

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

MANHATTAN COLLEGE,

Employer,

- and -

**MANHATTAN COLLEGE ADJUNCT
FACULTY UNION, NEW YORK STATE
UNITED TEACHERS, AFT/NEA/AFL-CIO**

Petitioner.

Case No. 02-RC-023543

**MANHATTAN COLLEGE'S POST-HEARING BRIEF TO THE REGIONAL
DIRECTOR**

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Pursuant to Section 102.67(a) of the National Labor Relations Board (the “Board” or “NLRB”) Rules and Regulations and the grant of the Hearing Officer on July 16, 2015, Manhattan College (“Manhattan College” or “College”), by its attorneys, Bond, Schoeneck & King, PLLC, hereby submits its post-hearing brief in the above-captioned representation proceeding.

PRELIMINARY STATEMENT

Manhattan College, a Lasallian Catholic College, maintains, as core principles and values, respect for all persons, quality education, concern for the poor, social justice, an inclusive community, and faith in the presence of God. These principles are derived from Manhattan College’s founding by the Institute of the Brothers of the Christian Schools and underlie Manhattan College’s mission. These principles define its operation. In order to fulfill its mission, Manhattan College looks to all those who choose to join the College to recognize its Catholic identity and respect and support its religious mission. In reliance on the Supreme Court’s

decision in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) and the subsequent decisions of the D.C. Circuit Court in *University of Great Falls v. NLRB*, 278 F. 3d 1335 (D.C. Cir. 2002) (“*Great Falls*”) and *Carroll College, Inc. v. NLRB*, 558 F. 3d 568 (D.C. Cir. 2009) (“*Carroll College*”), Manhattan College has asserted that the NLRB lacks jurisdiction over the College because it is a Catholic College committed to promoting its mission.

In December 2014, the NLRB in *Pacific Lutheran Univ.*, 361 NLRB No. 157 (Dec. 16, 2014) (“*PLU*”), announced a new standard for assessing jurisdiction over religious institutions of higher education such as Manhattan College. By fashioning a different jurisdictional standard, the Board discarded its constitutionally infirm “substantial religious character” test and replaced it with a test focusing on whether a religious university holds itself out as providing a religious educational environment (“Prong 1”), and then whether it holds out the petitioned-for employees as performing a specific role in creating or maintaining the university’s religious educational environment (“Prong 2”). However the *PLU* test fails to remedy the constitutional deficiencies in the Board’s jurisdictional analysis. Rather, it perpetuates the impermissible entanglement of its predecessor analysis by anointing the Board with the authority to determine in the first instance what is or is not a “religious function” of a college and then further to judge whether the college or university sufficiently holds out its employees – here faculty members, individually or collectively – as performing that function. Manhattan College respectfully submits that the Board can and should avoid entangling itself in Manhattan College’s religious beliefs by asserting jurisdiction under *PLU*, and instead use the constitutionally permissible test articulated by the U.S. Court of Appeals for the D.C. Circuit in *Great Falls* and reaffirmed in *Carroll College*.

Notwithstanding the constitutional infirmities of the *PLU* test, Manhattan College meets that test. It is beyond dispute that Manhattan College makes the minimal showing required by Prong 1 of the *PLU* test, and any continued argument to the contrary would be disingenuous. Manhattan College also meets Prong 2 by consistently communicating to its entire community—including its adjunct faculty—that being a faculty member at Manhattan College is different than being a faculty member at secular institution because Manhattan College faculty members are expected to maintain the College’s Catholic educational environment by acknowledging, respecting, understanding, and supporting its religious educational mission. Manhattan College makes this expectation known in its jobs portal, candidate interviews, employment application and hiring processes, orientation programs, public writings and speeches given by Manhattan College’s leadership, and countless other documents and programs. Significantly, the obligation of faculty at a Catholic college to respect and be supportive of the institution’s religious mission is a fundamental tenet of the apostolic constitution governing Catholic higher education, known as *Ex Corde Ecclesiae* (“*Ex Corde*”) and which was promulgated by Pope John Paul II in 1990, and its implementation document, the Application of *Ex Corde Ecclesiae* for the United States (“Application”), promulgated by the U.S. Conference of Catholic Bishops.

For these reasons and as set forth more fully below, the *PLU* test is constitutionally impermissible and substantially burdens Manhattan College’s free exercise of its religious beliefs. Nonetheless, Manhattan College meets that test, and it would be inappropriate for the Board to assert jurisdiction over Manhattan College even under the newly articulated *PLU* test.

PROCEDURAL HISTORY

On October 5, 2010 the Manhattan College Adjunct Faculty Union, New York State United Teachers, AFT/NEA/AFL-CIO (“Union” or “Petitioner”) filed a petition seeking to represent a unit of part-time faculty at the College. Manhattan College contested the Board’s jurisdiction over it as a religious institution.

The Region initially held a hearing on the jurisdictional issue during October and November 2010. At that time, the Board asserted jurisdiction over religious colleges like Manhattan College under the so-called “substantial religious character” test, which the Board developed following the U.S. Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). By a Decision and Direction of Election dated January 10, 2011, the Acting Regional Director found it appropriate to assert jurisdiction over Manhattan College under the substantial religious character test and directed an election to be held in a unit encompassing all individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course). Manhattan College timely filed a Request for Review with the Board on January 21, 2011 and it was granted on February 16, 2011.

Over four years later, on December 16, 2014, the Board in *PLU* discarded its constitutionally infirm substantial religious character test and articulated a new standard whereby it would decline jurisdiction over a religious college only if the college: (1) makes a minimal showing that it holds itself out as providing a religious educational environment, and (2) demonstrates that it holds out faculty in the petitioned-for unit as performing a specific role in creating or maintaining that religious educational environment. *PLU*, at *1. By Order dated February 3, 2015, the Board remanded the instant case back to the Region for reconsideration

under *PLU*. On March 13, 2015, Manhattan College requested that the hearing be re-opened for consideration of relevant evidence under the new standard. The Region granted Manhattan College's request by Order dated April 9, 2015 and conducted the re-opened hearing on May 19, June 16, June 22, June 26 and July 16, 2015.

RELEVANT FACTS

I. MANHATTAN COLLEGE'S CATHOLIC AND LASALLIAN FOUNDATION

Manhattan College is a Catholic College included in The Official Catholic Directory in the section for the Archdiocese of New York. (*See* Er. Ex. 2.)¹ The College was founded in 1853 by the Christian Brothers as the first Lasallian Catholic higher education institution in North America to educate students in the tradition of John Baptiste De La Salle, the Catholic Church's Patron Saint of Teachers. (*See* Er. Ex. 3; Er. Ex. 16 at 5; Er. Ex. 66 at 13–25; Er. Ex. 76 at 6.)² John Baptiste De La Salle established the Institute of the Brothers of the Christian Schools in 1680 which worked to transform teaching into a religious vocation devoted to educating the underprivileged by offering practical subjects so that students could lead a useful life in society and by teaching religion so that students would acquire a commitment to Christian ethics. (*See* Er. Ex. 16 at 5.) The core principals of a Lasallian Catholic education today are faith in the presence of God, quality education, respect for all persons, an inclusive community, and concern for the poor and social justice. (*See* Er. Ex. 3.) The Lasallian educational community spans more than 80 countries and maintains six colleges in the United States, of which Manhattan

¹ Transcript references in this Brief will be as follows: Employer will be "Er.," Petitioner will be "Pet.," and the NLRB Region will be "Bd."

² Manhattan College was chartered as an institution of higher education by the New York State Board of Regents in 1863 (Er. Ex. 6 at 1.) and is classified by the Internal Revenue Service as a Section 501(c)(iii) nonprofit entity. (Er. Ex. 1.) The College continues to have the Brother Provincial, Head of the Christian Brothers District, as a member of the Board of Trustees, as are a number of Christian Brothers; the Brother Provincial also serves as a permanent Vice Chair of the Board and is on the Executive Committee of the Board. (Er. Ex. 6 at 2, 5, 9; Er. Ex. 7; Tr. 850.) In the event of dissolution of the College, one half of all assets and property are to be returned to the District of the Christian Brothers. (Er. Ex. 6 at 1.)

College is an active participant. (*See* Er. Ex. 3; Er. Ex. 16 at 11–12.) The Lasallian educational mission, since its creation, viewed the teaching ministry as a vocation within the Catholic Church; it is a lifetime commitment with an emphasis on quality teaching of the underprivileged that could provide inspiration to non-Catholics as well. (*See* Er. Ex. 16 at 11–12.)

Manhattan College’s Lasallian and Catholic identity are and always have been inextricably bound together. (*See* Er. Ex. 16 at 12; Er. Ex. 66 at 27–67.) In addition to its recognition by the Archdiocese and its membership in the Association of Catholic Colleges and Universities, the College has always provided a full range of Catholic sacramental and devotional practices. (Er. Ex. 2; Er. Ex. 16 at 12–13; Er. Exs. 59, 73, 74.) Throughout its history, students have been required to take courses in religion, and the requirement persists today, with nine credits of religion as the sole requirement for all students in each of the five separate schools of Manhattan College. (*See* Er. Ex. 16 at 13–14; Pet. Ex. 15 at 30; Tr. 1334–35.) Students must take at least one religion courses in Catholic Studies. (*Id.*) Students in any major can take a concentration in Catholic Studies at the College. (Er. Ex. 101.) The Union’s witness, Professor Paul Dinter, an adjunct faculty member in the Religion Department, testified that in the required Catholic Studies courses he has taught, which he refers to as the “200-level courses,” that “[t]here is a requirement... if you’re teaching a 200 level course that you insert a couple of the goals. The goals specifically say that you are to familiarize students with Catholic traditions, symbols, etc.” (Tr. 1326, 1335–36.)

