian Brothers headquarters in Rome, and in *Collegium*. (Resp. Exh. 38). Significantly, the International Lasallian University Formation program was created by Manhattan College's former Vice-President for Mission. Its purposes include instruction in Lasallian Catholic spirituality, and participants are expected to become active participants in the Lasallian activities at their home campuses after participation. (Resp. Exh. 38). The *Collegium* program, identified as "A Colloquy on Faith and Intellectual Life," is geared to younger lay faculty members just becoming involved in Catholic higher education, and to non-Catholic educators at Catholic colleges, for the purpose of "discussion ... about their role in the Catholic mission of their institutions." Approximately twenty Manhattan College faculty members from a wide range of academic departments have already participated in *Collegium*. (Resp. Exh. 38).

A number of campus initiatives to promote and encourage the Catholic mission were the subject of testimony from witnesses for the College. A primary vehicle for campus activities is the Lasallian Education Committee, which is addressed by name in the *Sponsorship Covenant*. The Lasallian Education Committee sponsors campus presentations, discussions, convocations, conversations and annual events such as Founders Day, to promote ongoing dialogue about important issues related to Catholic identity and to promote the Catholicity of the College. (Resp. Exhs. 15, 19, 34, 35; Tr. 293-297). The College also annually bestows the Lasallian Award on a member of the faculty, administration or staff. (Resp. Exh. 19). While this was originally a faculty honor only, the decision was made to expand eligibility to administrators

and staff in recognition of the fact that the entire community is involved in promoting the College's Catholic identity. (Tr. 110-111).

Dr. Merriman testified about faculty involvement in activities outside the classroom which are consistent with the College's Catholic mission, which promote the Catholic values and ideals which the College seeks to teach its students, and which provide service to those most vulnerable in our communities. He described a program which he organized and administered for years to provide physical activities for disabled children from the area of the Bronx adjacent to the College. (Tr. 224-230). That program provided opportunities for Manhattan College students to engage in social action community service, which is a key component of the College's Catholic mission. (Resp. Exhs. 20, 21, 26). Some students participated as part of their academic programs, a few students worked in the program as student employees, and many other students volunteered. (Tr. 226-227). Dr. Merriman testified about the extensive support provided by the College to make the program available, including significant use of the College's gymnasium; and he attributed the willingness to support the effort as a reflection of the College's Catholic mission. (Tr. 229). Dr. Merriman noted that the program had been honored for its contribution by a community entity and by the Archdiocese. (Tr. pp mm.) Dr. Merriman now oversees a weekend program for developmentally challenged persons, and testified that other faculty seek to engage students in similar efforts, citing projects by engineering students to design a special chair for the disabled and business students who assisted the poor and elderly with tax filings. (Tr. 231).

The record reflects the programming for students that is designed to engage them in activities which contribute to their commitment to Catholic faith, values and spirituality. The College maintains a Campus Ministry and Social Action Office, a major purpose of which is to

foster faith, service and community; to give students an opportunity to develop their spirituality; and to put faith to work. (Resp. Exhs. 20, 21, 26, 28, 29, 30, 31, 32, 33). The Campus Ministry has conjoined goals to promote and provide liturgical opportunities, and to engage students in service learning projects. Campus Ministry provides opportunities for prayer, daily Mass, pastoral counseling, receipt of the sacraments and religious retreats, and will also assist an individual who wants to become Catholic. (*Id.*, Tr. 277-284). The service programs vary from as close as the College neighborhood to as far away as New Orleans, Haiti and Kenya. (Resp. Exhs. 21, 24). Manhattan College graduates also participate in the Lasallian Volunteers, a national Lasallian program for graduates that places them in Lasallian ministries in the poorest neighborhoods in the country to engage in service that will reflect their Lasallian values. (Resp. Exhs. 22, 23). Dr. Merriman testified that the Lasallian volunteer featured on the current brochure distributed at Lasallian colleges nation-wide is a Manhattan College graduate. (Resp. Exh. 23; Tr. 235).

In addition to social action programs, Campus Ministry encourages prayer and worship opportunities, encouraging students to become student ministers at Mass. They provide Bible study groups, the opportunity for Baptism, Confirmation, First Eucharist and Holy Communion. (Resp. Exhs. 21, 26, 28, 29, 30, 31, 32, 33). Dr. Merriman testified about his conversation with a student who had participated in one of the service learning projects and described it as a transformative experience. (Tr. 242-243).

Dr. Merriman explained that Campus Ministry and Social Action assists students to make the connection between their service to the poorest and most vulnerable as a manifestation of their beliefs and spirituality, as preparation for a life of service and caring for the poor, and as a growing understanding of their faith and values. (Tr. 239, 242-243). It is this

approach that Dr. Merriman identified as distinguishing the Manhattan College experience from community service available at other colleges and universities. (Tr. 324).

The Union offered testimony from both Professor Fahey and adjunct Michael Ewing that they had received an e-mail message from the Campus Ministry telling community members to show their support for members of the gay and lesbian community. (Tr. 457, 688). On cross-examination, Professor Fahey acknowledged that it is his understanding that the Catholic Church's view on homosexuality has changed, that there is an understanding that homosexuality may be biologically based, and that the Church no longer opposes individuals who are homosexual, although it continues to condemn the homosexual sex act. (Tr. 457-458). Professor Fahey further agreed on cross-examination agree that support for members of the gay and lesbian community is not inconsistent with current Church doctrine.

The Union also, on Professor Fahey's re-direct examination, introduced into evidence an article from the College student newspaper about a training program to prepare students to oppose bullying of homosexual, gay, lesbian, bisexual and transgendered students; the program was a national one, to be taught by two College employees. (Pet. Exh. 6). The article included a reference to the recent suicide of a college student in the metropolitan region after he was bullied about his homosexuality. Professor Fahey opined that the training would be in violation of Catholic Church doctrine if it did not make the point of condemning the homosexual sex act (Tr. 740-743); but he admitted on cross examination that he had no idea of what the training included, or what topics it covered. (Tr. 742-743).

