

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

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 REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR'S SUPPLEMENTAL DECISION AND ORDER**

BOND, SCHOENECK & KING, PLLC

Shelley Sanders Kehl
E. Katherine Hajjar
600 Third Avenue, 22nd Floor
New York, New York 10016
(646) 253-2300
skehl@bsk.com
khajjar@bsk.com

Attorneys for Employer Manhattan College

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STATEMENT OF THE CASE

Pursuant to Section 102.67(b) and (c) of the National Labor Relations Board Rules and Regulations and the August 26, 2015 Supplemental Decision and Order issued by Region 2 in this matter (the “August 26th Order” or “Order”), Manhattan College (“the College” or “Employer”), by its attorneys, Bond, Schoeneck & King, PLLC, hereby request review of the Region’s August 26th Order. Review is necessary because the Region’s decision departs from the Board’s decision in *Pacific Lutheran University*, 361 NLRB No. 157 (Dec. 16, 2014) (“*PLU*”) and is grounded in prejudicial and erroneous factual findings. 29 C.F.R. § 102.67(c)(1)–(2). The Board should also grant review because the record in this case demonstrates that *PLU* requires the same unconstitutional inquiry as its predecessor “substantial religious character” test and should be abandoned in favor of the Constitutional test articulated by the United States Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and reaffirmed by the D.C. Circuit in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). *Id.* § 102.67(c)(4).

SUMMARY OF ARGUMENT

The issue before the National Labor Relations Board (the “Board”) is whether the Board may assert jurisdiction over Manhattan College and insert itself in matters between the petitioned-for adjunct faculty and Manhattan College. The College submits that because it is a Lasallian Catholic College that holds out its entire faculty, both full-time and adjunct, as serving an essential role in maintaining the religious educational environment at the College, the Board does not have authority to assert jurisdiction.

The *PLU* standard relied upon by the Region and the Board is unconstitutional. In *PLU*, the Board established a two prong test to determine whether it could assert jurisdiction over a religious college or university. Under *PLU*, which supposedly discarded the constitutionally

infirm “substantial religious character” test, the Board does not have jurisdiction when a college (1) holds itself out as providing a religious educational environment and (2) hold out the petitioned-for unit as performing a role in creating or maintaining that environment. Yet this test, in prong two, merely perpetuates the “substantial religious character” test and extends the Board’s jurisdictional assessment beyond that which is necessary and legally permissible. The College therefore asks that the Board discard the constitutionally infirm *PLU* test and assess this matter according to the standard articulated by the United States Court of Appeals for the District of Columbia in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and reaffirmed in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). The College meets the *Great Falls* test because it holds itself out as providing a religious educational environment; is organized as a nonprofit; and is affiliated with a recognized religious organization. For this reason, and others, the Board should decline to exercise jurisdiction over the petitioned-for adjunct faculty at Manhattan College.

The Board lacks jurisdiction over the petitioned-for unit even under *PLU*. The College meets both prongs of the *PLU* standard. It is undisputed that the College meets the first prong of *PLU* by providing a religious educational environment. The College meets prong two of *PLU* in that it holds out its faculty as serving an important role in maintaining this Lasallian Catholic environment. The College meets prong two of the *PLU* test by requiring adjunct faculty to contractually agree to abide by and support the religious mission; informing adjunct faculty in various settings that their role as teachers is essential to the mission as they bring to life for students the mission of the College; distributing documents to faculty that outline the responsibility of all faculty to sustain the Catholic purpose of the College; offering professional development programs (“formation programs” and “seminars”) to teach faculty how to connect

the mission to their work in the classroom; and making the College's accreditation in part dependent on the faculty's ability to facilitate student achievement in the core competencies, which include religious and ethical awareness, all in the spirit of Saint John Baptist De La Salle, the Catholic Patron Saint of Teachers.

The Region misapplied the *PLU* standard and engaged in erroneous factual conclusions. The Region adopts a standard in its August 26th Order that is more rigid than what is required by the Board. The Region further mischaracterized the fact that faculty are not asked to proselytize, attend Catholic Mass, or receive the sacraments, as well as the College's commitment to academic freedom, as evidence of the College's failure to hold out its faculty as playing a role in maintaining the religious mission of the College. The Region's mischaracterization here is proof that government agencies are ill-suited to assess what is and is not a religious function. The Board must realize, as the Region failed to do, that it is precisely because the College is Catholic that it encourages academic freedom, including respect and dialogue with those of other traditions, and is committed to allowing faculty and the community to come to the faith voluntarily. It is antithetical to Catholic doctrine to require faculty to proselytize about Catholicism or indoctrinate students on Catholic beliefs in the classroom; Manhattan College is an institution of higher education providing college-level instruction. *PLU* does not require such a specific showing of faculty's activities as suggested by the Region in its August 26th Order. For these reasons, and as more fully discussed below, the Board should not use the Region's erroneous and prejudicial holding as a basis to assert jurisdiction over the petitioned-for unit.

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 adjunct 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 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.

The parties filed post-hearing briefs on August 6, 2015. Manhattan College argued in its brief that the *PLU* test is unconstitutional and should be discarded in favor of the test articulated by the D.C. Circuit in *Great Falls*, and, in any case, the College meets both prongs of the *PLU* test. By Supplemental Decision and Order dated August 26, 2015, Region 2 held that Manhattan College met the first prong of *PLU* as a College providing a religious educational environment but not the second prong, and thus ordered that the ballots previously impounded be counted.