II. CATHOLIC HIGHER EDUCATION IS DEFINED BY THE CATHOLIC CHURCH

Manhattan College conducts itself in accordance with the Catholic Church’s expressed intention for a Catholic institution of higher education. (*See* Er. Exs. 9, 16, 64, 66; Tr. 820.) The Catholic Church in 1990 defined Catholic higher education worldwide with the publication of

the Apostolic Constitution *Ex Corde Ecclesiae* (“*Ex Corde*”), which had its specific implementing norms elaborated by the United States Conference of Catholic Bishops in 2001. (Er. Exs. 57, 58; Tr. 820–32.) Therefore, the essential elements of what constitutes a Catholic College in the United States are set by the Vatican and the U. S. Catholic Bishops. *Ex Corde* sets forth the following description of a Catholic institution of higher education:

Every Catholic University, *as a university*, is an academic community which, in a rigorous and critical fashion, assists in the protection and advancement of human dignity and of a cultural heritage through research, teaching and various services.... It possesses that institutional autonomy necessary to perform its functions effectively and guarantees its members academic freedom....³

(Er. Ex. 57 at 4, ¶ 12; Tr. 822) (italics in the original, internal footnotes omitted.) Catholic higher education is further explained in *Ex Corde* as consisting of a dialogue between faith and reason, a concern for the ethical and moral implications of research and knowledge, a study of serious contemporary problems, the promotion of social justice, making education accessible to the poor and those customarily deprived of an education, and a commitment to ecumenical dialogue and diversity. (Er. Ex. 57 at 5, 8–10.) The Church is clear in *Ex Corde* that “freedom of conscience of each person is to be fully respected.” (Er. Ex. 57 at 14, Article 2 § 4) (footnote omitted.) Similarly, the Catholic Church declares that its religious mission for students requires students to be “challenged to pursue an education that combines excellence in humanistic and cultural development with specialized professional training.” (Er. Ex. 57 at 6, ¶ 23.)

Ex Corde explicitly states that “all the basic academic activities of a Catholic University are connected with and in harmony with the evangelizing mission of the Church ...” including research, education, professional training and dialogue with culture. (Er. Ex. 57 at 12.) Further,

³ *Ex Corde* further elaborates on its references to institutional autonomy and academic freedom in footnote 15 as follows: “... ‘institutional autonomy’ means that the governance of an academic institution is and remains internal to the institution; ‘academic freedom’ is the guarantee given to those involved in teaching and research that, within their specific specialized branch of knowledge, ... they may search for the truth wherever analysis and evidence leads them, and may teach and publish the results of this search” (Er. Ex. 57 at 18 ¶ 15.)

the Catholic Church makes it clear that the “natural expression of the Catholic identity of the University [is] ... a practical demonstration of its faith in daily activity” by offering opportunities for reflection and encouraging participation in activities which integrate religious and moral principles with academic life as well as respecting initiatives for prayer and reflection of those members of the college community of other religions. (Er. Ex. 57 at 10.) In 2001, the U.S. Conference of Catholic Bishops issued its report on the Application of *Ex Corde* to Catholic higher education institutions in the United States, recognizing the duality of their relationship as part of the Church and the higher education community in the nation, with academic commitments to secular goals and programs as well as continued participation in the Catholic tradition and, in many cases, such as Manhattan College, commitment to the special charisms of the founding religious communities. (Er. Ex. 58 at 1–3.) The U.S. Catholic Bishops reaffirmed the essential principles of *Ex Corde*, including commitment to Catholic ideals; principles and attitudes in carrying out teaching; research and all other university activities with due regard for academic freedom and the conscience of every individual; commitment to serve others, particularly the poor and vulnerable; institutional autonomy for governance; and embracing a diverse community as full partners in Catholic higher education. (Er. Ex. 58.) The Application of *Ex Corde* calls upon each Catholic College to strengthen its Catholic identity with the participation of the sponsoring religious community, the board of trustees, the administration, staff, faculty and students, to devise a plan for achieving its specific objectives and to review the progress of each college toward furthering its Catholic mission ten years after the promulgation by the U. S. Catholic Bishops Application Report. (Er. Ex. at 7, 10; *see also* Employer’s Brief dated Feb 28, 2011, Attachment, Letter dated January 19, 2011 from the U. S. Conference of Catholic Bishops, by Archbishop Dolan, to the President on compliance with *Ex Corde*.)

In accordance with *Ex Corde* and the wider dialogue it inspired at Manhattan College, and consistent with the subsequent guidance of the U. S. Catholic Bishops, Manhattan College undertook an extensive examination and revitalization of how it would articulate its Catholic identity and mission, including the adoption of a new Sponsorship Covenant with the founding order of Christian Brothers, scholarly research into the charism and meaning of its Lasallian identity and the teachings of John Baptiste De La Salle, a commitment to engaging and educating faculty and staff on Lasallian and Catholic beliefs and their integration into the full life of the College, and an expanded integration of the Lasallian and Catholic principles into the education and development of students. (See Er. Exs. 9, 16, 66.) Among the most significant developments undertaken by Manhattan College in furtherance of the centrality of the Catholic identity and as required by its Sponsorship Covenant with the New York Province of the Brothers of the Christian Schools (De La Salle Christian Brothers) are: (i) in consultation with the Brother Provincial, the College employs a Vice President for Mission, a Lasallian educator whose responsibility is to promote, assist, coordinate and support the fullest integration of the Catholic identity into the day-to-day activities of the faculty, staff, administration and students; (ii) the College makes the discussion of the College's Catholic identity and mission an explicit part of the hiring process so that those who accept employment with Manhattan College agree to recognize and respect the College's Catholic identity and Lasallian Mission; (iii) the implementation of orientation, in-service education, training, workshops, events, and liturgical activities to deepen the understanding and participation in the Lasallian Catholic vision of the College for Board members, administrators, faculty, staff and students. (Er. Ex. 9 at 2–4; Er. Exs. 16, 66; Tr. 840–45, 847–52.)

In furtherance of its chosen mission as a Lasallian Catholic College, and in compliance with the Application of *Ex Corde*, Manhattan College reported to New York Cardinal Dolan in 2012 on the College's achievements in promoting its Catholic identity in a document that was made available on campus as well as to the Archdiocese. (Er. Exs. 63, 64; Tr. 873–80.) The College's 2012 report on its fulfillment of *Ex Corde* documents the pervasiveness of the Lasallian Catholic identity on the campus through expansion of the work of the Department of Campus Ministry and Social Action; increased social action programs; work with Catholic Relief Services, opportunities for spiritual engagement and liturgical celebrations; increased participation in formation programs that are designed to give lay faculty, administrators and staff direction in how they can incorporate Catholic and Lasallian principles and teaching into their responsibilities on campus; expansion of on-campus centers and programs designed to enhance and emphasize the Catholic identity of the College (e.g. Center for Lasallian Studies, Center for Holocaust, Genocide and Interfaith Studies, Colloquium on Catholicism, Newman Lecture, Lasallian Education Committee, Lasallian Conversations, Lasallian Luncheon, Saint De La Salle Day); and attention to interdisciplinary studies, such as the undergraduate major in Peace Studies created in response to the Pope John XXIII's encyclical *Pacem in Terris* and the Catholic Studies minor which is available to all students. (Er. Ex. 64 at 3–7; Tr. 873–80.) The report extensively highlights the College's active promotion of "service to the people of God," Catholic liturgical activities, the "spirit of faith or 'seeing as God sees,'" the belief that teachers should "see Christ in ALL their students," and that a fundamental prayer at the College is the traditional Lasallian prayer "Let us remember that we are in the holy presence of God." (Er. Ex. 64 at 7–8.)

Thus, Manhattan College promotes "respect for human dignity" and "reflection on faith and reason" and asserts that the academic environment "encourages a dynamic quest for truth

and assists students in the development of mature understanding of the relationship of faith and reason.” (Tr. 863.) President O’Donnell testified that the former president of Notre Dame, Rev. Theodore Hesburgh, would describe the Catholic university as “the place where the church does its thinking ... the church sponsors universities because they recognize that the intellectual life of people of faith is part of who they are as human beings and, therefore, to be true to the religious mission of the church, the church has to be involved intimately and fully in the life of the mind.” (Tr. 817.) The President explained that “the church has a need as [a] church to be involved in all of the disciplines that the university is involved in. At the same time it has as its inspiration and its reason for being... a Catholic and Christian inspiration and... the role of the University is to promote its [the church’s] religious identity in the sphere of the secular intellectual world.” (Tr. 817.) Manhattan College has embraced this “role of the University” and is how it holds itself out to its community.

III. MANHATTAN COLLEGE’S RELIGIOUS EDUCATIONAL ENVIRONMENT

Manhattan College expresses and promotes its religious educational environment systematically to the campus community, to prospective employees, to active employees, to prospective students, to enrolled students, to parents, to alumni and to the general public. Likely the most common starting point for anyone interested in Manhattan College as well as those who are involved with Manhattan College is the College’s website. (Er. Exs. 121A, 130.) Manhattan College is pervasively referenced on the website as a Lasallian Catholic College, both in permanent text, images, and as part of the graphic presentation, ensuring that anyone seeking information about Manhattan College will know that Manhattan College is a Catholic College. (*Id.*) A primary link on the website is to “What It Means To Be Lasallian,” which explains the Catholic and Lasallian identity and refers those visiting the page to information about, for

example, Saint John Baptiste de La Salle, Campus Ministry and specific Lasallian programs and events. (Er. Exs. 71, 121A.)⁴ Other links on the website take a visitor to the page for the Office of Mission, to more information about the Lasallian Catholic purpose of the College, the religious heritage of the College, and information about the Christian Brothers and various Catholic programming at the College. (Er. Exs. 60–62, 65–68, 70–74.) The website link to the College’s Catholic identity highlights the Lasallian Star of Faith, a symbol of the College which proclaims Faith in the Presence of God as one of the core principals, and repeats that message in an explanation of the College’s logo and seal. (Er. Ex. 60.) Notably, the core principles set forth by the College, of which quality education is one, defines the educational approach at Manhattan College as follows: “[w]e engage in quality education together as students, staff and faculty by thinking critically and examining our world in light of faith.” (Er. Ex. 60; *see also* Er. Ex. 3; Er. Ex. 66 at 53.)