Dr. Merriman also talked about his responsibility for assisting with the organization of new student orientation and accompanying activities for parents, and described the presentations on Lasallian Catholic identity which are made to new students and their

parents. (Tr. 291; Resp. Exh. 33). In this regard, it bears noting that every major presentation over the two-day period of new student orientation involves the staff of the office of Campus Ministry, either as sole presenters or as part of a team of presenters. (Resp. Exh. 33). Dr. Merriman also confirmed that the College provides materials to new students to educate them about the College's Lasallian Catholic identity, that emphasizes the importance of service to the poor, and that provides a link to faith in God. The material ends with a portion of the traditional Lasallian prayer, "Live Jesus in our hearts, Forever!" (Tr. 273; Resp. Exh. 27) .

A significant amount of attention was devoted to the extent of activity on campus that reflects traditional religious worship, the extent to which participation in liturgical activities and events related to the Catholic identity are obligatory (and whether attendance is taken), and the existence on campus of Catholic art, statues, religious symbols and places of worship. Vice President for Human Resources Barbara Fabé testified that there is a small Chapel outside the Chancellor's Room room where Trustee meetings are held, and where the Council for Faculty Affairs meets. Most job applicants walk past the Chapel en route to Ms. Fabé's office, and daily prayer sessions are held in the Chapel. (Tr. 85). She and Board Chair O'Malley described the Quadrangle, which is the center of campus that contains the main Chapel, the statue of John Baptist de La Salle and the buildings which display portraits of the Christian Brothers and clergy who have played an important role in the College's history. (Tr. 86, 778). Ms. Fabé explained that most classrooms on campus display crucifix on the wall, and described the campus Masses for all major College events such as the start of school and graduation, for Days of Holy Obligation, and for religious holidays. (Tr. 85). She explained that these Masses are attended by students, staff, faculty, administrators, Trustees, alumni and parents. She testified about the prevalence of prayer on campus, including at the beginning of every meeting of the Board of

Trustees, at campus convocations, and at campus events. Dean Merriman testified that he starts faculty meetings in the School of Education with a prayer. (Tr. 297).

Chairman of the Board O'Malley described the practice of prayer at meetings of the Board of Trustees, the Board's Executive Committee, and other Board Committee meetings. He described how the Trustees participate in reading portions of the prayer, or have a responsive prayer, and end the meetings with a prayer. He explained the prayer that had been offered at the Trustee meeting just prior to his testimony, a page-long prayer offered by Brother Frank Byrne and taken from St. Paul's First Letter to the Corinthians. He explained that the entire Board always reads the closing prayer selected for the meeting and then a Brother recites the prayer attributed to St. John Baptist de La Salle, "Live Jesus in our hearts," to which the members of the Board respond, "Pray for us." (Tr. 754-755; Resp. Exh. 56). Mr. O'Malley, for whom the College Library is named,⁹ testified that the bridge leading to the Library, named the Founders Bridge, is dedicated to the historic leaders of the College and he identified these religious figures who are featured in a brochure prepared by the College to honor the major figures in the College's history. (Resp. Exh. 46; Tr. 777-778).

Dr. Merriman testified that he sometimes starts classes with a prayer, and that most classrooms on campus have a crucifix on the wall. (Tr. 297). One of the witnesses for the Union, Michael Ewing, also testified that a classroom he teaches in has a cross (Tr. 685), and that he had observed religious art on the campus. (Tr. 694). One adjunct faculty witness for the Union stated that he saw a cross in one classroom, and admitted that he had noticed the large statue of St. John Baptist de La Salle on campus. (Tr. 650, 664). One adjunct faculty member

⁹ Mr. O'Malley, who testified that the Library named after his family, towards which he contributed many million dollars, has a crucifix on its roof. He stated that he has pledged as additional \$5 million towards a new student center; but stated that it is an explicit condition of his commitments that "in the event the college doesn't continue with its Catholic Identity the gift is null and void, and I do that in writing." (Tr. 776).

testified that he in his two years as an adjunct teacher he had never noticed any chapels, religious art, statues or religious symbolism on the entire campus. (Tr. 373).¹⁰

The witnesses for the College made it clear that Manhattan College respects academic freedom for the faculty, does not discriminate against students or employees of other faiths (or of no faith), and respects the beliefs and practices of other religions. (*see* Resp. Exh. 16). In return, as former President Brother Thomas Scanlan explained in his presentation to new employees (Resp. Exh. 17), the College asks that those who accept employment at Manhattan College understand that it is a Catholic College and that its identity and mission are to be respected by all who join the community. While the College encourages and promotes participation in the Catholic life of the College, it respects individual choices and comfort levels. (*Ibid.*)

The spirit of openness is reflected in the *Sponsorship Covenant* and accepted by the Christian Brothers. The *Sponsorship Covenant* also sets out the respect for the individual choice of Catholic professors of theology regarding the *Mandatum of Ex Corde Ecclesiae*. (Resp. Exh. 16). The College promotes inter-faith opportunities and experiences, and has established a Holocaust Center to study the historic event and, consistent with the teachings of the Second Vatican Council, to promote Catholic-Jewish dialogue. (Resp. Exh. 45).

While the Trustees and the College continue to require three courses in Religious Studies for all students (and now require that all students take one of those three courses in Catholic studies) (Tr. 770, 773), there was testimony that there is a long-standing acknowledgement that being a Catholic college does not equate to forcing students to attend Mass or

¹⁰ The Union's representative, Mr. Esakoff, objected to testimony that a person on the Manhattan College campus will see religious objects; Mr. Esakoff's rationale was that, "They may be present on the campus, but perhaps no one will see them." (Tr. 88). The Hearing Officer appeared to agree that "a theoretical person" might or might not see something which is in plain sight. (Tr. 89).

participate in liturgies or sacraments. In fact, Mr. O'Malley testified that when he was a student at Manhattan from 1959 to 1963, he was not required to attend Mass on campus, and rarely did so. (Tr. 764-765). He stated that testimony from the Union witness that in the 1960's mass was required was not true.¹¹ Mr. O'Malley does attend Mass at Manhattan College currently; and he described the Graduation Mass as a standing room only event for students, friends and parents. (Tr. 775). When asked if other Trustees attend the Graduation Mass he responded : "I don't take attendance. I go to Mass to pray. I don't go to Mass to take attendance." (*Ibid.*). When asked by the Union's representative on cross-examination what percentage of the Catholic students attend Mass, Mr. O'Malley replied that he does not take attendance at Mass and is not on the campus on a daily basis. (Tr. 783). Mr. O'Malley testified that Mass is not mandatory at Manhattan College because, "There's no such thing as mandatory Mass." (Tr. 766.) He explained that, while Catholicism is a changing religion and Manhattan College has changed over the years in response to Vatican II and a more liberalized Church, "it didn't go away from its core mission." (Tr. 773).