RELEVANT FACTS

I. MANHATTAN COLLEGE'S CATHOLIC AND LASALLIAN HERITAGE

Manhattan College is Lasallian and Catholic. (*See* Er. Ex. 16 at 12; Er. Ex. 66 at 27–67.) The College is recognized by the Catholic Archdiocese of New York, is a member of the Association of Catholic Colleges and Universities, and conducts a full range of Catholic sacramental and devotional practices. (Er. Ex. 2; Er. Ex. 16 at 12–13; Er. Exs. 59, 73, 74.)

A. The College Continues To Be A Catholic College Inspired by the Charism of Saint John Baptiste De La Salle

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.) 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, concern for the poor, and social justice. (*See* Er. Ex. 3.) The Lasallian educational mission, since its creation, views 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.)

Throughout the College’s history, students have been required to take courses in religion, and that requirement persists today, with nine credits of religion as the sole requirement for all students in each of the College’s five separate schools. (*See* Er. Ex. 16 at 13–14; Pet. Ex. 15 at 30; Tr. 1334–35.) Students must take at least one religion course in Catholic Studies. (*Id.*) Students in any major can take a concentration in Catholic Studies at the College. (Er. Ex. 101.)

B. Manhattan College Pursues its Catholic Identity Consistent with the Church’s Pronouncements in *Ex Corde Ecclesiae*

Manhattan College conducts itself in accordance with the Catholic Church’s expressed intention for Catholic institutions 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 upon and made effective in 2001 by the United States Conference of Catholic Bishops. (Er. Exs. 57, 58; Tr. 820–32.) Therefore the pertinent dimensions of what constitutes a Catholic College in the United States are derived from 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....¹

(Er. Ex. 57 at 4 ¶ 12; Tr. 822) (italics in the original, internal footnotes omitted.)

Catholic higher education is further detailed 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.) Manhattan College’s mission and its practices embody the Church’s articulation of a Catholic higher education institution. Following the implementation of *Ex Corde* in the United States, Manhattan College, consistent with its distinct institutional governance, undertook a process to incorporate the principles of *Ex Corde* into its operations by, *inter alia*, executing a new Sponsorship Covenant with the Christian Brothers, appointing a Vice President for Mission, and adapting its hiring process to emphasize the responsibility regarding the mission across the College. (Er. Exs. 9, 16, 64, 66.)

II. MANHATTAN COLLEGE’S RELIGIOUS EDUCATIONAL ENVIRONMENT

Manhattan College provides a religious educational environment. It expresses and promotes this systematically to the campus community, to prospective and active employees, to

¹ *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.)

prospective students and enrolled students, and to parents, alumni and the general public. It holds itself out as providing a religious educational environment in a variety of ways. For example:

- The Mission Statement is widely publicized on the College website, displayed on campus, included in campus publications such as the Undergraduate Catalogue and the Employee Handbook, 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. Ex. 117 at 2; 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.*)
- The Lasallian Star of Faith is part of the College's seal and logo and is widely distributed and publicized on campus. The points of the Lasallian Star represent the foundational concepts of John Baptiste De La Salle's Institute of the Christian Brothers, which continue to form the academic program at Manhattan College; two of the five core principles are: (1) "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 (2) "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.)
- *Manhattan College and Its Lasallian Catholic Mission*, referred to as "The Green Book," is widely available on campus, on the website, and it is distributed to everyone on

campus, to each student and faculty member and many job applicants. (Er. Ex. 66; Tr. 885–91.) It is 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.) The Green Book 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 community and leading Christian Brothers, various campus chapels, the College’s Catholic Studies program, and the College’s commitment to social justice. The even numbered pages provide quotations from noteworthy religious figures, eminent religious scholars and 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.)²

- Mission Month at the College highlights core Lasallian principals. Mission Month is a time to be “[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. It highlights numerous

² 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 William 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.)

liturgical events and celebrations as well as various campus activities, lectures, presentations, meetings and outings that faculty, staff and students that reflect the Lasallian Catholic spirit and purpose of the campus. (Er. Ex. 85; Tr. 1000–05.) The Vice President for Mission, Brother Jack Curran, also uses the occasion to share material with faculty and other groups on campus that he hopes will inspire them further 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 College admissions process extensively highlights the College’s Lasallian Catholic nature. (Er. Exs. 105, 106, 107; Er. Ex. 121B at video clip 12; Tr. 1130–35.)
- Print and video publications aired during national athletic tournaments and games identify the College as Catholic. (Er. Ex. 113; Er. Ex. 121C at video clips 4, 5; Er. Ex. 121D at video clip 1.)
- The College was declared a Catholic Relief Services Global Campus, in recognition of its advancement of the social mission of the Church through the active engagement of faculty and students in 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.) President O’Donnell, recognizing the key role of faculty, appointed a Task Force that included ten faculty members and the Provost to promote and develop a working relationship with Catholic Relief Services. (Tr. 1162–63; Er. Ex. 115G.)
- Manhattan College is a member of the Association of Catholic Colleges and Universities, which requires, as a condition of membership, that member colleges are listed in one of

the Catholic institution indexes or identified in writing by the local religious leader as an institution covered by *Ex Corde*; President Brennan O'Donnell serves on the Board of the Association. (Er. Ex. 59; Tr. 815–16, 834–39.)

- The College's Lasallian Catholic heritage is expressed through the Catholic chapels, logo, seal, signs, symbols, art, and memorials displayed prominently throughout campus. (E.g. Er. Exs. 121A, 122.)

The Region held in its August 26th Order that the College indeed holds itself out as a religious educational environment. Order at 2. The Region also held that the College is recognized as Catholic and a nonprofit institution. (*Id.* at 12.)