The website contains numerous references to religious services and celebrations, including Daily Eucharist, Morning Prayer, confession before Mass, Sunday Mass, Ash Wednesday celebration, Stations of the Cross, Holy Week services, Bible Study and rite of Christian Initiation for entering the Catholic Church. (Er. Exs. 72, 73, 121A.) Only Catholic weddings are permitted on campus in the Chapel of De La Salle. (Er. Ex. 121A.) The College also hosts Agape Latte, a monthly speaker series/coffeehouse for students who want to learn more about how faith applies to life; among the speakers at Agape Latte are faculty members. (*See* Er. Exs. 70, 73, 74, 121A; Er. Ex. 121B at video clips 2, 3; Tr. 944–48.) A full accounting

⁴ The page “What It Means To Be Lasallian” includes a link to a video on the College’s Lasallian character. It discusses the role of faith and religion at the College, shows students participating in liturgical events and service learning projects intended to promote their faith-based education; the video states that Manhattan provides a religious and secular aspect of education and that “the [Christian] Brothers along with the faculty and staff are dedicated to carrying our De La Salle’s mission from the classroom to the quad.” (Er. Ex. 121A; Er. Ex. 121B at clip 11.)

of the portions of the website that document the College's Catholic identity to the community and the public would be impractical in this brief.

The President of Manhattan College, whose public inauguration ceremony included the presentation by the Christian Brothers of the Sponsorship Covenant between the Christian Brothers District of North America and Manhattan College, chose as the theme of his inaugural address "*Domine, opus tuum*, Lord, the work is yours," a primary prayer of John Baptiste de La Salle. (Er. Exs. 10, 18; Tr. 848–50.) In his testimony, President O'Donnell explained that the strategic plan developed at the College shortly after his arrival placed major significance on ensuring that the College's core identity as Catholic and Lasallian remained a vital and visible characteristic throughout the College and that the realization of the strategic plan would involve enhancing the curriculum to promote the teaching of Lasallian Catholic beliefs. (Er. Ex. 61 at 2, 3; Er. Ex. 118 at 2, 6; Tr. 856–60.) An important outgrowth of the Strategic Plan, the President explained, was the adoption of a refined Mission Statement, which is widely publicized on the website, is displayed on campus, is included in campus publications such as the Undergraduate Catalogue and is a vital part of the College's accreditation process. (Er. Ex. 62; Er. Ex. 66 at 9; Er. Ex. 95 at 10; Er. Exs. 121A, 122; Pet. Ex. 15 at 6, 9.) Manhattan College's Mission Statement emphasizes its Catholic and Lasallian identity: "Manhattan College is an independent Catholic institution of higher learning.... [The College] continues to draw its inspiration from the heritage of John Baptiste de La Salle.... Among the hallmarks of the Lasallian heritage are excellence in teaching, respect for human dignity, reflection on faith and its relation to reason, an emphasis on ethical conduct, and commitment to social justice." (*Id.*) Manhattan College's beliefs are also broadly described in the Lasallian Star, also widely distributed and publicized on campus, two of the five core principles of the Institute of the Christian Brothers are: (i) "Faith in

the Presence of God. We believe in the living presence of God in our students, in our community and in our world;” and (ii) “Quality education. We engage in quality education together as students, staff and faculty by thinking critically and examining our world in light of faith.” (Er. Exs. 3, 60; Er. Ex. 66 at 53; Er. Ex. 72; Tr. 852–54.)

In 2012 Manhattan College published *Manhattan College and Its Lasallian Catholic Mission*, referred to on campus as “The Green Book.” (Er. Ex. 66.) This 104 page book, which is widely available on campus and on the website, is distributed to everyone on campus, to each student, faculty and staff member and to each new hire and many job applicants. (Tr. 885–91.) The President described it as a *vade mecum* (“go with me”) companion publication that can be carried by a person for reading and reflection throughout the day. (Tr. 894–95.) It opens with the traditional Lasallian prayer: “Let us remember... We are in the holy presence of God ” and recounts (on the odd numbered pages) the College’s Lasallian and Catholic mission, history, identity, campus religious art and symbols, the Christian Brothers, the various campus chapels, the education in Catholic Studies, the strong commitment to social justice and offers (on the even numbered pages) quotations from noteworthy religious figures, eminent religious scholars, Manhattan College faculty and administrators that the reader can rely upon for reflection, meditation and prayer. (Er. Ex. 66 at 7, *passim*; Tr. 891–93, 894–95.)⁵

Similarly, the College has expanded its annual spring celebration of the birthday of Saint John Baptiste De La Salle from a one-day event to a month long celebration, identified as Mission Month, which was initiated by Vice President for Mission, Brother Jack Curran, to

⁵ Manhattan College’s Exhibit 98 included in the Appendix an Agenda from the College Senate, which stated that the Speaker of the Senate read an excerpt from The Green Book. Provost Clyde testified that it is the practice of the College Senate to begin with a reading from The Green Book and that it is “a common practice at the beginning of meetings ... to begin with a prayer or do a reading from The Green Book. I had a Dean’s retreat last Friday and we began with the reading from The Green Book. ... to focus us on priorities and the mission [and] to work together to further the mission.” (Tr. 1085–86.)

highlight the core Lasallian principals embraced by the College. The event is described as “[m]indful of the Presence of God in our lives... we bring alive our mission as a Lasallian Catholic College every day. We do this in so many curricular and co-curricular, disciplinary and interdisciplinary ways by encouraging our students of all faiths, cultures, and traditions to think, wonder, to imagine and to build a good life: a life of meaning, purpose, and service to their fellow human beings.” (Er. Exs. 67, 85; Tr. 909–10.) Mission Month coincides with Accepted Student Day for incoming students and their families and also often with the Easter celebration, and includes listings for numerous liturgical events and celebrations as well as various campus activities, lectures, presentations, meetings and outings. (Er. Ex. 85; Tr. 1000–05.) The Vice President for Mission uses the occasion to share with faculty and other groups on campus material that he hopes will inspire them as teachers to relate the mission of John Baptiste De La Salle to their teaching and their work at the College. (Tr. 1006–12; Er. Ex. 120B at pages from Brother Jack.)

The admissions process to the College communicates the Lasallian Catholic nature of the College on the website and through all of its literature to prospective students, which also emphasize the Lasallian nature of the College as a major attractive element of the institution for students and their families. (Er. Exs. 105, 106, 107; Er. Ex. 121B at video clip 12; Tr. 1130–35.) Even the College’s nickname, Jaspers, which is the name for its athletic teams, connects directly to its Catholic Lasallian nature; Brother Jasper, who served as an administrator of the College, brought baseball to the College and is credited with being the creator of the “seventh-inning stretch.” (Er. Ex. 66 at 37; Er. Exs. 108, 113; Tr. 1133–34.) The publicity materials utilized by the College’s athletic programs, both in print and video, including at national tournament competitions, identifies the College as Catholic. (Er. Ex. 113; Er. Ex. 121C at video clips 4, 5;

Er. Ex. 121D at video clip 1.) The College revised its student Code of Conduct after completing the strategic plan to emphasize the expectation that student's will model their behavior at Manhattan on the Lasallian values in their education with the addition of a detailed preamble which describes the connection: "... the sense of catholic spirit witnessed through campus ministry, social justice, our curriculum and daily sacramental offerings imbue our campus with our distinctively Catholic mission and identity." (Er. Ex. 65; Er. Ex. 119 at 5–8; Tr. 881–85.) The Student Code explicitly sets forth for students the twelve virtues of a good Lasallian, including humility, wisdom, piety and generosity. (*Id.*) The current Undergraduate Catalog opens with a description of the Lasallian Catholic identity and explains that the College-wide core goals and competencies for all academic programs include, in pertinent part, fostering a reflection on faith, values, and ethics. (Pet. Ex. 15 at 11, 27–28.) The specific core competencies include "religious and ethical awareness" and that among the leading objectives for students are making "decisions based on ethical concerns and transcendent moral values as articulated in Christianity" and to "[u]nderstand that Manhattan is a Catholic institution...." (Pet. Ex. 15 at 11, 27–28.)

The College's commitment to developing in students a dedication to social justice, to helping those in need, to promoting a diverse and inclusive community, and to exploring their personal faith and purpose is overseen and promoted by the Office of Campus Ministry and Social Action, which has a major influence throughout the college through activities ranging from religious retreats and Bible study groups to social-learning trips around the world, often in partnership with Catholic or Lasallian institutions abroad. (Er. Exs. 20–24, 26, 28–32, 70, 73, 115A–H, 121A, 122; Er. Ex. 121C at video clip 3; *see also* Er. Exs. 20–24.) The religious goal of service to others and social justice motivated the College to become active with the global

humanitarian organization Catholic Relief Services; in 2014 the College was declared a Catholic Relief Services Global Campus, recognizing that the partnership with the College is to advance the social mission of the Church through the active engagement of faculty and students by sharing the “commitment to the Gospel call to love our neighbors, uphold the dignity of all persons and promote full human development ... We seek to live fully into our true identity: made in the image and likeness of God and part of one human family.” (Er. Exs. 115G, 115H; Er. Ex. 121C at video clip 1; Er. Ex. 122; Tr. 1161–65.) The President appointed a Task Force that included ten faculty members and the Provost to promote and develop the working relationship with Catholic Relief Services. (Tr. 1162–63; Er. Ex. 115G.) The success of the College’s effort to promote the religious educational environment of its students is reflected in the results of the College’s Graduate Student Survey, which reported that: 70% of College graduates agree or strongly agree that Manhattan College’s core identity as Lasallian and Catholic is vital and visible; 54% felt that it was very important or important that the College is Catholic; 52% felt it was very important or important that it was Lasallian; 56% found it very important or important that the College supported the faith development of students; 69% believed it was very important or important to emphasize ethical conduct; and 75% believed it was very important or important to respect the human dignity of all. (Er. Ex. 112 at 14.)

Manhattan College expresses its religious educational environment publicly through its membership in the Association of Catholic Colleges and Universities, which requires as a condition of membership that a college is listed in one of the Catholic institution indexes or is identified in writing by the local religious leader as covered by *Ex Corde*; President O’Donnell serves on the Board of the Association. (Er. Ex. 59; Tr. 815–16, 834–39.) The President also

serves on the Board of Lasalle University, another Lasallian Catholic college, and will head the Lasallian Association of Colleges and Universities as of July 2015. (Tr. 836–83.)

