UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANHATTAN COLLEGE,
Employer,

and 2-RC-23543

MANHATTAN COLLEGE ADJUNCT
FACULTY UNION, NYSUT AFT-NEA,
AFL-CIO,
Petitioner.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AS *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations and the American Federation of Teachers, AFL-CIO, file this brief in support of Region 2's Decision and Direction of Election in this case.

The Region's Decision directs a representation election in a unit of part-time adjunct faculty at Manhattan College. DDE 24. The College challenges the Decision on the ground that "under the Supreme Court's decision in *NLRB* v. *Catholic Bishop* of Chicago, 440 U.S. 490 (U.S. 1979), and its progeny, . . . the Board may not assume jurisdiction *over religiously-affiliated schools and colleges*" Employer's Mem. on Review 2 (emphasis added). In particular, the College relies upon "the three-part bright-line test" enunciated by the D.C. Circuit in *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009), and *University of Great*

Falls v. NLRB, 278 F.3d 1335, 1344-45 (D.C. Cir. 2002). Employer's Mem. on Review 32. *See id*. at 32-43.[1]

The D.C. Circuit's three-part test rests on a fundamental misreading of *Catholic Bishop*. The court of appeals misreads *Catholic Bishop* as "hold[ing] that the NLRB lacks jurisdiction over *church-operated schools*." *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009) (emphasis added). Based on that misunderstanding, the D.C. Circuit concluded that it was necessary to derive a "test for determining whether *a school* is beyond Board jurisdiction" that would not require "trolling through the beliefs of schools, making determinations about their religious mission, and that mission's centrality to the 'primary purpose' of the school." *Id*. at 571-72 (brackets, quotation marks and citation omitted).

Rather than adopt the D.C. Circuit's test, we submit that the Board should

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[1] The D.C. Circuit's three-part test provides that "[a] school is exempt from NLRB jurisdiction if it (1) holds itself out to students, faculty and the community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." *Carroll College*, 558 F.3d at 572 (quotation marks and citations omitted). Since virtually all private colleges are nonprofit and even the barest of religious "affiliation alone" will serve to satisfy the third prong, *id*. at 574, in application the test boils down to whether a college "holds itself out . . . as providing a religious educational environment." *See Great Falls,* 278 F.3d at 1344 (identifying this as the "far more useful inquiry" on the theory that "such public representations serve as a market check . . . on institutions falsely identify[ing] themselves as religious merely to obtain exemption from the NLRA").

clarify that, under *Catholic Bishop*, the determinative question is *not* whether a particular college is religious in nature but whether the faculty members in the petitioned-for unit perform a religious function. As we now demonstrate, focusing on the function performed by the faculty members faithfully carries out the *Catholic Bishop* decision while avoiding the entanglement problems perceived by the D.C. Circuit.

1. *Catholic Bishop* addressed "[w]hether *teachers* in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act." 440 U.S. at 491 (emphasis added). *Id*. at 500 ("whether Congress intended the Board to have jurisdiction over teachers in church-operated schools"). *Catholic Bishop* involved teachers in "parochial schools," and the Court considered it highly pertinent that "[r]eligious authority necessarily pervades the school system." *Id*. at 501. With the "teacher[s] under religious control and discipline," the Court found that "the separation of the religious from the purely secular aspects of pre-college education" would be impossible. *Ibid*. (quotation marks and citations omitted). "[R]ecogniz[ing] the critical and unique role of the teacher in fulfilling the mission of a church-operated school," the Court concluded that there was "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." *Id*. 504.

In sum, *Catholic Bishop* held that "the Board [does not] have jurisdiction over teachers" in "parochial schools" where "[r]eligious authority necessarily pervades the school system" and the teachers are "under [such] religious control and discipline" that "the separation of the religious from the purely secular aspects of pre-college education" would be impossible. 440 U.S. at 500-01 & 504.

There are thus two highly pertinent aspects of the *Catholic Bishop* decision. First, *Catholic Bishop* holds that the Board does not have jurisdiction over *teachers* at parochial schools; the decision does *not* "exclude church-operated schools, as entire units, from the coverage of the NLRA." *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1301 (9th Cir. 1991). "Both the rationale and the language of the *Catholic Bishop* opinion accordingly support the limitation of its holding to the employment relationship between church-operated schools and its teachers." *Id*. at 1302. Second, *Catholic Bishop* excludes from the Board's jurisdiction only those teachers who are under an "obligation . . . to imbue and indoctrinate the student body with the tenets of a religious faith." *NLRB v. Bishop Ford Cent. Catholic High School*, 623 F.2d 818, 822 (2d Cir. 1980). "It is the commitment of the faculty to religious values no matter what subject in the curriculum is taught and the obligation to propagate those values which provides the risk of entanglement." *Ibid*. *Accord Denver Post of the Nat'l Soc. of the Volunteers of America v. NLRB*, 732 F.2d 769, 772 (10th Cir. 1984).