III. ADJUNCT FACULTY HAVE A ROLE IN SUPPORTING THE COLLEGE'S RELIGIOUS EDUCATIONAL ENVIRONMENT

Manhattan College holds out its adjunct faculty as contributing to the College's religious educational environment. Central to the College's Lasallian Catholic identity is the emphasis on teachers. 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" is of the highest importance. (Er. Ex. 66 at 5.) The College's contemporary application of this rule is articulated in, *inter alia*, its Mission Statement that affirms the primary importance of excellence in teaching and the College's five-pointed star that emphasizes a commitment to providing a quality education through faculty that promote "thinking critically and examining our world in light of faith." All faculty (including adjunct faculty) receive as part of the hiring process, an explanation written by Brother Luke Salm, who was a long time faculty member and scholar on John Baptiste De La Salle, that defines the traits all faculty at Manhattan College are expected to exemplify: commitment to the poor, an appreciation for the importance of religious education, excellence in teaching, quality education

accessible to all, and combining a core curriculum with professional education; Brother Luke significantly emphasizes the welcoming of lay men and women faculty to a more active role in the Church. (Er. Ex. 14 at Appendix; Er. Ex. 66 at 5, 53.)

A. Faculty are a Conduit for Imparting the Mission to Students

Manhattan College's faculty, including adjunct faculty, are the primary conduit through which Manhattan College achieves its Lasallian Catholic educational mission. In the major Admissions Office recruitment piece given to prospective students, the College 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.)

The College does not differentiate between the role of full-time and adjunct faculty with regard to mission and classroom duties. (Tr. 902-07, 1055-57, 1063.) Faculty members regularly fluctuate between full-time and adjunct status depending on their semester's course load. (Tr. 1113, 1322, 1416-17.) Manhattan College's faculty helped ensure that the College's identity remains visibly and vitally Lasallian Catholic by emphasizing this identity in the current strategic plan. (Tr. 856-64.) A result of the strategic plan was the redefined Mission Statement that affirms the Catholic intellectual tradition's commitment to the interplay between faith and reason. (*Id.*) 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....*" (Er. Ex. 14 at insert on Manhattan College: Lasallian, Catholic and Independent) (emphasis added.)

B. Senior Administrators Connect the Faculty Role to the Religious Mission

President Brennan O'Donnell and Provost William Clyde speak with adjunct faculty about the particular Lasallian focus of the College. Senior administrators regularly connect the Lasallian mission of the College to the functions of the faculty on campus. (Tr. 897–98.)

President O'Donnell speaks to adjunct faculty during orientation about their teaching duties as they relate to the religious mission of the College. (Er. Ex. 116; Tr. 889, 896–900.) He displays The Green Book on a screen at the orientation and uses it as a guide to talking about the mission, the Catholic intellectual tradition, and the Lasallian identity of the College. (Tr. 996, 1180, 1191–92.)³ He tells adjunct faculty about “the Catholic intellectual tradition in order to talk about [how] all of us have responsibility for promoting...education within the context of a Catholic university.” (Tr. 897–98.) In the Middle States Association of Colleges and Schools Commission on Higher Education (“Middle States”) accreditation 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, he makes 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.)

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 on

³ See e.g. Er. Ex. 117 at 2–4, 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* contains a brief description of the history and the Mission Statement identifies 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.”

Mission Month, which is sent to adjunct faculty, the President 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 Clyde speaks with faculty about the obligation to make the religious educational mission the priority in everything the College does. (Tr. 1055–57.) The Provost also specifically speaks with adjunct faculty to make sure adjuncts understand the College’s mission and understand that they have the same responsibilities as all faculty have with regard to contributing to the Lasallian educational mission of the College. (Tr. 1056, 1063.) He speaks individually with faculty about the College’s mission and publicly at the Faculty Convocation about the role of faculty in fulfilling the Lasallian Catholic mission: “Manhattan College’s Mission calls [students] to noble 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.) In fact, Provost Clyde scheduled meetings specifically with the adjunct faculty at each of the schools 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.)

Department chairpersons similarly raise the Catholic mission of the College with adjunct faculty during hiring interviews. Dr. Moujalli Hourani, a graduate of Manhattan College and the Chairman of the Department of Civil Engineering, the largest department in the College, employs between twenty to twenty-five adjunct professors each year and he has hired around sixty adjuncts during his service as Department Chairman. (Tr. 1391, 1394–95.) Dr. Hourani explains to prospective adjunct faculty how their role at the College is different than it would be at a secular college:

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.

* * *

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. 1397, 1403.)

Dr. Jeff Horn, Chairman of the History Department, who testified for the Petitioner, also raises the Catholic identity of the College with 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.)

Dr. Lance Evans, Chairman of the Biology Department from 2007 to 2010, who testified for the Petitioner, stated 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 also testified 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.)

Brother Jack Curran, the Vice President for Mission, and Provost Clyde distribute “Manhattan College and its Lasallian Identity Catholic Heritage and Core Identity” during faculty orientations. This document provides 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 Catholic-related 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 provided to faculty to deepen their understanding and assist them in integrating the Catholic mission into their work at the College. (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 pursue the Catholic education of faculty, staff and administrators and that his Office exists to support the College’s faculty and staff in promoting and integrating the Lasallian Catholic core identity in their work. Brother Jack, who was instrumental in organizing the College Core Identity Seminars for faculty, testified that new faculty “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.)