Mr. O'Malley further testified that the Religious Studies courses he took as a student in the early 1960's were not all devoted to Catholic studies, and that he studied many other faiths, including Judaism, Islam and Buddhism; he stated that the courses he took were not geared to indoctrination, but were academic classes. (Tr. 765-766). He identified one of his Religious Studies Professors, Brother Luke Salm, as a mentor, and Mr. O'Malley's testimony was wholly consistent with the report, *Characteristics of the Lasallian School*, which was issued by Brother Luke in 1970. (Resp. Exh. 42). As Brother Luke explained in his report, which was endorsed by the entire Religious Studies Department, the College had not been attempting to

¹¹ Mr. O'Malley testified that "If anyone has testified that mass was mandatory in that period of time they're either hallucinating or perjuring." (Tr. 774).

indoctrinate students or proselytize for or against religion since at least 1958, when a change in the name of the department was made to emphasize the academic nature of the religion courses offered. Brother Luke wrote that, given the transitional nature of the college experience, no educational or religious purpose was served by imposing traditional doctrine; he suggested that to challenge a student to view Catholicism from the perspective of the faith traditions of other religions, and to understand how the Catholic tradition relates to the contemporary world, is a more effective way for students to come to a mature self-understanding of their personal faith and the tradition and culture from which they have come. (*Ibid.*) This approach continues to be the manner in which Manhattan College seeks to educate its students about religion, faith and spirituality. (Resp. Exh. 16).

Mr. O'Malley's testimony also addressed the financial support provided by donors to the College to enable it to build new buildings and provide for the students, including his personal support. As a Trustee, he has had occasion to speak with prospective donors, most of whom are alumni of the College and it was his sense that many support the College financially because it remains a Catholic college. He explained that his own support was specifically based on the continuation of the Catholic identity. (Tr. 777).

Mr. O'Malley's views were set out in the following question and answer:

“Q: What do you deem to be the core reason Manhattan College is a Catholic college?”

“A: Well, first of all, its very foundation, its 157 years of history as a Catholic institution. That's obviously number one. We have religious images all over the campus, we have daily Mass on the campus. We insist on religious studies, we insist that there's a portion of those studies that relate to Catholicism. As we hire people to work at the college to teach our students we clearly explain to them that this is a Catholic college, it's not make-believe.”

“So every step of the way we say it’s Catholic, we can’t get into this nonsense of indoctrination and mandatory nonsense that people seem to misunderstand as a part of Catholicism. Perhaps if you want to go back 200 years we had a lot of screwballs running the show, and some things were done to extreme, and you could say that in every religion, it wouldn’t matter whether it was Catholicism, Protestantism, Judaism, the Muslim faith, whatever, we are changing. Catholicism is a changing religion. So Manhattan changed as Vatican II came along and liberalized the church. Certainly Manhattan College changed, but it didn’t get away from its core mission.”

(Tr. 772-773).

SUMMARY OF ARGUMENT

Manhattan College is exempt from the National Labor relations Act as a religious institution under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and the court decisions that followed *Catholic Bishop*, culminating in *Carroll College v. NLRB*, 558 F.3d 556 (D.C. Cir. 2009).

In *Carroll College*, the Court of Appeals for the District of Columbia reaffirmed the bright-line test which it had initially promulgated in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) for determining when a college is exempt from NLRB jurisdiction as a religious institution under *Catholic Bishop*. Manhattan College easily meets each element of that test: it holds itself out to the public as providing a religious educational environment; it is a non-profit institution; and it is affiliated with the Catholic Church and the New York Province of the Brothers of the Christian Schools (de La Salle Christian Brothers).

By contrast, the NLRB has adopted framework for analysis that looks to whether a school can satisfy the NLRB that it has a “substantial religious character” in order to determine if it is exempt from jurisdiction under *Catholic Bishop*. This analytical framework has been applied by the Board in a manner that intrudes it into considering virtually all aspects of a religious college’s organization and operations. *See St. Joseph’s College*, 282 NLRB 65 (1986).

Unfortunately, this approach involves exactly the sort of invasive inquiry that *Catholic Bishop* sought to avoid, and leaves the NLRB trolling through the substance and contours of the faith and mission of a religiously-affiliated institution, and making its own doctrinal analysis of the sufficiency of religious observance and motivation. This type of inquiry clearly risks infringing upon the guarantees of the First Amendment’s Establishment and Free Exercise Clauses.

ARGUMENT

POINT I: MANHATTAN COLLEGE IS EXEMPT FROM NLRB JURISDICTION UNDER EXISTING CASE LAW

The Supreme Court determined in *Catholic Bishop* that Congress did not intend for the NLRB to have jurisdiction over religious institutions by reason of the Religion Clauses of the First Amendment. 440 U.S. at 507. Central to the Supreme Court’s reasoning was the concern that an NLRB bargaining order would entangle the Board into an inquiry regarding the good faith of a position asserted by the religious institution, and the relationship of the position taken to the institution’s religious mission, which would be a prohibited inquiry into matters protected by the First Amendment. Notably, the Supreme Court made it absolutely clear that this prohibition applied not just to the *substance* of a possible NLRB determination, but also to the *process* by which that determination might be made:

“It is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, *but also the very process of inquiry leading to findings and conclusions.*”

440 U.S. at 502 (emphasis supplied).

After *Catholic Bishop* was decided, the NLRB proceeded to devise a framework for determining whether a religious institution is beyond NLRB jurisdiction. in a series of cases in which the Board attempted to decide whether an institution had a “substantial religious character.” *See Livingstone College*, 286 NLRB 1308 (1987); *St. Joseph’s College*, 282 NLRB

65 (1986); *Jewish Day School*, 283 NLRB 757 (1987). However, the scrutiny by which this analysis was performed was rejected in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986). Writing for the First Circuit's *en banc* decision, now-Supreme Court Justice Breyer concluded that the *Catholic Bishop* doctrine applies not just to institutions that are "pervasively sectarian," but also to a "college that seeks primarily to provide its students with a secular education, but which also maintains a subsidiary religious mission." *Id.*, at 398-99. Then-Judge Breyer concluded that the NLRB's "*ad hoc* efforts , the application of which will themselves involve significant entanglement, are precisely what the Supreme Court in *Catholic Bishop* sought to avoid." *Id.* at 402-403.