Given these two aspects of the decision, the proper focus in determining whether a unit of employees is excluded from the Board's jurisdiction under *Catholic Bishop* is *not* whether the employer "is a religious institution" but whether the "function" performed by the employees at issue is "one of religious education." *The Salvation Army*, 345 NLRB 550, 550 (2005).

2. Before returning to the correct application of *Catholic Bishop*, it bears emphasis that, as a matter of plain statutory language, "faculty members employed at institutions of higher learning have long been considered 'professional employees' protected by the Act." *David Wolcott Kendall Mem. School of Design v. NLRB*, 866 F.2d 157, 160 (6th Cir. 1989). *See* 29 U.S.C. § 152(12) ("professional employees" are those "engaged in work [] predominantly intellectual and varied in character . . . involving the consistent exercise of discretion and judgment . . . [and] learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning"). Thus, the question here is not whether the faculty members at issue come within the statutory definition of covered "employees" but whether the First Amendment concerns identified in *Catholic Bishop* justify excluding these faculty members from coverage of the Act.

The Board initially took the position that "*Catholic Bishop* applies only to parochial elementary and secondary schools" and does not apply at all to college

faculty. *Barber-Socita College, Inc.*, 245 NLRB 406, 406 (1979). In so holding, the Board relied upon the Supreme Court's observation that "there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Ibid*. quoting *Tilton v. Richardson*, 403 U.S. 672, 685 (1971). In particular, the Board relied upon the Court's statement that, "[s]ince religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." *Ibid*. quoting *Tilton*, 403 U.S. at 687.

In *St. Joseph's College*, 282 NLRB 65, 68 (1986), the Board announced that it would henceforth apply *Catholic Bishop* to church-related colleges "on a case-by-case basis." While recognizing "that significant differences exist between colleges and universities on the one hand, and secondary and primary schools on the other," the Board observed that some colleges "exhibit[] many characteristics of a school which is truly church-oriented within the meaning of *Catholic Bishop*." *Id*. at 68 & n. 10. In concluding "that the Board's assertion of jurisdiction here 'presents a significant risk that the First Amendment will be infringed[,]' *Catholic Bishop*, 440 U.S. at 502," the *St. Joseph College* Board relied "particularly [on] . . . the College's requirement that faculty members conform to Catholic doctrine and agree on hire 'to promote the objectives and goals . . . of the Sisters of Mercy of Maine'

not merely the objectives and goals of the College itself." *Id*. at 68. "The pervasiveness of the Order's influence on the teaching of the College, even as to subjects commonly viewed as secular" created a substantial risk that taking jurisdiction over the St. Joseph College faculty would "involve the Board in an 'inquiry into the good faith of a position asserted by the clergy-administrators' in the resolution of common unfair labor practices involving discipline or discharge, a result clearly disapproved of by the Court in *Catholic Bishop*, 440 U.S. at 502." *Ibid*.

In the next case to apply *Catholic Bishop* in the higher education setting, the Board did assert jurisdiction over a unit of teaching faculty based on the finding that "the absence of a requirement that the faculty propagate or conform to a particular religious faith significantly diminishes any risk of impermissible constitutional infringement posed by asserting jurisdiction." *Livingston College*, 286 NLRB 1308, 1310 (1987). The *Livingston College* Board emphasized that "the fact that faculty members are not required to conform to AME [church] doctrine or promote the ideals and objectives of the AME Church" was "[o]f more significance" than whether the College itself "ha[d] a religious mission." *Id*. at 1309.