C. The College Explains the Faculty Role in Maintaining the Mission During the Hiring Process

In addition to the hiring interview process, the College communicates the centrality of the Lasallian Catholic mission with prospective adjunct faculty, specifically the responsibility of adjunct faculty to understand, respect and support the Catholic mission in a variety of documents. (Tr. 902–07, 1055–57.) The College places a premium on candidates that express an interest in the Catholic Mission of the College and question hiring candidates that seem uninterested in the mission; some of the public job postings note that a preference may be given to faculty candidates who are Christian Brothers. (*E.g.* Tr. 1065; Pet. Ex. 21.) This consistent emphasis sends a two-fold message to the applicant: (1) that the College is a Catholic institution committed to preserving its Lasallian identity and (2) that the lay faculty at the College will have to engage the religious mission of the College.

Before many adjunct faculty candidates even apply for a position at Manhattan College, the College’s online job portal unequivocally notifies applicants 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.)

The College’s employment application includes detailed information on the College’s Lasallian Catholic identity and the faculty member’s responsibility. (Er. Exs. 14, 16.) The last page of the employment application, which prominently identifies Manhattan College as having a “Lasallian Catholic Tradition Since 1853” includes an affirmation that must be signed by the applicant: “I will read and abide by the Mission Statement of Manhattan College.” (Er. Exs. 14, 16.) Among the inserts to the application are the statement referred to in the Sponsorship Covenant as “Manhattan College: Lasallian, Catholic and Independent” and Brother Luke Salm’s

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.) The employment application contains additional material for prospective hires and for which the prospective faculty member must sign in agreement, including:

- 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." (Er. Exs. 14, 16, 94D.)
- A copy of the booklet "Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage," which contains the Sponsorship Covenant between the Christian Brothers and the College and describes in great detail the responsibility of faculty to sustain the Catholic purpose of Manhattan College; the last page of the booklet is a receipt to be signed by faculty asserting that they have read and will respect the Lasallian culture of the College. (Er. Ex. 16 at 47; *see also* Er. Ex. 94B at signed copy of receipt.)
- "The Green Book" titled *Manhattan College and Its Lasallian Catholic Mission* provides the prospective hire with a compilation of the College's Lasallian Catholic history, traditional prayers, quotations about the College's mission from faculty and religious leaders, descriptions of programs that can equip faculty to integrate the religious mission into their role. (Er. Exs. 66, 94C; Tr. 1070–71.)

The intensive and multifaceted effort to provide all faculty with the materials to ensure that they become fully informed about the College's religious educational mission and environment is consistent with *Ex Corde*, the Application of the Catholic Bishops, the Sponsorship Covenant, and Manhattan College policy. By directly discussing the mission of the

College with prospective faculty and by providing them with detailed materials to make them knowledgeable about their responsibility to respect and abide by the Catholic mission at the point a prospective hire is deciding whether to work for Manhattan College, the senior administration and Human Resources Department ensure that adjunct faculty are aware of these responsibilities from the outset of their employment. (Tr. 1272, 1386.)

D. Adjunct Faculty Must Sign Appointment Letters

In addition to signing acknowledgements for receipt of the various publications and documents setting forth the religious mission, an adjunct faculty must also sign a letter of appointment in order to complete the hire process. The letter of appointment for adjunct faculty specifically has the adjunct faculty member agree that he/she will “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.)

E. The College Provides Formation Programs and Seminars To Enable Faculty To Integrate the Catholic Mission into Courses

Manhattan College reinforces the role of faculty members, including adjunct faculty members, in furthering and maintaining Manhattan College’s religious educational mission by providing organized education programs, generally referred to as formation programs, on Catholic and Lasallian beliefs and how faculty can 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.) Manhattan College’s Vice President of Mission, Brother Jack Curran, is in charge of 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) During his interview for the Provost’s position, Dr. Clyde’s responsibility for promoting faculty participation in formation-type

programs was discussed. (Tr. 1045–47.) The President testified that he tells adjunct faculty about the formation programs when he speaks with them because adjunct faculty are welcome and 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.)

Participation by faculty in formation programs is paid for by the College. One of the most attended faculty formation programs is the Rome Lasallian Leadership Program, which is designed to enhance the sense of the Lasallian intellectual vocation and to create a group of faculty mentors back at the College who could encourage other faculty members to integrate the Lasallian charism into the academic and campus setting. (Er. Ex. 104 at 14–15; Tr. 1127.) Other examples are the Buttimer Institute of Lasallian Studies, named in honor of a graduate of Manhattan College, Brother Charles Henry Buttimer, which many faculty and staff at Manhattan College attend in order to engage in an intensive study of John Baptist De La Salle, as well as Collegium, which is a dialogue on Faith and Intellectual Life for faculty beginning careers in Catholic higher education. (Er. Ex. 66 at 35, 54; *see also* Er. Exs. 25, 38.)

The College also has campus-based formation programs known as the College Core Identity Seminars (CCIS). The College developed these programs to promote faculty engagement with the College's Catholic identity. (Er. Ex. 76 at 3; Er. Exs. 77–84; Tr. 970–80.) The Core Identity seminars are essentially professional development programs led by faculty who participated in external formation programs and who now, with their newly-acquired knowledge, coach other faculty on how to incorporate the Lasallian values and the Catholic intellectual tradition into their classroom instruction. (Er. Ex. 77 at 2–3; Er. Ex. 78.) New and long-time faculty, administrators and staff can attend these Core Seminars. (Er. Exs. 79–84; Tr.