In *University of Great Falls v. NLRB*, 278 F.3d 1335 (2002), the Court of Appeals for the District of Columbia similarly rejected the NLRB's approach to determining jurisdiction under *Catholic Bishop* as "flawed," *id.* at 1347, holding that in applying its "substantial religious character" test, the NLRB had engaged in just "the sort of intrusive inquiry that *Catholic Bishop* sought to avoid." *Id.* at 1341-42. Drawing significantly from the opinion in *Universidad Central de Bayamon*, and reading *Catholic Bishop* to require a much different, and less intrusive inquiry, the *Great Falls* Court fashioned a three-part test for the analysis of Board jurisdiction over religiously-affiliated institutions. Under the *Great Falls* criteria, a religious educational institution is exempt from the NLRB's jurisdiction if: (i) it holds itself out to students, faculty, and the community as providing a religious educational environment; (ii) it is organized as a nonprofit entity; and (iii) it is affiliated with, *or* owned, operated or controlled, by a recognized religious organization. *Id.* at 1343-45. The Court explicitly intended this test to be a "bright-line" rule for determining jurisdiction *without* delving into matters of religious doctrine or motive. *Id.* at 1345.

In its analysis of the NLRB’s “substantial religious character” standard, the *Great Falls* Court noted that the NLRB had attempted to minimize the religious beliefs of the University of Great Falls because the university had a nondiscriminatory admissions policy, had faculty who were not Catholic, did not require attendance at Mass, and respected other religious views. The Court stated that to limit the *Catholic Bishop* exemption to religious institutions which pursue hard-nosed proselytizing, limit enrollment to the members of their religion, and have no academic freedom, is an unnecessarily stunted view and may itself be a violation of the First Amendment.¹² *Id.* at 1345-1347. Instead, the three-part test crafted by the Court, relying on objective, publicly-available documents, would let the NLRB separate between sham and *bona fide* religious affiliation without setting itself up as an arbiter of doctrinal legitimacy. By avoiding such probing, the Court said, the Board would not need to “needlessly engage in the ‘trolling’ that ... *Catholic Bishop* itself sought to avoid.” *Id.*, at 1345 (citing *Universidad de Bayamon, supra*). But it is *exactly* this doctrinal “trolling” which the Union has insistently invited with respect to Manhattan College. The Union has framed the debate as a supposed dispute over Catholic theology and Catholic legitimacy; and the Board has given disturbing indications that it will accept the invitation to decide “Catholic legitimacy” notwithstanding the Constitutional consequences.

In *Carroll College, supra*, the D.C. Circuit Court of Appeals was faced with a situation similar to that in *Great Falls*: a religiously affiliated college had asserted its religious mission as the basis for exemption from NLRB jurisdiction of the NLRB, but had again encountered the Board’s rigid application of its “substantial religious character” test. While the

¹² This was hardly a novel proposition on the First Circuit’s part. It goes without saying that there is absolutely *no* support for the contention that the NLRB can decide that a college is not Catholic unless it compels students to go to Mass, hires only Catholic employees, and generally behaves like a narrow-minded stereotype drawn from an anti-religious tract.

case also involved an issue regarding the Religious Freedom Restoration Act (“RFRA”), it was decided by the Circuit Court under the three-part bright-line test promulgated earlier by the Circuit in *Great Falls*. The *Carroll College* Court held that Carroll College easily satisfied the *Great Falls* test: it was a non-profit private college affiliated with the Presbyterian Church, a recognized religious organization. The Court considered the college’s public documents to determine whether it held itself out to students, faculty and the broader community as providing a religious educational environment. In particular the Court noted that the college’s Mission Statement provided that the college would “demonstrate Christian values by ... example” and would “provide a learning environment devoted to academic excellence and congenial to Christian witness”; and that an agreement between the college and the Synod of the Presbyterian Church committed the trustees of the college to “recognize and affirm [its] origins and heritage in the concern of the Church for the intellectual and spiritual growth of its students, faculty, administration and staff.” 558 F.3d at 572-573. These objective indicia satisfied the *Great Falls* test.

The Regional Director whose decision was reviewed in *Carroll College* had determined that – in his view – the aspirational nature of the college’s statements were not supported by evidence of actual religious influence or control; and he further concluded that because the Presbyterian Church did not own the college’s campus, did not sponsor the college and did not have any right of ultimate control over the college, it did not meet the third element of the test for affiliation with the Church. In a footnote, the Regional Director observed that he would have reached the same conclusions under the three-part *Great Falls* test. The Circuit Court disagreed.

It is instructive to note where the *Carroll College* Court took exception to the Regional Director's approach below. Specifically, the Court explained the following:

“In determining whether a school is exempt from the NLRA under *Catholic Bishop*, the NLRB may not ‘ask how effective the institution is at inculcating its beliefs.’ [Citation omitted]. To do otherwise and require proof of ‘actual religious influence or control’ as the Regional Director did here ...is tantamount to questioning the sincerity of the school’s public representations about the significance of its religious affiliation. This neither the Board nor we can do.”

Id., at 573. The Court further quoted *Great Falls* to the effect that courts “cannot ask about the centrality of beliefs or how important the religious mission is to the institution.” *Ibid.* Finally, the Court squarely rejected the Regional Director's assertion that there was no “affiliation” under the *Great Falls* test because the Presbyterian Church did not own the college's campus, did not sponsor the college, and did not have any right of ultimate control over the college. The Court stated that the test is satisfied if the institution is “affiliated with *or* owned, operated or controlled ... by a recognized religious organization.” *Id.* at 574 (emphasis in the original).