In the two higher education decisions overruled by the D.C. Circuit, however, the Board used language suggesting that the question is whether "*an entity* is . . . exempt from Board jurisdiction under *Catholic Bishop*," *Carroll*

College, Inc., 345 NLRB 254, 257 (2005)(emphasis added), and that the answer to that question turns on whether "the *school*'s purpose and function was the propagation of a religious faith," *University of Great Falls*, 331 NLRB 1663, 1665 (2000) (emphasis added).[2] These formulations caused the D.C. Circuit to conclude that the relevant question is "whether a school is beyond Board jurisdiction" and that to answer this question the Board "troll[ed] through the beliefs of schools, making determinations about their religious mission, and that mission's centrality to the 'primary purpose' of the school." *Carroll College*, 558 F.3d at 571-72 (brackets, quotation marks and citation omitted). It is imperative that the Board correct the D.C. Circuit's misunderstanding by clearly explaining, once again, that *Catholic Bishop* does *not* "exclude church-operated schools, as entire units, from the coverage of the NLRA," *Hanna Boys Center*, 940 F.2d at 1301. *See, e.g., The Salvation Army*, 345 NLRB at 550; *Hanna Boys Center*, 284 NLRB 1080, 1083 (1987); *Jewish Day School*, 283 NLRB 757, 761 n. 48 (1987).

3. Under *Catholic Bishop*, the determinative question is whether the teachers at issue play a sufficiently "critical and unique role . . . in fulfilling the mission of a church-operated school" that there is a real "danger that religious doctrine will

[2] At the same time, the Board continued to treat as a "particularly significant" the fact that "the college's faculty members were not required to conform to Church doctrine or promote the Church's ideals." *Ibid*.

become intertwined with secular instruction." *Catholic Bishop*, 440 U.S. at 501. If the faculty members are not "under religious control and discipline," there is not a "danger that religious doctrine will become intertwined with secular instruction" and the Board need not decline jurisdiction in order to "avoid entanglement with the religious mission of the school." *Id*. at 501-02. There is no reason for the Board to go beyond "the role played by the teachers," *id*. at 501, because if the faculty members are not obligated "to imbue and indoctrinate the student body with the tenets of a religious faith," *Bishop Ford Cent. Catholic High School*, 623 F.2d at 822, their "function . . . is not one of religious education," and it is legally irrelevant whether the college "is a religious institution," *The Salvation Army*, 345 NLRB at 550.

As a general matter, the "process of inquiry[ing]" into the role played by faculty at a religious college will *not* "impinge on rights guaranteed by the Religious Clauses." *Catholic Bishop*, 440 U.S. at 502. "Many church-related colleges and universities are characterized by a high degree of academic freedom . . . ." *Tilton*, 403 U.S. at 686. It is very much to the point that these colleges have an interest in publicly proclaiming their respect for academic freedom. "[B]y their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." *Ibid*. "While public religious identification [may] attract some students and faculty to the

institution," *Great Falls*, 278 F.3d at 1344, most prospective students and faculty would be put off by any suggestion that "sectarian influence" could cause secular "courses" to be taught in ways that contradict "their own internal disciplines," *Tilton*, 403 U.S. at 686. Thus, even "an institution [that] holds itself out to the public as religious," *Great Falls*, 278 F.3d at 1344, is likely to also hold itself out as being "characterized by a high degree of academic freedom," *Tilton*, 403 U.S. at 686. *See* American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, 1970 Interpretive Comments note 3 ("Most church-related institutions no longer need or desire the [religion-based] departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure.").[3] This case illustrates the point well.

Manhattan College itself states that "the mission of the College . . . is strikingly different from that of the parochial schools and Catholic high schools where indoctrination in the faith and insistence on religious observance is seen as part of their mission." DDE 13. Contrasting its mission with that of the parochial schools, Manhattan College proclaims that it "must first be a college with characteristic academic freedom for teachers to pursue research and to present the

[3] Available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm.

truth as they see it with critical and professional objectivity." *Ibid.* As the College explains, its "long-standing tradition of no religious test for admission or employment[] made the College eligible for aid from New York State under the Bundy Law." *Id.* at 12. And, the College's assurances that it is "neither controlled by the state or the Church" make it eligible to be "an accredited institution of higher learning in New York State and recognized by the Middle States Association of Colleges and Schools." *Id*. at 14.

In short, determining that the Manhattan College faculty, including the part-time faculty at issue here, are left free of religious influence does not require any intrusive inquiry into the religious nature of the college. The College itself proclaims this to be the case. All the Board needs to do is take the College at its word.

The part-time faculty in the petitioned for unit at Manhattan College are under *no* "obligation . . . to imbue and indoctrinate the student body with the tenets of a religious faith." *Bishop Ford Cent. Catholic High School*, 623 F.2d at 822. That being so, there are no First Amendment grounds for treating the part-time faculty as exempt from the NLRB's jurisdiction, and Region 2's Decision and Direction of Election should be sustained.

Respectfully submitted,

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