The College’s Lasallian Catholic heritage is demonstrated daily by the Catholic chapels on campus, the logo, seal, signs, symbols, art, and memorials displayed prominently throughout campus. (*E.g.*, Er. Exs. 121A, 122.) Manhattan College also holds University-wide liturgical ceremonies and offers programs—including lecture series, service learning trips and community involvement—that convey its religious educational environment. (Er. Exs. 70, 73, 74, 87; *see also* Er. Exs. 20–24, 26, 28–32.) Every noteworthy event on campus includes a celebration of the Catholic mission, whether it is the Baccalaureate Mass, the Spring Honors Convocation, the Fall Convocation or Admitted Students Day. (Er. Exs. 67, 69, 75, 85, 88, 91–93; Er. Ex. 121B at video clip 4.) Petitioner’s witness, Adjunct Professor Paul Dinter, testified that a program he initiated on Vatican II, which coincided with Parent’s Weekend on campus, included several religious services; he explained that Catholic institutions start “almost anything with Mass.” (Er. Ex. 102; Tr. 1325.) When the College built a new student center, it inscribed quotations on the walls reflecting the religious mission of the College. (Er. Ex. 121B at video clip 9.) The College dedicated a bridge connecting the main quadrangle of campus to the library as the Founders Bridge in honor of the distinguished Christian Brothers. (Er. Ex. 46; Er. Ex. 66 at 43.) The College acquired, after a fundraising drive with donors, a major historic stained glass window collection of stained glass panels of De La Salle’s life and work, which will adorn campus and become a teaching tool and resource for the students, particularly Fine Arts students. (Er. Exs. 68, 121A; Tr. 913–18.)

Even Manhattan College’s accreditation depends on the College aligning its operations and achievements to its declared Catholic mission. (Er. Exs. 95, 97, 98; Er. Ex. 129 at 25, 75;

Tr. 1428.) Primary accreditation is with The Middle States Association of Colleges and Schools Commission on Higher Education (“Middle States”) while certain individual programs have additional accreditation, such as from the Accreditation Board for Engineering and Technology (“ABET”) for engineering departments. (Er. Exs. 95, 97, 98, 129; Pet. Exs. 23, 24, 32; Tr. 1074–75.) Accrediting agencies “measure you [the college] against the standards with your mission in mind.” (Tr. 1076–77; *see also* Er. Ex. 95 at 8–11; Pet. Ex. 32 at 25–27.) The Middle States report states that the College Mission Statement appears “in the College catalog, on the website, offered to prospective students by admissions, contained in the student handbook, the *Faculty Handbook*, and clearly represented by Human Resources in all hiring.” (Er. Ex. 95 at 11.) The accreditation report, largely prepared by faculty, also addresses the College’s academic program core competencies, including faith, values and ethics as well as religious and ethical awareness. (Er. Ex. 95 at 15–16.) The self-study report expressly examines ways in which Manhattan College fulfils its Lasallian Catholic mission, discussing the many ways in which: “[a]ll faculty and staff are made aware of the Lasallian Catholic traditions.” (Er. Ex. 95 at 16–18.) The Middle States response to the College identifies, as a significant accomplishment, the activities undertaken by Manhattan College “to enhance and imbue the education of the students, both academically and spiritually. These activities have included the involvement of students, faculty and administrators in communicating Lasallian spirituality.” (Er. Ex. 97 at 6.) The Middle States report assessed achievements relating to the core competencies, including the competency on religious and ethical awareness, and the Provost testified that it is the faculty who are responsible for achieving student proficiency in these competencies. (Er. Ex. 95 at 14–16; Tr. 1099; *see also* Er. Exs. 99, 100.) Dr. Hourani of the Civil Engineering Department gave similar testimony about the ABET accreditation process, saying that accreditation agencies “look at [Manhattan] as

a Catholic institution different than they look at Cooper and at Columbia.” (Tr. 1428.) The ABET accreditation process also focuses on the Catholic mission and the assessment of student learning consistent with the College’s religious identity. (Er. Exs. 99, 100; Er. Ex. 129 at 23–25, 31; Tr. 1416.)

The success of the College’s promotion of its Catholic identity and mission, and of its outstanding academic programs are recognized nationally by external entities that rate and assess college programs; in some of these ratings the College is recognized for its overall strength or for the job success of its graduates, but the description of the College either identifies it as Catholic or rates it among the group of religious colleges and universities. (Er. Exs. 109–11.) Where the College had an opportunity to add information to the ranking company’s website posting, the College chooses to highlight its Catholic identity. (Er. Ex. 109.)

Even a cursory review of the voluminous record in this proceeding reflects the fact that a specific reference to each and every way Manhattan College describes or manifests its religious educational environment would require far more pages in this brief than would be necessary for the Region to conclude that Manhattan College holds itself out as providing a religious educational environment. That conclusion is indisputable.

IV. ROLE OF FACULTY IN SUPPORTING THE COLLEGE’S RELIGIOUS EDUCATIONAL ENVIRONMENT

Manhattan College’s Lasallian Catholic identity is grounded in the centrality of the role of the professor and the professor’s duty, in the words of the Rule of the Brothers of the Christian Schools: “[t]o provide a human and Christian education to the young, especially the poor, according to the ministry which the Church has entrusted to it.” (Er. Ex. 66 at 5.) The College’s contemporary application of this rule is articulated in: (i) its Mission Statement that affirms the primary importance of excellence in teaching; (ii) the five-pointed star symbol of the

College that emphasizes quality education provided by faculty as “thinking critically and examining our world in light of faith;” and (iii) an explanation written by Brother Luke Salm, which is provided to all full-time and adjunct faculty (in fact all employees) at the time they are hired defining the characteristics of Manhattan College as a Lasallian college and the traits all faculty at Manhattan College are to exemplify: commitment to the poor, the importance of religious education, excellence in teaching, quality education accessible to all, combining a core curriculum with professional education, and welcoming lay men and women to a more active role in the Church.⁶ (Er. Ex. 14 at Appendix; Er. Ex. 66 at 5, 53.)

As stated in the documents given to all new faculty hires the College tells new faculty that: “[f]or all of these outward manifestations of its Catholic character, the College could not call itself Catholic if the Catholic tradition were not an important element of its academic endeavor, which is after all what constitutes the College as a college.” (Er. Ex. 14 at insert on Manhattan College: Lasallian, Catholic and Independent.) Manhattan College’s faculty are the primary conduit of communicating Manhattan College’s mission to its students; in the major Admissions Office recruitment piece given to prospective students, the College explicitly states that “teaching faculty at Manhattan College are committed to the five core principles set forth by Saint John Baptiste de La Salle, which are symbolized by the five-point star in the Manhattan College school shield.” (Er. Ex. 107 at 43; Tr. 1135–36.) In fact Manhattan College’s faculty helped define the College’s strategic plan, which in pertinent part seeks to ensure that the College’s core identity as Lasallian Catholic be visible and vital; a process that also resulted in the development of the redefined Mission Statement that affirms the interplay between faith and reason. (Tr. 856–64.) The President testified that when he speaks to adjunct faculty about their teaching duties he talks about “the Catholic intellectual tradition in order to talk about [how] all

⁶ “Faculty” in this brief refers to all faculty, including adjunct faculty, unless otherwise indicated.

of us have responsibility for promoting ... education within the context of a Catholic university.” (Tr. 897–98.) In the Middle States report’s discussion of how the College makes faculty aware of their mission-related responsibilities, President O’Donnell is quoted as saying that in his meetings and presentations his objective is “to make sure that all new members of the community understand that we take our identity as Catholic and Lasallian seriously and that we ask those who choose to join us to do so with an appreciation of and willingness to participate in the fostering of that identity.” (Er. Ex. 95 at 16–17.) The College’s un rebutted testimony by the President and Provost was that the College does not differentiate between the teaching responsibilities of faculty – whether full-time or adjunct – with regard to mission. (Tr. 902–07, 1055–57.) The Provost testified that he speaks with faculty and others at the College about the obligation to make the religious educational mission the priority in everything the College does. (Tr. 1055–57.) Specifically regarding adjunct faculty, the Provost stated that he speaks with adjuncts one-on-one and in formal settings, and that he initiated an orientation specifically for adjuncts so he could speak with adjuncts to make sure they understand the mission and understand that they have the same responsibility as all faculty: “As I say to them when I meet with them, they’re teaching the same students that all our faculty are and so I need them to be prepared to engage ... [them] the same as all our faculty” (Tr. 1056, 1063.) Faculty status, as adjunct or full-time, often fluctuates, further underscoring the Provost’s assertion that there is no distinction between an adjunct and full-time faculty member’s responsibilities with regard to the College’s mission. (Tr. 1113, 1322, 1416–17.) Professor Paul Dinter, testifying for Petitioner, has had appointments at different times in the past five years as a full-time faculty member and as an adjunct faculty member; he was asked by the Union’s attorney whether, based on his experience, there were different expectations by the College of full-time faculty members in

comparison to adjunct faculty. (Tr. 1321–22.) Professor Dinter replied that “[a]djunct faculty are pretty much not invited ... to Department meetings ... [and] they’re encouraged to have office hours, but there are no offices and that’s probably the main difference.” (*Id.*)

The importance of Manhattan College’s faculty to its religious educational mission does not come just from within Manhattan College; as discussed earlier it is mandated by *Ex Corde* which says “[a]ll teachers...at the time of their appointment are to be informed about the Catholic identity of the institution and its implications and about the responsibility to promote or at least to respect that identity.” (Er. Ex. 57) (emphasis added.) The primary role of faculty in Manhattan College’s religious educational mission is also emphasized by the Catholic Bishops Application of *Ex Corde* to Catholic Colleges, which requires all professors to exhibit academic competence and respect for Catholic doctrine. (Er. Ex. 58, Art. 4.4b.) For example, according to the Application:

The responsibility for safeguarding and strengthening the Catholic identity of the university rests primarily with the university itself. All the members of the university community are called to participate in this important task in accordance with their specific roles: the sponsoring religious community, the board of trustees, the administration and staff, *the faculty*, and the students. Men and women of religious faiths other than Catholic...*on the faculty*...can make a valuable contribution to the university. Their presence affords the opportunity for all to learn and benefit from each other.

(Er. Ex. 58, Art. 4.1) (emphasis added.)