980–98.) An outgrowth of the College Core Identity Seminars was a research project, financially supported by the College, designed to survey and catalogue existing faculty “mission-oriented pedagogical initiatives” so that the information about what faculty currently do in class to integrate mission with their course objectives can be shared with all faculty. Dr. Jeff Horn, who testified for the Petitioner, together with other faculty who had been involved in the College Core Identity Seminars, initiated the project and supervised the student researcher. (Er. Exs. 80, 81; Tr. 982–90.)

F. The College Celebrates Faculty Who Embody the Lasallian Tradition

The College promotes the Lasallian Catholic role of faculty. The College’s Distinguished Lasallian of the Year award celebrates faculty members who brings to life, inside and outside the classroom, the Lasallian hallmark of reflection on faith and reason; engages students in thinking critically and examining the world in the light of faith; and believes in the living presence of God in students, staff, administrators and faculty. (Er. Ex. 69; Er. Ex. 76 at 8; Er. Exs. 120A, 121A.) Faculty are nominated for this 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 and who are persons of faith who teach by example and give life to the Lasallian values that sustain the Lasallian Catholic identity of the College. (*Id.*) Dr. Hourani, was honored as a Distinguished Lasallian for his passion for teaching, his commitment to mentoring 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 testified that adjuncts are eligible to receive the Distinguished Lasallian of the Year award. (Tr. 974.)

During Mission Month, the President honors members of the faculty and staff who have been recognized as Distinguished Lasallians, faculty who have been facilitators or participants in the College Core Identity Seminars, faculty who have participated in formation programs, and

faculty who serve on committees associated with the Office of Mission. (Er. Ex. 69.) The College 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.)

G. The Faculty Affirm Their Role in Supporting the Lasallian Identity

Faculty affirm their collective role in promoting the Lasallian Catholic mission. Faculty members participated in producing the booklet *Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage*, which all faculty and staff receive and sign and two campus governance bodies endorsed, the Board of Trustees and the Council for Faculty Affairs. (Er. Ex. 16 at 17.) The Council for Faculty Affairs independently affirmed the professional responsibility of faculty to acknowledge the Catholic identity and the importance of the Catholic intellectual tradition (which emphasizes the interaction of faith and reason), stating 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 since 2007 and a former Manhattan College Trustee and Chair of the Board of Trustees,⁴ 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, and adjunct faculty

⁴ 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.)

can be present, which reflects his knowledge of the responsibility of faculty to assist students in understanding the integration of faith and reason. (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 what I say to them...those courses are designed to...help you come to answers to those questions.” (Tr. 1215.) Dr. Lawler confirmed that he attended 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 he attended regarding mission 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.)

Professor Paul Dinter, an adjunct faculty member of the Religious Studies Department, proposed and organized a program on the anniversary of Vatican II, which faculty could use as a source of classroom materials. (Er. Ex. 125; Tr. 1312–14; 1324–25, 1341–44.) Professor Dinter was previously the Catholic Chaplain at Columbia University and, at Manhattan College, has fluctuated between full-time and adjunct status depending on departmental needs. (Tr. 1312–14.) Following his attendance at a conference dealing with the 50th anniversary of Vatican II, for which the College paid, he secured President O’Donnell’s backing to present a program at the College for the 50th anniversary of Vatican II; Professor Dinter helped organize the four-day event which the College funded. (Er. Ex. 102, 125; Tr. 1324–25, 1341–44.) In a July 2013 email, Adjunct Professor Dinter asks faculty colleagues to mark their calendars for this College sponsored event, which he tells them would have materials on Vatican II for faculty to introduce

and include in their classes; he describes various portions of the event, including the opening Eucharist Celebration and the closing interfaith prayer service. (*Id.*)

College faculty, whose professional expertise distinguish their working conditions from those of typical employees, are not told what specific content to teach or how to teach the class, are not subject to discipline for what they teach in class, and are not expected to proselytize or indoctrinate students. To do so would be inconsistent with what it means to be a college faculty member at a Catholic institution of higher education and contrary to the intent of *Ex Corde*. (E.g. Tr. 1241–42, 1275–76, 1285–88, 1319–21, 1375–77.) Manhattan achieves faculty participation in its Catholic mission by educating, inviting and encouraging members of its community, especially faculty, to be involved. (*See* Tr. 1226, 1234.)

President O'Donnell explained the danger of focusing on how the College is similar to secular colleges instead of how religion motivates the College's operations. He said: "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.) The President explained that "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," but "it wasn't mission driven." (Tr. 1178.) He distinguished between the absence of a mission at a secular college and Manhattan College where there is a clearly articulated religious mission. (*Id.*) The Provost testified that at Manhattan College he knows that there is a religious

“motivation...rational...determination...commitment” to activities dealing with ethics, morals, and service. (*Id.*) He conveys to faculty that the religious mission is a part of their responsibility as faculty members when he talks at “lectures, interviews...at public places and private places...[and] at orientation for adjuncts....” (Tr. 1180.)

Adjunct faculty witnesses confirmed that the College identifies as Lasallian Catholic and that the College expects all faculty to be supportive and respectful of the mission; there was no doubt that Manhattan College’s activities are motivated by its religious mission. (Er. Exs. 123–26; Tr. 823–25, 1178–80, 1227–28.) The holding out of faculty to support and sustain the religious mission is concretely demonstrated daily by education programs and events that engage faculty, by a continuing focus and dialogue on the visible and vital Catholic culture, by inspiration and by example; it would be a contradiction of the Lasallian Catholic charism to seek to do so by compulsion or threats. (Er. Ex. 66 at 55.)