The Court's conclusion in *Carroll College* should be heeded here:

“After our decision in *Great Falls*, Carroll [College] is patently beyond the NLRB's jurisdiction. *Great Falls* created a bright-line test of the Board's jurisdiction according to which we ask three questions easily answered with objective criteria. From Carroll's public representations, it is readily apparent that the college holds itself out to all as providing a religious educational environment. That it is a nonprofit affiliated with a Presbyterian synod is beyond dispute. From the Board's own review of Carroll's publicly available documents [citation omitted] *it should have known immediately* that the college was entitled to a *Catholic Bishop* exemption from the NLRA's collective bargaining requirements.”

Ibid.

We respectfully remind the Board that while it has recognized expertise to interpret labor policy matters embodied in the NLRA, it does *not* enjoy a similar writ of authority or expertise as to issues of avoidance under the First Amendment to the United States

Constitution. In the latter area, it is the federal courts which have the expertise, and have unchallengeable primacy of authority under Article III of the Constitution. The courts have spoken clearly and unequivocally to where the line between the First Amendment and the NLRA must lie, and we ask the Board to be mindful of that Constitutional mandate.

POINT II: MANHATTAN COLLEGE MEETS THE THREE-PART TEST OF CARROLL COLLEGE AND GREAT FALLS

The “bright-line” test of *Great Falls* and *Carroll College*, holds that an institution is exempt from NLRB jurisdiction an institution if it:

- A. Holds itself out to students, faculty and the community as providing a religious educational environment (described alternatively in the decision as “holds itself out to the public as a religious institution”);
- B. Is organized as a non-profit entity; and
- C. Is affiliated with or owned, operated or controlled by a recognized religious organization.

558 F.3d at 572. As noted above, this objective inquiry avoids the constitutional infirmities of the NLRB’s “substantial religious character” test by forgoing any inquiry into the institution’s motives or beliefs, the centrality of those beliefs, or the importance of its religious mission, while providing assurance of a *bona fide* religious identity.

A. Manhattan College Holds Itself out as a Religious Institution.

It is undisputed that Manhattan College publicly identifies itself through its *Mission Statement* as an “independent Catholic institution of higher learning ... founded upon the Lasallian tradition of excellence in teaching, respect for individual dignity, and commitment to social justice inspired by ... John Baptist de La Salle ... [and with a] mission ... to provide a contemporary, person-centered educational experience characterized by high academic standards, reflection on faith, values and ethics, and life-long career preparation.” This

statement is provided both to students through the College Catalogue (Pet. Exh. 2) and to applicants for jobs by Human Resources. (Resp. Exh. 14). Applicants sign an acknowledgment that they have received a copy of the *Mission Statement* and will abide by it. (Resp. Exh. 14). Appointment letters which are provided to many employees include a statement that the individual must commit to fulfill the obligations of the *Mission Statement*, and those letters must be signed and returned to the College. (Resp. Exh. 37).

The College Catalogue contains numerous other references to the Catholic heritage and culture of the College; sets out the nine-credit Religious Studies requirement (including one course in Catholic Studies); and describes the College-wide Core Goals and learning objectives which include religious and ethical awareness, understanding that Manhattan College is a Catholic institution, commitment to respect for individual dignity and social justice, and the need to take action based on ethical concerns and transcendent moral values as articulated in Christianity and other religious and philosophical traditions.

References to the College's Catholic identity are similarly included in job advertisements, which include multiple references to Manhattan as a Catholic college, and state that the College seeks applications from "those attracted to a college with a Catholic identity." (Resp. Exhs. 12, 13.)

The College provides new employees orientation training as to its Catholic mission, and with a publication on the College's Catholic culture which includes major documents setting forth the Catholic identity of the College, among which are the Board of Trustees' 1999 Report, *Manhattan College: Lasallian, Catholic and Independent*,¹³ the 1999 statement of the Council for Faculty Affairs acknowledging that Manhattan College is a Catholic

¹³ The detailed Report of the Board was adopted by the Trustees in 1999 as the culmination of a College-wide process that arrived at a consensus on the Catholic identity of the College and avenues to be explored to enhance it. It confirms the continuing commitment of the College as a Catholic Lasallian institution. (Resp. Exh. 16).

institution; and the 2002 *Sponsorship Covenant* between the College and the New York Province of the Brothers of the Christian Schools (de La Salle Christian Brothers)¹⁴. (Resp. Exh. 16.)

The By-Laws of the College set forth the requirement that the Brother Provincial of the Christian Brothers must be a member and Vice-Chair of the Board of Trustees, a mandatory member of the Board's Executive/Nominating Committee, and, under Canon Law the "Juridic Person" for the College. The By-Laws further require that a minimum of five Christian Brothers be members of the Board of Trustees, and that upon a dissolution of the College, the property and assets, as permitted by law, are to be distributed equally to the Order of Christian Brothers and to another Lasallian Catholic college.

The Office of Campus Ministry and Social Action is active and highly-visible on campus, with students and staff distributing literature and sponsoring events about Catholic activities, liturgical and sacramental activities, and service learning opportunities for students in the local community and across the globe.

The physical campus clearly establishes, to anyone who walks across the open spaces or visits the buildings, that Manhattan College is a Catholic institution. Numerous physical symbols of religious faith adorn the campus. The center of the campus is dominated by the Quadrangle, which includes two chapels, the smaller of which is located inside Memorial Hall opposite the Trustees' Board Room. The cupolas atop major buildings on or near the Quadrangle display visible crosses. The Quadrangle also includes a statute of Saint John Baptist

¹⁴ The *Sponsorship Covenant* is also distributed widely and is a formulation of the College's continuing operation as a Christian Brothers College, including the conduct of hiring, the role of the Vice President for Mission, and the promotion of the Catholic identity among staff, faculty, students and the community. (Resp. Exhs. 9, 16). It states that "The purposes of the College ... are conducted in harmony with the College's heritage and continuing reality as a Catholic college in the Lasallian tradition.... [T]he College is guided by the moral, spiritual and religious inspiration of the Catholic tradition ... and derives inspiration from the religious faith and educational ideals ... of the Christian Brothers. The Covenant specifies that the College fulfills its Mission by teaching and scholarship, ...by community service, for the educational benefit of its students and their overall personal and religious development." (Resp. Exh. 9, p. 2).

de La Salle, and throughout campus buildings there are numerous portraits of Christian Brothers and Catholic clergy, and murals of the Christian Brothers. There are crosses on the walls of the classrooms.