Further, in the Sponsorship Covenant with the Christian Brothers, Manhattan College undertook hiring responsibilities in accordance with *Ex Corde* and its Application by the Catholic Bishops:

Consistent with the commitment to academic freedom is a professional responsibility to recognize that Manhattan College is a Catholic institution committed to Catholic values and principles and that its identity be respected by all members of the College community. This places no obligation whatsoever on the personal religious beliefs and practices of any individual. The College

community recognizes the importance of the Catholic intellectual tradition as an aspect of the College's identity.

- a) Faculty and Staff: In the hiring process, the Provost (faculty and academic staff) and the Vice President for Human Resources (all other employees) discuss the mission statement, the College's Catholic identity, and its Lasallian Tradition (with reference to the Board-approved statement: "Manhattan College: Lasallian, Catholic and Independent") with each applicant. All letters of appointment and annual contracts include an agreement to respect the College's Catholic identity and Lasallian Tradition.

(Er. Ex. 9 at 3; Er. Ex. 16 at 43.)

In keeping with *Ex Corde* and its Application by the Catholic Bishops, Manhattan College's Sponsorship Covenant with the Christian Brothers and Manhattan College's own institutional autonomy pursuant to those documents, Manhattan College takes appropriate measures to ensure that all of its faculty and staff are aware of and committed to its responsibility to maintain Manhattan College's Catholic identity. (Er. Ex. 95 at 16–18.) Significant attention is devoted during faculty hiring to the centrality of the Lasallian Catholic mission and, again, the College does not differentiate between full-time and adjunct faculty with regard to the responsibility of faculty to understand, respect and support the Catholic mission. (Tr. 902–07, 1055–57.) Before many adjunct faculty candidates even apply for a position at Manhattan College, the College's website job portal notifies all job applicants, including adjunct candidates, that Manhattan College is a "Catholic coeducational institution in the Lasallian tradition ... We expect our *faculty*, administration and staff to be knowledgeable about our mission and to make a positive contribution to that mission." (Pet. Ex. 16) (emphasis added.)⁷

⁷ Petitioner also introduced into evidence, as Petitioner's Exhibit 18, the specific job descriptions posted on the College website, which can be reached through the website portal in Petitioner's Exhibit 16. Many of these specific job descriptions do not identify the Catholic identity, but based on the web information on the bottom of each page of Exhibit 18, it appears that these postings are reached through the page that does contain references to the Catholic mission information. Similarly, Petitioner's Exhibit 21 contains job postings on a third-party website, which states at the conclusion of the advertisement that the College was founded by the Christian Brothers. It should be noted that jobs are posted by the Office of Human Resources, which includes as part of its website its Departmental

Manhattan College specifically addresses with all new hires, including new adjunct faculty members, the religious nature of their role at or around the time of their hire. The Application for Employment has for years included detailed information on the College's Lasallian Catholic identity and the faculty member's responsibility. (Er. Exs. 14, 16.) The last page of the job application, which prominently identifies Manhattan College as having a "Lasallian Catholic Tradition Since 1853" includes as part of the Applicant's Statement, which must be signed, "I will read and abide by the Mission Statement of Manhattan College." (Er. Ex. 14.) In addition, the job application includes a copy of the Mission Statement with the additional text that states: "I have received the mission statement of Manhattan College. I have read it, understand it, and have had the opportunity to ask any questions. I will abide by this document." and which the prospective hire must sign and submit. (*Id.*; Er. Ex. 94D.) The job application packet also contains the statement referred to in the Sponsorship Covenant titled "Manhattan College: Lasallian, Catholic and Independent" and the Luke Salm Appendix on the Characteristics of a Lasallian School, which details a faculty member's responsibility with regard to the Mission. (Er. Ex. 9 at 3; Er. Ex. 14.) Prospective faculty and adjunct faculty hires are given a copy of the booklet "Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage," which contains the Sponsorship Covenant and describes in great detail the responsibility of faculty to sustain the Catholic purpose of Manhattan College; applicants sign the last page of the booklet asserting that they have read and respect the Lasallian culture of the College. (Er. Ex. 16 at 47; *see also* Er. Ex. 94B at signed copy of receipt.) More recently, the College gives to each prospective hire "The Green Book," the *vade mecum* booklet titled "Manhattan College and Its Lasallian Catholic Mission," which the prospective hire

Mission Statement affirming that "[w]e expect our faculty, administration and staff to be knowledgeable about our mission and to make a positive contribution to that mission." (Er. Ex. 11; *see also* job ads Er. Exs. 12, 13.)

acknowledges receiving in writing. (Er. Exs. 66, 94C; Tr. 1070–71.) The intensive effort to provide faculty, including adjunct faculty, with the materials to ensure that they become fully informed about the College’s religious educational mission and environment, consistent with *Ex Corde*, the Application of the Catholic Bishops, the Sponsorship Covenant, and Manhattan College policy serves to augment what is discussed directly with faculty and adjunct faculty candidates during the hiring process or, alternatively, is relied upon by some department chairmen to communicate the Catholic mission of the College to prospective faculty members in the case where limited discussion occurs with a department chairperson. (Tr. 1272, 1386.) Finally, the letter of appointment given to adjuncts to sign to indicate acceptance of the offer of employment states the College “...requires that you fulfill the academic obligations of faculty members outlined in the Manhattan College Faculty Handbook and the Mission Statement of the College as they apply to part-time faculty.” (Er. Exs. 94A, 127.)

The centrality of the mission is discussed with each faculty applicant during a meeting with the President or Provost of the College, who devote specific attention to discussing with the prospective candidate the Catholic identity of the College and the connection the mission has with the responsibilities of faculty.⁸ (Tr. 897–98.) For adjunct faculty candidates, that discussion occurs with the department chairperson, generally when they cover the centrality of the Lasallian Catholic identity; Dr. Moujalli Hourani, a graduate of Manhattan College and the Chairman of the Department of Civil Engineering for twelve years, the largest department in the College, employs between twenty to twenty-five adjuncts each year and he has hired around sixty adjuncts during his service as Department Chairman. (Tr. 1391, 1394–95.) Dr. Hourani

⁸ In fact, Manhattan College witnesses identified occasions when Manhattan College questioned hiring faculty candidates who had seemed uninterested in the Catholic Mission of the College. (E.g. Tr.1065)

explained what he discusses with prospective adjunct candidates during the initial telephone interview and when he meets with a likely adjunct hire in person:

I tell them who we are. We are a Catholic institution, we are a Lasallian Institution. We believe in the Catholic faith. And the position in the department is for the steel design course ... but more important ... than the course itself is that we care about our students. I am dedicated 100% to the student as a whole, not just now in engineering.

(Tr. 1397.)

Dr. Hourani elaborated about his statements to potential adjuncts during the interview process:

I tell them this school was established with the Christian faith and with the Catholic faith. And we are committed to it and we had a few brothers, but ... the mission is going to continue with, without the brothers.

(Tr. 1403.)

There was also testimony from Dr. Hourani regarding the teaching of ethics to engineering students, in which he explained that faculty teach students about the professional code of ethics promulgated by professional engineers in addition to Lasallian Catholic ethics as it relates to the curriculum: "I am telling them that we are this Catholic institution and we are [in] the Lasallian institution and as I said the ethics I believe is rooted in the Catholic faith" (Tr. 1407.) After Dr. Hourani was interrupted by Petitioner's attorney, the Hearing Officer asked Dr. Hourani specifically whether in addition to ethics that are contained in the professional code [for engineers], did Dr. Hourani tell adjuncts that there are other ethics and what did he say to adjuncts specifically: "I tell them exactly that because we are focusing on the individual ...because you know, we are a Catholic institution we have an additional obligation." (Tr. 1407–08.) When Dr. Hourani further elaborated about the teaching of ethics with examples of

engineering situations involving ethical considerations, the Hearing Officer posed a question to Dr. Hourani to which Dr. Hourani answered as follows:

Q: You mentioned, you know, an example of a highway going through a poor neighborhood or a structure that might cause pollution. Are these two things part of the code of civil engineering practice, those considerations?"

A: No.

Q: No, okay.

(Tr. 1408). The College then asked Dr. Hourani:

Q: Are they [ethical examples] part of the Catholic mission of the college?

A: I believe they are.

(Tr. 1409.)

In addition to Dr. Hourani, other chairpersons at Manhattan College testified that they raised the Catholic identity of the College with adjunct candidates. Petitioner's witness, Dr. Jeff Horn, Chairman of the History Department, testified about how the issue of Catholic identity arises when he is interviewing adjunct candidates:

Well, we try to do a pretty thorough job of finding out about them, but also letting them understand who we are and what our expectations are. Depending on the course, we have certain minimum standards We also emphasize thoroughly that this is an institution that is in the Catholic heritage.

I often bring it up, usually because I – it's something that people want to know, but don't necessarily feel comfortable bringing it up themselves.

(Tr. 1372.) Notwithstanding the above, Dr. Horn later testified that the Lasallian heritage is rarely raised. (Tr. 1375.) Dr. Horn acknowledged that adjuncts hired by the History Department receive from the Office of Human Resources material on the Lasallian Catholic mission and sign acknowledgements that they have received the material on Catholic mission, understand it and will respect it, explaining that "the read and respect says that you must [be] cognizant of it, and

understand its purpose and it's generally appropriate nature. To then expect that person to be required to teach it or to be evaluated on that is a completely different kettle of fish...." (Tr. 1387.) Dr. Horn did acknowledge that academic freedom would absolutely allow an adjunct faculty member to discuss Catholic values in a classroom. (Tr. 1384.) It is worth noting that in the testimony of the Vice President for Mission, Brother Jack spoke about the College financially supporting a new faculty research project intended to survey and catalogue the existing "mission-oriented pedagogical initiatives" of current faculty so that the information could be shared with all faculty; the initiative for the project and the oversight of the summer student research student was a group of faculty who had been involved in the College Core identity Seminar and Dr. Jeff Horn, who had committed to oversee the methodological work for the survey. (Er. Exs. 80, 81; Tr. 982–90.)