H. Manhattan’s Core Curriculum Requires Competency in Religious and Ethical Awareness

The College’s mission to educate students about the relationship of faith with reason and ethical issues is reflected in the educational competencies expected of students and in the pedagogical approach of faculty. The College’s core curriculum competencies are set forth in the College’s undergraduate course catalogue:

All academic programs at Manhattan College have, as their foundation, a broad liberal education. The college-wide educational goals define the common curricular ground for all students. In fulfilling its mission, the College seeks to provide skills for a lifetime of intellectual growth; foster a reflection on faith, values, and ethics; and encourage a respect for individual dignity and a commitment to social justice. These educational goals allow the various schools to develop unique programs with specific missions. The educational goals also allow for creative implementation tailored to diverse student and faculty strengths and interests.

(Pet. Ex. 15 at 11, 27–28.) The College states that upon graduation students will be able to demonstrate, in pertinent part, their religious and ethical awareness by their ability to:

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

(*Id.*) These competency requirements apply to the entire curriculum and their fulfillment is part of the assessment process of courses, the Provost testified that it is the teaching 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.) It is inescapable, therefore, that faculty are a primary contributor to student achievement in these core competencies. For example, beyond the traditional issues raised by the professional code of ethics for engineers, Engineering Department faculty teach students to factor broader ethical concerns into project design and execution, because a Lasallian Catholic education requires more substantive ethical considerations; Dr. Hourani stated that he explains to adjunct faculty why ethics is important specifically at Manhattan College: “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.) Dr. Hourani testified that as a “Catholic institution we have an additional obligation” to teach ethics independent of what is required in the professional code for engineers. (Tr. 1407–08.) Ethics are part of the Catholic mission of the College. (Tr. 1408–09.)

The College’s success in achieving the core competencies with regard to religious and ethical awareness and a religious educational environment is documented by the survey conducted of recent graduates, who report that 70% of the graduates strongly agree or agree that

the College's core identity as Lasallian Catholic is vital and visible, 56% found it very important or important that the College supported the faith development of students and 69% believed it was very important or important to emphasize ethical conduct. (Er. Ex. 112 at 14.)

I. Accreditation Bodies Weigh Compliance With Institutional Mission

Further, the 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 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, [is] offered to prospective students by admissions, [is] 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 College's success in involving "students, *faculty* and administrators in communicating Lasallian spirituality." (Er. Ex. 97 at 6) (emphasis added.) The Middle States report assessed achievements relating to the core competencies, including the competency on religious and ethical awareness,

which places on faculty a responsibility to achieve this mission-related student proficiency in the core 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 engineering program 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 focuses on the Catholic mission and the assessment of student achievement in the core competencies, including the religious and ethical awareness, consistent with the College’s religious identity. (Er. Exs. 99, 100; Er. Ex. 129 at 23–25, 31; Tr. 1416.)

J. Catholic Doctrine Delineates the Role of Faculty at a Catholic College

The importance of Manhattan College’s faculty to its religious educational mission is not only derived from within Manhattan College. As discussed earlier, it is mandated by *Ex Corde*. *Ex Corde* 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, which is a public document, Manhattan College assumed 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 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 their responsibility to maintain Manhattan College's Catholic identity. Moreover, the College systematically communicates to the faculty, students, and community the essential responsibility of faculty to contribute to the mission by educating students in a manner that upon graduation the students can demonstrate competency in, among other areas, religious and ethical awareness, and assess their own conduct and make decisions based on ethical concerns and transcendent moral values as articulated in Catholic and other religious and philosophical traditions.

ARGUMENT

The test articulated in *PLU*, and as applied by the Region, is an unconstitutional test because it forces the Board to engage in an improper inquiry into the religious character of an educational institution. Government entanglement of this sort is prohibited by the U.S. Constitution and *Catholic Bishop*. Accordingly, the Board should grant review and abandon its *PLU* standard in favor of the standard articulated by the U.S. Court of Appeals in *Great Falls*, which unlike the *PLU* test is consistent with the First Amendment. Still, even under the constitutionally infirm *PLU* test, the Board lacks jurisdiction over the petitioned-for unit as the College meets both prongs of the *PLU* test in any fair application of the facts.

I. THE *PACIFIC LUTHERAN* TEST IS UNCONSTITUTIONAL; THE TEST ARTICULATED IN *GREAT FALLS* PROVIDES THE APPROPRIATE FRAMEWORK

A. The Test Articulated by the Board in *PLU* is Unconstitutional and Should Be Discarded

The Board in *PLU* established a two-pronged test to assess whether it could legally assert jurisdiction over a religious college or university. According to *PLU*, the Board stated it would not exercise jurisdiction over those institutions that met both prongs of their self-promulgated test. *PLU* at *1. The first prong of *PLU* requires, as a threshold matter, that a college or university “holds itself out as providing a religious educational environment.” *Id.* While the first prong is consistent with the Constitution, *Catholic Bishop*, and *Great Falls*, *PLU*’s second prong is a mere restatement of the rejected “substantial religious character” inquiry. The second prong requires that an institution demonstrate that it holds out the petitioned-for unit as “performing a specific role in creating or maintaining the university’s religious educational environment.” *Id.* The second prong extends the Board’s jurisdictional assessment beyond that which is necessary and which is constitutionally permissible.