These objective indicia of the College's public identity as a religious institution – its public documents, its public activities and institutions, and its physical character – fully meet, and even exceed, the judicial criteria articulated to determine whether the University of Great Falls and Carroll College met the first part of the three-part test. In the previous cases, the Court reviewed similar public documents of the respective institutions, including mission statements, covenants with religious organizations, relevant statements adopted by Trustees and corporate Articles of Incorporation, course catalogue, and found them sufficient to satisfy the analysis.

B. Manhattan College is a Non-Profit Entity

It cannot and will not be contested that Manhattan College is recognized by the Internal Revenue Service as a tax-exempt entity (Resp. Exh. 1), which qualifies it as non-profit. The IRS Determination letter verifying the College's satisfies the second part of the test.

C. Manhattan College is Affiliated with the Catholic Church and the Christian Brothers

Manhattan College is listed in the *Official Catholic Directory*, a compilation of institutions recognized by the Catholic Church as Catholic institutions. (Resp. Exh. 2). This was the evidence of affiliation that the Court relied upon in *Great Falls*. 278 F.3d at 1345. Manhattan College is also affiliated with the New York Province of the Brothers of the Christian Schools (de La Salle Christian Brothers) as documented by the *Sponsorship Covenant* signed by the Board of Trustees and the Brother Provincial. (Resp. Exh. 9). This was the evidence of affiliation that the Court relied upon in *Carroll College*. 558 F.3d at 573-574. Further, the Manhattan College campus includes a residence for Christian Brothers who work at the College,

have retired from work with the College, or have duties for the Order of Christian Brothers in the local area. (Resp. Exh. 5). As noted above, were the College to dissolve, its property and assets would be distributed equally between the Christian Brothers Province and another Lasallian college. (Resp. Exh. 6).

Manhattan College satisfies all three tests set forth in *Great Falls* and later confirmed in *Carroll College*: it is a non-profit college affiliated with the Catholic Church and the Christian Brothers, and it holds itself out to the public as providing a religious educational environment. In this regard, it should be noted that in the earlier 1999 decision (Board Exh. 3), the Regional Director found that the College was non-profit (*id.* at p 2), and that it was publicly listed in the *Official Catholic Directory* (*id.* at p. 6), which requires the approval of the Church for listing. The Regional Director concluded in 1999 that the College possess an unmistakably Catholic philosophy and mission which derives from the beliefs, history and vision of the founding Order, that the physical indicia of the Catholic faith fill the campus, that the College offers a campus ministry which sponsors Catholic sacramental liturgies, and that the Mission statement presents the College as a Catholic institution. Accordingly, as found in that prior decision, Manhattan College satisfies the three-part test in the first analysis in 1999.

POINT III: MANHATTAN COLLEGE MEETS THE STANDARDS WHICH THE NLRB HAS SET FOR *CATHOLIC BISHOP* EXEMPTION

While the foregoing analysis is sufficient to show that Manhattan College is exempt from the jurisdiction of the NLRB, the factual record further demonstrates that Manhattan College should be exempt from NLRB jurisdiction under *Catholic Bishop* even if the Board were entirely to ignore the Constitutional lessons of *Great Falls* and *Carroll College*. Thus, notwithstanding the Board's apparent reluctance (to this point, at least) to heed those judicial admonitions, jurisdiction should be declined.

Unfortunately, the NLRB's application of a more intrusive analysis than the one advocated by the Courts has not resulted in a coherent application of *Catholic Bishop*. An examination of cases where the NLRB has declined to exercise jurisdiction reveal facts seriously at odds with decisions where the NLRB has asserted jurisdiction.

A consistent hurdle raised by the NLRB to a finding that a religious college is exempt from jurisdiction under *Catholic Bishop* has involved the absence of ownership and control of the College by a religious body. The Regional Director in *Carroll College*, 345 NLRB 254 (2005), found that the Church did not exert any type of control over the College, the Trustees were not required to be Church members, the Church had no power to nominate or elect Trustees, there was only one minister on the College's Board, the College owned its own property (rather than the Church), and there was no evidence that the Church would require dismissal of faculty for engaging in conduct contrary to its teachings. 343 NLRB at 255. Accordingly, jurisdiction was asserted.

By contrast, in *Jewish Day School*, 283 NLRB 757 (1987), the NLRB *declined* to assert jurisdiction, finding "sufficient" evidence of the religious purpose of the school. A close

reading of the case, however, establishes that the school was a private non-profit corporation established by the United Jewish Appeal Federation of Greater Washington – a fundraising organization that sought to raise money for Jewish welfare but clearly was *not* a recognized religious organization or entity. *Id.*, at 757. The board of directors consisted of individuals active in the Jewish community, but included only three rabbis; and a number of the directors were elected by parents of the school children. No directors were appointed or elected by a recognized religious organization. Members of the board of directors constituted the education committee, which was responsible for determining educational policies and curriculum; and no religious body controlled what was taught. The school did not prohibit attendance by non-Jewish students, and did not adhere to one particular branch of Jewish religious thought, but instead taught and recognized them all. *Id.*, at 758-759. Notwithstanding, the Board found an exemption even though the school was not controlled by a recognized religious organization, but rather by a lay board of citizens who owned the assets and property and made decisions about what would be taught.

In fact, in *Jewish Day School*, the NLRB *overruled* its earlier decision in *Bishop Ford Central High School*, 243 NLRB 49 (1979), a case where the NLRB had asserted jurisdiction because the school, even though it was clearly religious, was owned by a separate corporation and not controlled by the local Archdiocese .