Dr. Lance Evans, Chairman of the Biology Department from 2007 to 2010, testified for the Petitioner that when he interviewed candidates for adjunct positions he would describe the Lasallian heritage and refer them to the website for additional information. (Tr. 1272.) Dr. Evans did testify about the importance in assessing whether adjunct faculty "exhibited the caring qualities that we at Manhattan think are important in terms of conveying information and conveying knowledge." (Tr. 1277.) For an inexplicable reason, Petitioner's Counsel questioned Dr. Evans about when he was hired forty years ago by Manhattan College, at which time Dr. Evans had raised a question about the teaching of evolution and he was assured that it was permitted because it was consistent with Catholic belief. (Tr. 1264–65, 1304.)

Manhattan College also informs adjunct faculty members about their responsibility with regard to the Catholic mission of the College during orientation; President O'Donnell testified that he personally speaks to the adjunct faculty at their orientation about the College's Catholic

mission and how it is part of the faculty's role. (Er. Ex. 116; Tr. 889, 896–900.) The President displays The Green Book on a screen at orientation as a guide to talking about the mission, the Catholic intellectual tradition and the Lasallian identity of the College. (Tr. 996, 1180, 1191–92.)⁹

President O'Donnell conveys a similar message about the importance of the College's Catholic mission for faculty at the Faculty Convocation. In his letter to the community, including adjunct faculty, regarding the College's celebration of Mission Month, the April month-long event to honor the Lasallian Catholic tradition, President O'Donnell noted that: "as I said in my remarks at Faculty Convocation, [the mission] calls us to engage in a kind of education that is deeply personal and relational, that aims to assist in the development of the whole person – mind, body and soul – and that challenges students to use their intellect to contribute to the common good." (Er. Ex. 67.) The President reminded the community that the College's "tradition grounds itself in the proposition that each and every human being, as created in the image and likeness of God, is of inestimable worth and a participant in a single human family" and he invited all to participate in the Mass that would recognize and celebrate the students who volunteer and serve others...." (*Id.*)

Provost William Clyde has spoken individually with faculty about the College's mission and also has spoken publicly at the Faculty Convocation to the faculty about their role in fulfilling the Lasallian Catholic mission: "Manhattan College's Mission calls [students] to noble

⁹ See e.g. Er. Ex. 117 at 2-4; Er. Exs. 109–10 at *Manhattan College A Lasallian Catholic College Employee Handbook*, which contains at the very beginning of the book the College's Catholic history and mission, the mission of the Office of Human Resources, and a discussion of the Office of Campus Ministry and Formation Programs; see also Pet. Ex. 14 at 2, 30, 39, 78; Er. Ex. 114 at 5. The *Manhattan College Faculty Handbook*, which contains a brief description of the history and the Mission Statement, identifies the purpose of the Vice President for Mission as responsible for promoting the mission and Lasallian Catholic identity of the College in areas such as academic affairs; confirms that one of the standing committees of the Council for Faculty Affairs is the Council on Campus Ministry; and establishes that one of the enumerated grounds for dismissal of a faculty member is reason 4: "refusal to accept and/or to implement the stated aims of the College."

lives, productive careers and responsible citizenship – internships, mission trips, service projects, and the faculty will all help[students] understand what that means ” and “as I say to every faculty candidate I interview, we are not all Brothers, we are not all Catholics, we are not all Christians, we are not all religious, but we do share a sense of the critical importance of faith questions in the lives of our students (and ourselves).” (Er. Ex. 92 at 3–4; Er. Ex. 93 at 4; Tr. 1049–50, 1053–54.) Additionally, Provost Clyde scheduled meetings specifically with the adjunct faculty by school at the College to express his expectation that adjunct faculty understand and embrace the religious mission of the College. (Tr. 1055–57, 1190–93, 1218–19, 1430.)

Manhattan College reinforces the role of faculty members, including adjunct faculty members, in furthering and maintaining Manhattan College’s religious educational mission throughout their employment by offering them opportunities to participate in various programs that educate them on the Catholic and Lasallian beliefs as well as aid them in discovering ways to integrate these beliefs into their role as teachers. (Er. Ex. 64 at 4–5; Er. Ex. 66 at 35; Er. Ex. 69; Er. Ex. 76 at 9–14; Er. Ex. 104; Tr. 1117–26, 1193–94.) Referred to as “formation programs” these professional development activities, paid for by the College, may be local, national or international and one of the most attended is the Lasallian Leadership Program in Rome. (Er. Ex. 104 at 14–15; Tr. 1127.) The program in Rome is attended by College faculty, and is designed to enhance the sense of the Lasallian intellectual vocation and to create a group of mentors and animators back at the College who could to take on a leadership role in integrating the Lasallian charism into the academic and overall campus setting. (Er. Ex. 104 at 14–15; Tr. 1127.) Manhattan College’s Vice President of Mission, Brother Jack Curran, takes the lead in expanding “[w]orkshops and institutes for the administration and *faculty* interested in a deeper understanding of the vision of De La Salle, Lasallian educational philosophy and practice, and

Lasallian spirituality.” (Er. Ex. 16 at 44; Tr. 1126) (emphasis added.) In fact, during his interview for the Provost’s job, Dr. Clyde’s responsibility for promoting faculty participation in formation programs was discussed. (Tr. 1045–47.) These programs include, but are not limited to: the Buttimer Institute of Lasallian Studies, named in honor of a graduate of Manhattan College, Brother Charles Henry Buttimer, and attended by many faculty and staff at Manhattan College in order to engage in an intensive study of De La Salle and Collegium, which is a colloquy on Faith and Intellectual Life designed for faculty beginning careers in Catholic higher education. (Er. Ex. 66 at 35, 54; *see also* Er. Exs. 25, 38.) The President testified that he tells adjunct faculty about the formation programs when he speaks with them because adjunct faculty are eligible to participate in formation programs. (Tr. 899.) The President noted that The Green Book was written by a Manhattan College Dean as an outgrowth of participating in one of the formation programs. (Tr. 898–99.)

The College also promotes the Lasallian Catholic role of faculty, as well as others on campus, through the prestigious recognition of being designated a Distinguished Lasallian of the Year, a faculty member who brings to life inside and outside the classroom the Lasallian hallmark of reflection on faith and reason, who engages students in thinking critically and examining our world in the light of faith; and someone who believes in the living presence of God in our students, staff, administrators and faculty. (Er. Ex. 69; Er. Ex. 76 at 8; Er. Exs. 120A, 121A.) Faculty are nominated for the award and the recipient is honored at campus celebrations and recognized by the national associations of Christian Brothers as a person who exemplifies the highest Lasallian values, which are persons of faith who teach by example and give life to the Lasallian values that animate and sustain the core identity that inspires the mission of Manhattan College as a Lasallian Catholic college.” (*Id.*) Chairman of the Department of Civil Engineering,

Dr. Hourani, was honored as a Distinguished Lasallian for his passion for teaching, his close relationship with his students, and for his belief that every human being deserves the best education because every human being is a child of God. (Er. Ex. 114.) Brother Jack, Vice President for Mission testified that adjuncts are eligible for nomination as Distinguished Lasallians. (Tr. 974.)

Orientation for faculty has introduced additional measures to educate faculty about the College's Catholic history and identity. The Vice President for Mission, Brother Jack Curran, prepared a fifteen page document entitled "Manhattan College and its Lasallian Identity Catholic Heritage and Core Identity" to be distributed by the Provost to new faculty that would provide new faculty with a concise explanation of the interweaving of the Catholic and Lasallian principles at the College, a condensed summary of the history of the Christian Brothers and the current organization of the Lasallian community, an explanation of the commonly used acronyms, the role of Mission at Manhattan College, the key documents that faculty will receive on the Catholic Mission, and the numerous programs, awards, committees and resources available to faculty to deepen their understanding and assist them in integrating the Catholic mission into their work at Manhattan. (Er. Ex. 76; Tr. 970–74.) Brother Jack makes it clear in the document that to achieve the Lasallian Catholic mission for the College's students it is essential that the College support the Catholic education of faculty, staff and administrators and that his Office exists to assist the College's schools, departments and programs in realizing, promoting and integrating the Lasallian and Catholic core identity; Brother Jack testified that the new faculty would "have a chance during the college core [identity] seminars ... to further explore with your faculty colleagues, who would be the facilitators of this, what it means for faculty at

Manhattan College to be part of a Lasallian Catholic university ...” and “the core identity of the college being Lasallian Catholic and how we unfold that.” (Er. Ex. 76 at 3; Tr. 971–72.)

In its commitment to promote the involvement of faculty with its Catholic identity, Manhattan College has developed a campus-based formation program which was designed for new faculty, but is developing into a program for administrators and staff as well as a wider range of faculty. (Er. Ex. 76 at 3; Er. Exs. 77–84; Tr. 970–80.) Through the combined efforts of Vice President for Mission, Brother Jack Curran and Provost William Clyde the College introduced a program referred to as the College Core Identity Seminar (CCIS) for new faculty in Fall 2014; new faculty were assigned and attended one of the seminar groups meeting during October and November, led by faculty who had participated in formation programs, to learn how to incorporate the core Lasallian values and the Catholic intellectual tradition at Manhattan into their classroom instruction. (Er. Ex. 77 at 2–3; Er. Ex. 78.) By the Spring, the CCIS expanded into a second program for faculty who were not new to the College, led by faculty facilitators, a separate seminar cohort for administrators and staff addressing issues relevant to their role in promoting the Catholic identity, and a research project to survey what other faculty colleagues, including adjuncts, were doing to integrate the Lasallian Catholic values into their teaching. (Er. Exs. 79–84; Tr. 980–98.) During the month-long celebration of Mission Month, the President hosted an event, which opens with a prayer and benediction to honor the members of the faculty and staff who have been recognized as Distinguished Lasallians as well as to pay tribute to those faculty who have been facilitators of the College Core Identity Seminars; the faculty and staff who have participated in the College Core Identity Seminars; the faculty who have participated in the formation programs for professional development with regard to the Lasallian Catholic Mission; and the faculty who serve on the committees associated with the Office of Mission

because of their important contributions to promoting the Catholic identity across the College. (Er. Ex. 69.) The College also produced a booklet to publically recognize and promote the scholarly and public service activities of faculty, highlighting at the beginning of the book the activities tied to the College's core identity as Catholic and Lasallian. (Er. Ex. 103 at 2–8.)