The Supreme Court in *Catholic Bishop* ruled that once a school is deemed to be religious, the faculty are *per se* outside the Board's jurisdiction. 440 U.S. at 501. In developing the *PLU* test, the Board correctly noted the Supreme Court's statement about "the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *PLU* at *10. However, 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 position that once a school is deemed religiously affiliated, its faculty are *per se* outside the Board's jurisdiction because faculty's "critical and unique role" in fulfilling the school's religious mission is inherent. 440 U.S. at 501. To hold otherwise, and allow Board jurisdiction over faculty in a college determined to be religious, would create an unacceptable risk of government entanglement in matters that concern the Church and its affiliated institutions. *See id.* The First Amendment prohibits government entities, and thus the Board, from deciding what is and is not religious (and, further, what is and is not religious *enough*); government entities are particularly ill-equipped to grapple with these questions. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) ("the line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014) (an analysis of whether legislative prayers were nonsectarian "would involve government in religious matters to a far greater degree"); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (government inquiry into "whether a school is pervasively sectarian is not only unnecessary but also offensive); *Hernandez v. Comm'r*

of *Internal Revenue*, 490 U.S. 680, 694 (1989) (rejecting proposal that “would force the IRS and the judiciary into differentiating ‘religious’ services from ‘secular’ ones”).

The Board acknowledges that its test in *PLU* raises First Amendment concerns. It said that “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.” *PLU* at *8. The Board further acknowledges in *PLU* that it would be inappropriate to “look behind” college documents held out to the public such as job descriptions, handbooks, and statements to accrediting bodies “to determine what specific role petitioned-for faculty actually play in fulfilling the religious mission of a school or to inspect the university’s actual practice with respect to faculty members.” *Id.* at *9. The Region’s decision here unfortunately only demonstrates that application of *PLU* results in trolling through religious beliefs, and, worse, judging whether an institution’s mission and expectations of faculty are religious enough for a U.S. government agency.

Perhaps the most glaring unconstitutional aspect of the *PLU* test is that the Board takes the position that it has authority to define how a religious mission is to be pursued by a faith-based college even when presented with a comprehensive explanation of the manner in which a religiously-affiliated college is instructed by its own religion on the process. Here, that would mean substituting its own views of what constitutes a religious function for the College’s view, when the College is defining the institutional and faculty role by applying explicit guidance from the Catholic Church. The Vatican has defined Catholic higher education in *Ex Corde* and the United States Catholic Bishops have adapted it for U. S. Catholic colleges. The Constitution forbids the Board to disregard those views and substitute its own beliefs. Thus, where the

Vatican has determined that Catholic higher education respects academic freedom, embraces diversity and ecumenical dialogue, respects the personal beliefs and practices of all at Catholic colleges and universities, and seeks from lay faculty support and respect of the Catholic mission, it is not the place of the Board to disqualify these religious principles as indicia of the faculty's role in promoting the religious mission. It is further not the place of the Board to impose different, burdensome, and misguided criteria based on compulsion and outdated concepts of what constitutes a religious role.

Notwithstanding the Board's articulated constitutional concerns, the application of the second prong of *PLU*, which is merely a repackaging of the discarded "substantial religious character" test, continues to result in prohibited First Amendment entanglement. It requires like the "substantial religious character" test an evaluation of "the role of the unit employees in effectuating [the] purpose" of a religious college's operations. *See Univ. of Great Falls*, 331 NLRB No. 188, *4 (Aug. 31, 2000). The Board attempts to avoid the constitutional problems of the "substantial character test" by focusing the prong two inquiry on the faculty rather than the institution, but this shift of focus does not cure the constitutional defects inherent in a government assessment that focuses on the *specifics* of faculty activities. The Board demonstrates in its *PLU* analysis that in prong two it is not simply assessing whether a college "holds out" its faculty as playing a role in the religious mission, but is actually engaged in a much more invasive review. *PLU* at *12 ("neither students nor faculty are required to attend religious services or participate in any of these activities; there is no evidence that faculty are required to perform any functions in connection with any of these activities.") The nature of the inquiry required by *PLU*, and how the Region has applied the *PLU* standard, is precisely the type of inquiry that *Catholic Bishop* prohibits. *Catholic Bishop*, 440 U.S. at 502 ("it is not only the

conclusion that may be reached by the Board which may impinge on rights guaranteed by the Religion clauses, but also the very process of inquiry leading to findings and conclusions.”); *Great Falls* at 1341.

In light of the above, the Board should discard *PLU* and instead evaluate whether it is appropriate to assert jurisdiction over the petitioned-for unit according to the constitutionally permissible test articulated by the United States Court of Appeals in *Great Falls*.

B. Manhattan College Satisfies the *Great Falls* Test

The Board should decline jurisdiction over Manhattan College under *Great Falls*. The test articulated in *Great Falls* is the only standard approved by a body with competence to opine on constitutional matters. 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. 278 F.3d 1335, 1343. The Region correctly determined that Manhattan College holds itself out as providing a religious educational environment and thus meets the first prong of the *PLU* test. *See* Order at 2. The first prong of the *PLU* test is essentially the same test articulated in point one of the *Great Falls* test; for these reasons the College meets the first point of the *Great Falls* test.

It is not disputed that the College is a 501(c)(3) nonprofit organization. (Er. Ex. 1.) It is also not disputed that the College is a Lasallian Catholic college founded by the Christian Brothers to educate students in the tradition of the Catholic Patron Saint of Teachers, Saint John Baptiste De La Salle, and that it is recognized by the Archdiocese of New York as a Catholic institution of higher education. (E.g. *see* Er. Exs. 2, 3; Er. Ex. 16 at 5; Er. Ex. 66 at 13–25; Er. Ex. 76 at 6). Manhattan College therefore easily meets the second and third points of the *Great Falls* test. The Region held in its August 26th Order not only that the College holds itself out as

a religious educational environment, but also that the College is recognized as Catholic and nonprofit. Order at 2, 12.