In *St. Joseph's College*, 282 NLRB 65 (1986), the NLRB *declined* to assert jurisdiction over a college founded by the Sisters of Mercy. In its analysis, the NLRB found, among other factors, that the college recognized the concept of academic freedom, had never taken action against a faculty member for taking a position inconsistent with church belief, made attendance at Mass voluntary, and offered courses comparable to offerings at a secular college.

Id., at 66-68. These factors (which are prevalent at most religious colleges) did *not* deter the NLRB from declining to assert jurisdiction. It is worth noting that the Court of Appeals in *Great Falls* pointed out the similarity in corporate structure between the University of Great Falls and St Joseph's College, and found that the NLRB's attempt to distinguish the former was unpersuasive.¹⁵

What the history of Board decisions demonstrates is that the existence of factors, such as voluntary Mass, recognition of academic freedom, a lay Board, and secular courses at college have *not* consistently led the Board to assert jurisdiction. And, significantly, what the Courts have been opining since *Universidad Central de Bayamon, supra*, is that there is no uniform definition or concept of religion, and no standard for what makes a college "sufficiently religious." Religious beliefs are a matter of Constitutionally-protected faith, and "need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection." *University of Great Falls v. NLRB, supra*, 278 F.3d at 1344).

Indeed, what is striking about this proceeding is that the *Union's* case was all about religious belief. Virtually all of the case put on by the Union was to present Manhattan College as un-Catholic precisely because it is respectful of academic freedom, does not enforce doctrinaire rigidity, and encourages but does not compel religious practice. Thus, the Union repeatedly asked if the College takes attendance at religious events. Its testimony placed great emphasis on the fact that the College respects and teaches about religious faiths other than Catholicism. The Union contended that it was somehow un-Catholic that the College respects the dignity of all people, including those who are gay or lesbian.

¹⁵ "Both schools teach secular subjects, both offer mass but do not require it, both have non-Catholic faculty, both espouse belief in academic freedom. Both are religious schools trying to find their place in a twenty-first century world without giving up what makes them religious." 278 F.3d at 1347.

The Union made a further point of emphasizing the reduced presence of the Christian Brothers as evidence that the College could no longer be “authentically” religious. The phenomenon of fewer religious and clergy is not an issue unique to Manhattan College but is a phenomenon generally facing religious institutions in the larger world. Many religions, including the Catholic Church, have been grappling with the decline in priests, ministers, brothers and sisters – and as set forth in the College’s testimony, it and other religious institutions are increasingly looking to members of a committed laity to assume responsibility for promoting and maintaining the religion. The efforts at Manhattan to have lay faculty attend Formation programs, to become involved with campus programs on religious issues, and to serve as the senior administrators is a response to the demographic reality. To assert that a predominance (or other “magic number”) of priests or Brothers is a requirement for a Manhattan College to maintain its Catholic identity and mission is to strip the community of its Constitutional right to be Catholic.

If the Board were to follow only *Catholic Bishop*, and to give no deference to *Great Falls* or *Carroll College*, it would address the question whether the religious identity of Manhattan College would create an “entanglement” contravening the protections of the First Amendment. Once again we note that the very nature of the inquiry advocated by the Union in the proceeding – counting the number of Brothers; insisting that Mass be mandatory; contrasting the ecumenical approach of the College to an invented cliché of supposedly-required indoctrination; counting (or pretending not to be aware of) the existence of crosses and other religious symbols on buildings and in classrooms; and making the entirely repugnant argument that “true” Catholicism cannot be respectful of gays and lesbians – all would have the Government deeply involved in dissecting the religious beliefs of the College.

Ironically, the Union's argument was couched almost entirely in theological terms – in other words, in an attempt to define Catholicism – which necessarily demonstrates the religious entanglement that would arise were the NLRB to assert jurisdiction. The Union's testimony, provided primarily by Manhattan College Professor Joseph Fahey, centered on two concepts: that absent indoctrination and proselytizing, Manhattan cannot be a Catholic college; and, that according to Professor Fahey's view of Catholic social teachings, the College's assertion that the NLRB does not have jurisdiction is a "mortal sin" in Catholic theology.

It should not escape the Board's notice that every single point which the Union attempted to establish through Professor Fahey's testimony was explicitly couched in Catholic religious terms.

Although most of Professor Fahey's testimony about the historical record at Manhattan College did not survive cross-examination, his expansive claims as to what constitutes an authentically Catholic college raises questions of Catholic religious belief. Hence, the arguments advanced by the Union through Professor Fahey would require the Board to make judgments about Catholic doctrine. Is this properly within the Board's purview as an agency of the United States Government? We submit not.

Obviously, the Brother Provincial and the Roman Catholic Archdiocese of New York consider Manhattan College to be legitimately Catholic despite the absence of indoctrination and proselytizing, and the absence of mandatory Mass. Brother Luke Salm, who hired Professor Fahey and chaired the Religious Studies Department, clearly understood that being Catholic did not require indoctrination or compelled religious practice. Professor Fahey disagrees. However, that does not vest the Board with jurisdiction to decide whether it is the College or the Union which is "correctly" Catholic.

Professor Fahey testified about his membership and leadership of an external organization called “Catholic Scholars for Workers Justice,” and the Union offered (and the Hearing Officer accepted in evidence) two documents by that external organization. The first was a statement describing the organization, and the second was a statement issued by the organization in support of the unionizing effort which is the subject of this proceeding. (Pet. Exhs. 3, 4). Professor Fahey later testified about another document circulated on campus, (marked for identification as Respondent’s Exhibit 51 but *not* received in evidence by the Hearing Officer), titled *Union Busting is a Mortal Sin*. Professor Fahey testified that he initiated the creation of *Union Busting is a Mortal Sin*, helped draft and research it, and directed “Catholic Scholars for Workers Justice,” to distribute it at Manhattan College. It was circulated on campus with Pet. Exh. 4 attached to it.

Union Busting is a Mortal Sin claims to be based on the Vatican’s *Compendium on Social Teachings*, and argues that any resistance to unionization is a violation of Church doctrine and a mortal sin. Notably, a copy of the document was sent to one of the College’s witness while he was still eligible to be recalled.