Faculty also play a role in affirming their own collective visible and vital role in promoting the Lasallian Catholic mission. When the College produced the booklet *Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage*, which all faculty and staff receive when hired and for which they signed a receipt, two campus governance groups endorsed the booklet, the Board of Trustees and the Council for Faculty Affairs. (Er. Ex. 16 at 17.) The Faculty Council, consistent with the expectations of *Ex Corde*, stated that:

Consistent with this commitment to academic freedom is a professional responsibility to recognize that Manhattan College 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.

(*Id.*)

Dr. John Lawler, an adjunct faculty member of the Civil Engineering Department and a former Manhattan College Trustee and Chair of the Board of Trustees,¹⁰ testified about the speech he has given for years at the College, primarily to accepted students and their parents, but also at various honors convocations and events, at which faculty, including adjunct faculty can be present. (Tr. 1209–12, 1216.) Dr. Lawler stated that among the things he tells his audience is that "...sooner or later everybody asks the big questions and the big questions are why am I here, what am I doing here? Is there a God? If there is does he care for me and things of this nature.

¹⁰ Dr. Lawler, as Chair of the Board of trustees of the College, signed the Sponsorship Covenant in 2002 with the Brothers of the Christian Schools. (Er. Ex. 9 at 4; Er. Ex. 16 at 45.)

And what I say to them if you – those courses are designed to provide to help you come to answers to those questions.” (Tr. 1215.) Dr. Lawler, who has been an adjunct faculty member since 2007, testified further that he had been present at meetings where the Provost, the Dean of the School of Engineering, and his Department Chairperson spoke about the responsibility of faculty, including adjunct faculty, to support the College’s mission; he noted that the Provost’s meeting was for adjuncts only. (Tr. 1218–19.) Dr. Lawler confirmed that it is his understanding that his duties as an adjunct faculty member include supporting the Catholic mission of the College. (Tr. 1225.)

Another faculty member, who testified for Petitioner, Professor Paul Dinter of the Religious Studies Department, was previously the Catholic Chaplin at Columbia University, has over the years shifted from full-time to adjunct status depending on departmental needs. (Tr. 1312–14.) Although during his testimony he attempted to distance his responsibilities from the College’s mission, he previously took it upon himself to seek the College’s support, by meeting directly with President O’Donnell to secure the President’s backing to organize a program for the 50th anniversary of Vatican II. (Er. Ex. 102; Tr. 1324.) While he stated that he worked to put on a program “in commemoration of the 50th anniversary of the document on sacred liturgy which came out in 1963,” that he was not required to be involved in the program, and that he did not encourage anyone to attend the program, on cross examination at the hearing he testified that the College had paid for his attendance at a conference dealing with Vatican II and thereafter he proposed to the President that Manhattan do a program on the topic which the College ultimately funded and Professor Dinter helped organize. (Er. Ex. 125; Tr. 1324–25, 1341–44.) Despite his testimony, Professor Dinter’s July 2013 email asks faculty colleagues to mark their calendars for the October event and plan to attend; he describes various portions of the event, including the

opening Eucharist Celebration in the Chapel of Saint John Baptiste de la Salle which will “highlight both the active participation of the faithful and the celebrative character that music and dance add to a contemporary actualization of the Paschal mystery.” (Er. Ex. 126 at 2.) Dr. Dinter’s email also noted that there would be a teach-in on Vatican II involving students who took the Vatican II class, that there will be materials from Vatican II for faculty to introduce and include in their classes, and that the four-day event would close with an interfaith prayer service. (*Id.*)

There was repetitive testimony on the fact that College faculty are not told what specific content to teach, are not disciplined for what they teach in class, and are not expected to proselytize or indoctrinate students, and that to do so would be inconsistent with Manhattan College being an institution of higher education, would be in conflict with the role of faculty and contrary to the intent of *Ex Corde*. (E.g. Tr. 1241–42, 1275–76, 1285–88, 1319–21, 1375–77.) Manhattan chooses to achieve participation in its Catholic mission by educating, inviting and encouraging members of its community to be involved. (See Tr. 1226, 1234.) President O’Donnell testified about the comparison between Manhattan as a Catholic college and a secular college: “there’s a great deal about the Catholic University that will be indistinguishable in day-to-day operation from any University that is a University, but there is also a Christian inspiration and a Catholic purpose behind the sponsoring of the institution.” (Tr. 823–24.) As the President explained, “the Second Vatican Council says that the Church needs to be in dialogue with those of other traditions in order to do the intellectual work that the Catholic Church needs through its Universities.” (Tr. 825.) Provost Clyde, in comparing his experience at a secular college to his experience at Manhattan College, testified that while at a secular college the activity around service, ethics, morals “was a sub-set of interested parties who participated,” “it wasn’t mission

driven.” (Tr. 1178.) He explained that at a secular college there is not a mission as there is at Manhattan College. (*Id.*) (“there was support and expectation that this was part of what we should be doing [at Manhattan College].”) The Provost explained that at his former place of employment at a secular college people engaged in service “for their own reasons, but there wasn’t a focused rationale for it. ... there was no dedication, there was no reason for doing all of that.” (*Id.*) The Provost testified that in contrast, at Manhattan College, he knows the religious “motivation, the rationale, the determination, the commitment” to activities dealing with ethics, morals and service. (*Id.*) When asked if he conveyed that religious motivation to faculty as being part of their responsibilities as faculty members, the Provost testifies that he absolutely does when he talks at “lectures, interviews ... at public places and private places... [and] at orientation for adjuncts” (Tr. 1180.)

There was no doubt that both adjunct faculty witnesses knew that the College identified itself as Lasallian Catholic and that the College expects all faculty to be supportive and respectful of the mission; there was no doubt that at Manhattan College, in addition to all the regular activities of a secular college, Manhattan’s religious mission provided the motivation, the inspiration, and the pervasive support for the activities that make the religious identity of the College viable and visible. (Er. Exs. 123–26; Tr. 823–25, 1178–80, 1227–28.) As a result of Manhattan College’s efforts, Manhattan College faculty, including adjunct faculty members, have a robust understanding of the expectations for faculty to promote the Lasallian Catholic mission and evidence of that tangible role. The holding out of faculty to support and sustain a mission does not rest on compulsion or threats but education, inspiration and example.

ARGUMENT

I. THE *PACIFIC LUTHERAN UNIVERSITY* TEST IS CONSTITUTIONALLY INFIRM AND UNDER *GREAT FALLS* THE BOARD LACKS JURISDICTION OVER THE PETITIONED-FOR UNIT

A. The *PLU* Test Is Unconstitutional And Should Be Rejected

The *PLU* test has two prongs. The first prong—whether the school holds itself out as providing a religious educational environment—is consistent with the U.S. Constitution, *Catholic Bishop*, and *Great Falls*. Prong 1 requires only that the institution show it is a *bona fide* religious educational institution through a limited set of objective facts.

The problem with the *PLU* standard lies in Prong 2, which asks whether a school holds out the petitioned-for faculty unit as performing a specific religious function. This inquiry places the Board in the improper posture of defining what it believes is or is not a “religious function” for a specific religious institution. The Board through Prong 2 also improperly seeks to judge how Manhattan College utilizes its faculty in furtherance of its religious mission, though the College is in accord with the parameters set forth by the Vatican.

While the Board purports to have discarded its unconstitutional “substantial religious character” test, Prong 2 is nothing more than a repackaging of that test, which according to the Board required an evaluation of “the role of the unit employees in effectuating [the] purpose” of a religious university’s operations. *Univ. of Great Falls*, 331 NLRB No. 188, *4 (Aug. 31, 2000). The Board also purports to decide in *PLU* when faculty members at a religious school are “indistinguishable from secular teachers” even though making this determination violates the Supreme Court’s admonition against government inquiry into the difference between the “religious” and the “secular.” *See, e.g., Town of Greece v. Galloway*, 135 S. Ct. 1811, 1820 (2014); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000); *Hernandez v. Comm’nr of Internal Revenue*, 490 U.S. 680, 694 (1989); *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977).

The comparison between secular colleges and a religious college is meaningless because a religious college does all that a secular college does and additionally has a religious mission and related religious activities. (Tr. 823-25.) These problems are exemplified by the Board's preemptive determination that a professor's role in furthering components of an institution's mission such as diversity and academic freedom are secular in nature. *PLU*, at *11–12. This determination evidences both an improper entanglement between church and state and is factually incorrect. In fact, diversity and academic freedom are not only compatible with religious mission, but *essential* to it—Manhattan College could not fulfill its mission as a Catholic institution or meet its obligations under *Ex Corde* without adhering to these principles. (Tr. 823–27; Er. Exs. 9, 14, 64, 66.) The Board's suggestion that a “specific religious function” requires some sort of proselytization or indoctrination further evidences fundamental problems with *PLU*. *PLU*, at *12.¹¹ It is constitutionally improper for the Board to weigh in on what is or is not an appropriate religious educational mission or a specific religious function, particularly when it is substituting its flawed definition for the definition provided by the religion's own pronouncements. Manhattan College, consistent with Catholic intellectual tradition, consciously avoids proselytization and indoctrination in fulfilling its religious educational mission. (Tr. 823.) This approach is purposeful and necessary in Manhattan College's “search for truth” and “dialogue between faith and reason.” (*Id.*) The specifics set forth in the twenty-one pages of *Ex Corde* and the fourteen pages of the Application are not vague aspirational generalizations, but a nuanced detailed pronouncement by the Catholic Church of how the Church sees the operation of Catholic colleges and universities in harmony with Catholic Church doctrine as well as how the Church views the role of faculty at Catholic colleges and universities; the Board lacks the

¹¹ The Board claims that it will not require a showing that faculty members are required to proselytize or to indoctrinate students, *PLU*, at *12 n.14, but the practical effect of its test is that the Board requires exactly that.

constitutional authority to dismissively cast aside the Church's provisions in favor of its own concepts which are not grounded in religious doctrine. (Er. Exs. 57, 58.)

PLU is also riddled with inconsistencies and contradictions. The Board says it will rely only on how a university "holds itself out" and will not look beyond a university's statements to actual activity, but the Board then looks beyond *PLU*'s statements by preemptively concluding that diversity and academic freedom—also key components of Manhattan College's religious educational mission—are "nonreligious." *PLU*, at *11. The Board also says that it is required to "avoid any intrusive inquiry into the character or sincerity of a university's religious views," (*id.* at *3), but *PLU* calls for precisely that type of inquiry by assuming that certain views and practices are insufficiently "religious" to warrant the Board's deference. The Board further says that its test "avoids intrusive inquiry into the university's beliefs or how it implements its religious mission," (*id.* at *9), but at the same time its test necessarily requires Manhattan College to explain how it implements that mission specifically through a sub-set of its faculty. These contradictions likely derive from a fundamental clash between *PLU* and *Catholic Bishop*. While the Board is correct that *Catholic Bishop* emphasized "the critical and unique role of the teacher in fulfilling the mission of a church-operated school," (*PLU*, at *10), the Board incorrectly interprets this language as a license to determine whether faculty in fact have a specific role. To the contrary, *Catholic Bishop* stands for the proposition that once a school is deemed religiously-affiliated, its faculty are *per se* outside Board jurisdiction because faculty's "critical and unique role" in fulfilling the school's religious mission is inherent. 440 U.S. at 501. Simply stated, the religious function of any faculty member at a religious college like Manhattan College is defined by the college in consultation with its religious authorities and not the government. Thus, once a college such as Manhattan College establishes that it provides a

religious educational environment and that its faculty are expected to respect and support that religious mission, the college must be outside the Board's jurisdiction.

Further, the Board's *PLU* test is unrealistic given its inherent contradictions. For example, presumably to avoid asserting jurisdiction over individual employees who perform a religious function, the Board recognizes that evidence about "specific employees in the petitioned-for unit" would be relevant. *PLU*, at *10, *12, n.13.¹² However, the Board simultaneously recognizes the constitutional entanglement presented by an "examination of the actual functions performed by employees." *PLU*, at *11. This contradiction is compounded in this case because the Hearing Officer consistently barred testimony about the actual statements or activities of individual faculty members and wanted to know only what the faculty member had been told by the College. (Tr. 907–08, 982–83, 1175–76.) For example, the Hearing Officer barred the Provost from testifying about whether an adjunct had ever expressly talked with the Provost about the adjunct's commitment to mission, commenting that a statement made by a faculty member to the College was not relevant. (*Id.*) The *PLU* test also fails to account for a fatal line-drawing problem. Once evidence is in the record regarding the specific religious functions of individual faculty members, the Board will have to determine which of those faculty members have a function that is "religious enough" to bring them outside of Board jurisdiction and which do not. At Manhattan College, for example, adjunct faculty members such as Dr. John Lawler are dedicated to speaking with students and families about their opportunity to embrace the Lasallian Catholic core principles in their academic work. (Tr. 1213–15.) On the other hand, Professor Paul Dinter who organized a four-day colloquium, including a teach-in for students, on

¹² Although the Board states that such evidence would be relevant, it simultaneously recognizes the constitutional entanglement presented by this inquiry. *PLU*, at *11 ("We recognize that our examination of the actual functions performed by employees could raise the same First Amendment concerns as an examination of the university's actual beliefs, and we are again faced with the need to avoid 'trolling' through a university's operation to determine whether and how it is fulfilling its religious mission.")

Vatican II may place a different emphasis on his activities with regard to mission. (Tr. 1324–25; Er. Exs. 102, 125, 126.) As Member Johnson points out at footnote 13 of his dissenting opinion in *PLU*, asserting jurisdiction over some faculty members but not others risks discrimination based on religious preference.

B. Manhattan College Meets The *Great Falls* Test

Under *Great Falls* the Board cannot assert jurisdiction over a college that (1) holds itself out as providing a religious educational environment, (2) is organized as a nonprofit, and (3) is affiliated with a recognized religious organization. Points 2 and 3 above are easily met – it is not disputed that Manhattan College is a 501(c)(3) nonprofit organization, (Er. Ex. 1), or that it is affiliated with the Christian Brothers. (Er. Exs. 2, 9, 14, 63, 64.)

Point 1 is also easily met. In *Great Falls*, the Court of Appeals looked no further than the university’s mission statement, catalogue, iconography, and the University’s listing in the official Catholic Directory. 278 F.3d at 1345. These and many other features of Manhattan College show that Manhattan College holds itself out as providing a religious educational environment. Manhattan College’s Mission Statement describes the College as “a Catholic institution of higher learning” ... “founded by the Institute of the Brothers of the Christian School” ... “draws its inspiration from John Baptiste de la Salle” ... “the patron saint of teachers” ... “[a]mong the hallmarks of this Lasallian heritage are” ... “reflection on faith and its relation to reason.” (Er. Ex. 66 at 9.) Its symbol – the five-pointed Lasallian star – represents the core principles of the Christian Brothers, including “Faith in the Presence of God.” (Er. Ex. 66 at 52–53.) Its widely-distributed publications have large sections dedicated to Manhattan College’s Lasallian Catholic mission and identity. (Er. Exs. 14, 16, 66.) The Student Code of Conduct is based on the twelve virtues of a good Lasallian. (Er. Ex. 119 at 6–8.) Manhattan College has a website that prominently and pervasively illustrates the Lasallian Catholic identity, features religious art

throughout campus, holds numerous liturgical events on campus, is listed in the Official Catholic Directory, has a Sponsorship Covenant with the Christian Brothers, and is a member of the Association of Catholic Colleges and Universities. (Er. Exs. 2, 9, 59, 68, 73.) The Board need not and cannot look any further than these facts to find a religious educational environment although additional evidence in the record makes this conclusion irrefutable.

For the foregoing reasons, the Region should find that the Board lacks jurisdiction over Manhattan College under the constitutionally-permissible test articulated by the U.S. Court of Appeals in *Great Falls*.

II. THE BOARD LACKS JURISDICTION OVER THE PETITIONED-FOR UNIT UNDER *PACIFIC LUTHERAN UNIVERSITY*

A. Manhattan College Meets Prong 1 of the *PLU* Standard

The threshold question under *PLU* is whether Manhattan College holds itself out as providing a religious educational environment. Prong 1 “does not require any particular showing of religious character and does not impose a heavy burden on colleges and universities claiming to be religious institutions.” *PLU*, at *9. Rather, only a “minimal showing” is required at this stage, “when the Board is determining not whether it has the authority to assert jurisdiction, but whether First Amendment concerns are even potentially implicated with respect to the petitioned-for unit.” *Id.* On this threshold issue, the Board “err[s] on the side of being over-inclusive.” *Id.* Assessing this threshold requirement in *PLU*, the Board focused on the same types of documents as did the court in *Great Falls*. The Board in *PLU* looked no further than the fact that the school’s website, articles of incorporation, bylaws, faculty handbook, course catalog, and other publications discussed PLU’s Lutheran heritage and tradition. On that basis the Board found that PLU met the threshold requirement. *Id.* at 15–16.

For the same reasons that Manhattan College meets Prong 1 of the *Great Falls* test, there can be no question that Manhattan College has made the minimal showing required by Prong 1 of the *PLU* test. It is simply beyond dispute that Manhattan College describes its Catholic and Lasallian heritage in its relevant public documents. (Er. Exs. 66, 121A, 122.) Manhattan College does far more every day other than distributing and maintaining public documents to promote its religious educational mission and environment.

B. Manhattan College Meets Prong 2 of the *PLU* Standard

The second prong of *PLU* asks whether Manhattan College holds out the petitioned-for faculty unit as performing a religious function. Among other things, the Board will consider whether such faculty members “are hired, fired, and assessed under criteria that...implicate religious considerations.” *PLU*, at *11. The Board will also consider whether “the religious nature of the university will have any impact at all on” the petitioned-for faculty’s employment and whether faculty roles are different than those that “they would be expected to fill at virtually all universities.” *Id.* at *12. Relevant evidence includes but is not limited to job descriptions, employment contracts, and faculty handbooks. *Id.* Significantly, the Board states that it will “rely on the institution’s own statements about whether its teachers are obligated to perform a religious function, without questioning the institution’s good faith or otherwise second-guessing those statements” and “focus[] on whether a reasonable prospective applicant would conclude that performance of [his/her] faculty responsibilities would require furtherance of the college or university’s religious mission.” *Id.* Manhattan College’s adjunct faculty meet this standard.

Manhattan College’s practices, documents, and public statements amply hold out all of its faculty, including its adjunct faculty, as having a role in maintaining Manhattan College’s religious educational environment. For example, adjunct faculty candidates are informed of the religious mission at the time of hire. (Er. Exs. 14, 16, 66, 94A–94D.) Indeed, Manhattan

College's job portal where many adjunct jobs are posted states that "[w]e expect our *faculty*, administration and staff to be knowledgeable about our mission and to make a positive contribution to that mission." (Pet. Ex. 16) (emphasis added.) Adjunct faculty members are also informed of their religious function at the commencement of their appointments. This orientation includes descriptions of their religious functions in The Green Book. (Er. Ex. 66.) Manhattan College reinforces the religious functions of adjunct faculty throughout their employment and regularly informs them about religious programming and encourages them both to attend and to apply what is learned to their work. (Er. Exs. 120A, 120B, 122.) Public speeches delivered at College events further describe the religious function of Manhattan College's faculty to students, the community at large, and faculty themselves. (Er. Exs. 18, 88, 92, 93.)

It is simply impossible to read the record in this case and determine that Manhattan College cannot "distinguish [its faculty members] from faculty members at nonreligious universities"¹³ or that a reasonable adjunct faculty member—in particular one paying attention to what Manhattan College says and provides to them—would conclude that his or her responsibilities have nothing to do with Manhattan College's religious educational mission. *PLU*, at *12–13. Accordingly, Manhattan College satisfies the *PLU* test, and the Board should not assert jurisdiction over it.

CONCLUSION

For the foregoing reasons, the Region should analyze this matter under the proper jurisdictional standard articulated by the U.S. Court of Appeals in *Great Falls* and not under the

¹³ Manhattan College maintains that it would be constitutionally improper for the Board to assert jurisdiction based on any comparison between religious and secular schools. *See, e.g., New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) (litigation between church and state "about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

standard articulated by the Board in *PLU*. However, if the Region does analyze this case under *PLU*, it should decline to exercise jurisdiction over the petitioned-for unit even under that test.

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