When it became apparent to the Hearing Officer from the College’s proffer of Professor Fahey’s theological essay that the Union was framing the question of its alleged organizational rights as a religious argument, the Hearing Officer refused to admit *Union Busting is a Mortal Sin* in evidence over the repeated protests of the College, *and despite the fact that part of the document had already been offered by the Union and admitted into the record*.

What was abundantly clear, however, is that the Union has chosen to make its organizational campaign a referendum on Catholic thought. Its arguments to the Board – and its propaganda on the Manhattan College campus – make it absolutely clear that any subsequent

involvement with the Union will inevitably raise issues of Catholic doctrine and belief regarding rights to be granted to workers. This is the quintessence of “entanglement.”

Under any reasonable analysis, there is no question that Manhattan College is a Catholic College strongly committed to its religious mission. Manhattan College and its affiliated religious sponsors are vested with the responsibility and authority to define the College’s actualization of its Catholic identity. Those fundamentally religious decisions are not subject to Government scrutiny.

As is abundantly clear from the record, Manhattan College’s Catholic identity is not grounded on rigid, unchanging principles and practices, but grows and responds to developments in the Church, the Christian Brothers Order, and its own College community. The record sets out in detail the most recent actions of the College to define its Catholic fabric of the College, and to lay out a blueprint for maintaining the relevancy of its Catholic identity. The Board of Trustees Report, *Manhattan College: Catholic Lasallian and Independent*, took almost five years to complete, and articulates the College’s vigorous commitment to defining, sustaining and strengthening its Catholic identity. The Council for Faculty Affairs, acting for the faculty, promptly affirmed the Catholic identity of the College as set forth in the *Report*. The *Trustees Report* was Manhattan College’s response to the Vatican’s *Ex Corde Ecclesiae* and the evolving role of a committed laity at the College in response to the declining number of Christian Brothers. It was a comprehensive declaration of how Manhattan College would continue to realize its Catholic mission in the 21st Century.

The *Sponsorship Covenant* between the Christian Brothers and the College further defined how the College, in coordination with its founding (and sustaining) religious Order, would perpetuate its religious identity. The choices made on how the College would

approach hiring, the role of the Vice-President for Mission, and the roles of lay faculty and staff in fulfilling the College's religious functions are *fundamentally religious decisions*. That they eschew rigidity and intolerance does *not* mean that they are not an expression of Catholic religious beliefs.

Manhattan College consistently and substantively demonstrates its religious identity. The Brother Provincial must be a member, and an officer, of the Board of Trustees, and also a member of the critical Executive/Nominating Committee. Additional required numbers of Christian Brothers must be Trustees. The College's property and assets, in the event of dissolution, would be distributed to the Christian Brothers and a Lasallian College.

All students are required to take nine credits of religious studies, three of which must be in Catholic Studies. This ongoing commitment to a significant block of courses in religion cannot be minimized by the Union or the Board simply because those courses are not designed to *indoctrinate* students: the Union's argument notwithstanding. Religion does not automatically equate to rigidity and compulsion. Where the Catholic Church, the Order of Christian Brothers and Manhattan College all recognize that students may be brought to faith not by coercion but by a curriculum that challenges their understanding and beliefs, the Government may not, at the Union's behest, impose a skewed and cynical cartoon version of Catholicism as its standard of religious legitimacy.

The record documents the concerted efforts of the College, as recognized in the *Sponsorship Covenant*, to hire persons who understand the Catholic mission of the College and are prepared to respect and support that mission. Rather than seeking to compel adherence to a punch-list of religious conformity, the College understands that attracting faculty and staff who understand the College and are prepared to support the religious mission is a far more desirable,

and effective, approach. By including a focus on Catholic identity in the College's interview process, the job application forms, the literature provided to applicants, and in new employee orientation activities and documents, the College consistently demonstrates the seriousness of its commitment to build a community willing to support the Catholic mission. Applicants sign and acknowledgment that they have received the Mission statement and will abide by it.

There is also a systemic effort at the College to involve faculty, administrators and staff in an ongoing dialogue about Catholicism, Lasallian beliefs, faith and spirituality. The documented activities of the Lasallian Education Committee, the Newman Lecture, Founders Day, the Holocaust Center and the numerous programs, speakers and events – all focused on Catholic religious identity – are the fabric of the College. The Lasallian awards recognize and value individual contributions to this mission. The College encourages faculty and administrators to participate in Formation programs to deepen their understanding of the religious role, and to enable them to apply what they have learned on campus, whether in the development of courses or the leadership of service learning programs. Similar opportunities are provided to students in addition to the plethora of presentations, lectures, convocations and campus events. Participation in community service and volunteer projects is part of the Catholic Lasallian commitment to help those most vulnerable.

Attempts by the Union to dismiss these activities as no different from student volunteer efforts at other colleges is, once more, a cynical effort to dissociate moral commitment from Catholic thought, and to assert that socially-conscious action must be viewed by the Government as inherently secular. This does not, however, negate the fact that at Manhattan College, Campus Ministry and Social Action adds the spiritual and religious dimension for participating students.

The College has an unmistakable formal religious aspect. The churches and chapels on campus, the statues and portraits of the Christian Brothers and clergy, the crosses in classrooms, are not merely incidental art and architecture; rather, they are explicit manifestations of religious faith. The daily Mass, the prayer meetings, the offering of the religious sacraments such as baptism, communion and confirmation, and the inter-faith gatherings all explicitly convey the Catholic religious identity of the College. The Union argues that these offerings cannot be “truly religious” unless they are also compulsory; but this is a false and entirely contrived equivalency which the Board cannot endorse without imposing its own definition of “approved” faith in clear violation of the First Amendment.

The arguments that religion requires indoctrination and proselytizing in order to be authentic, and that religious belief must be authoritarian and hence inconsistent with academic freedom are more than indefensible; these arguments are being made to promote a violation of fundamental American values of religious freedom. The Union is, of course, free to make any arguments it wants to – no matter how cynical, trivial or distorted – about what it means to be Catholic; but the Government is not free to accept the Union’s invitation to determine questions of “correct” religious doctrine.

CONCLUSION

For all of the reasons hereinabove set forth, jurisdiction should be declined.

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Respectfully submitted,

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