The College satisfies the test articulated by the D.C. Circuit in *Great Falls* and the Board should accordingly decline jurisdiction in this matter.

II. THE REGION ERRED IN ASSERTING JURISDICTION OVER THE PETITIONED-FOR UNIT EVEN UNDER THE *PACIFIC LUTHERAN* TEST

A. Manhattan College Satisfies both Prongs of the *PLU* Test

While the Region correctly held that the College meets the first prong of *PLU* by holding itself out as a religious education environment, it incorrectly determined that the College does not hold out its adjunct faculty as serving a role in maintaining the College's Lasallian Catholic educational environment. Order at 2. For the following reasons Manhattan College's adjunct faculty meet the second prong of the *PLU* standard.

The Board will consider a variety of factors in assessing whether a college meets the second prong of *PLU*, but 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 will "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." *PLU* at *9. The Board further says that when appropriately applying the *PLU* test it "will not seek to look behind these documents to determine what specific role petitioned-for faculty actually play in fulfilling the religious mission of a school or to inspect the university's actual practice with respect to faculty members. *Id.*

Manhattan College holds out its faculty as having a role in maintaining its religious educational environment.⁵ To understand that role, the Board must understand what it means to be a Catholic institution, and, specifically, a Lasallian institution. The Lasallian Catholic identity places primary emphasis on the professor and the professor-student relationship. This emphasis is expressed in, *inter alia*: (1) the College's Mission Statement which affirms that *teaching* is of primary importance as a cornerstone of Lasallian belief; (2) the five-pointed star which affirms the faculty's role in "thinking critically and examining our world in light of faith;" and (3) Brother Luke Salm's statement, provided to all faculty at the time of hire, that the traits all College faculty are expected to support is a commitment to the poor, an appreciation for 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. (Er. Ex. 14 at Appendix; Er. Ex. 66 at 5, 53.) The adjunct faculty's role in supporting and maintaining the Lasallian educational environment, as is the role of all faculty, is to be committed to the five core principles set forth by Saint John Baptist De La Salle which are: faith in the presence of God, respect for all people, quality education, inclusive community, concern for the poor, and social justice. (Er. Ex. 107; Tr. 1135–36.) There is no evidence in the record that the teaching responsibilities of adjunct faculty differ from the teaching responsibilities of full-time faculty.

The adjunct faculty is contractually required to abide by and support the religious mission of the College. The adjunct faculty must sign their letter of appointment agreeing that their status

⁵ Manhattan College does not differentiate between its expectations for full-time and adjunct faculty with regard to maintaining the Lasallian Catholic nature of the College. (Tr. 902–07, 1055–57). Many faculty members' status at the College fluctuates between full-time and adjunct status depending on the number of credit hours taught a semester. (Tr. 1113, 1322, 1416–17.) For example, Professor Paul Dinter, who appeared for Petitioner, has in the past five years been a full-time faculty member and alternatively an adjunct faculty member at Manhattan College. He testified that the "main difference" between adjuncts and full-time faculty at the College was merely that adjuncts do not have offices on campus. (Tr. 1321–222.) The term "faculty" in this brief is used to refer to both full-time and adjunct faculty.

as a faculty member “requires...[that they] fulfill the academic obligations of faculty members outlined in the Manhattan College Faculty Handbook and the Mission Statement of the College.” (Er. Exs. 94A, 127.) This is not a casual requirement or a “general or aspirational statement” as characterized by the Region. Order at 11–12. The College here is creating a contractual obligation with adjunct faculty in which adjunct faculty agree to support the religious mission. The *meaning* behind this message to adjunct faculty in the appointment letter is a religious question for the College to judge and not for the Board’s consideration or for the Board to endeavor to interpret. *See PLU* at 10, n.19 (“We will decline jurisdiction so long as the university’s public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations.”)

The College’s faculty is the primary conduit through which Manhattan College communicates its Catholic mission and core competencies to the students. 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.) The College’s Undergraduate Catalog, beyond the description of the Lasallian Catholic identity and the required nine credits in religion, sets forth the College-wide core competencies for all academic programs, which include, in pertinent part, fostering a reflection on faith, values, and ethics. (Pet. Ex. 15 at 11, 27–28.) The core competencies which students must demonstrate they have achieved cover “religious and ethical awareness” which include as indicia that students are making “decisions based on ethical concerns and transcendent moral values as articulated in Christianity” and that students “[u]nderstand that Manhattan is a Catholic institution....” (Pet. Ex. 15 at 11, 27–28.) Faculty, who are responsible for what is taught in the classroom, have the

primary responsibility for seeing that students achieve these core competencies, including the ones related to “religious and ethical awareness.” The College seeks to align curriculum with the achievement of the core competencies, assess the success of achieving these core competencies and is measured by accreditors on the progress toward achieving defined core competencies. (Er. Ex. 95 at 14–16; Er. Exs. 99, 100.) The faculty’s role in educating students so that they meet the particular Lasallian educational standards set by the College is clearly articulated by the College to faculty and is understood by them. As professionals, college faculty at Manhattan College or elsewhere, are not given detailed job descriptions or precise instructions on how to perform their duties; the established practice in higher education is that a professional with the appropriate subject matter expertise and experience will be given general direction on the subject matter to be covered and the specific educational goals and expectations of the higher education institution and the faculty member will fulfill these requirements and expectations within their professional judgment. (Tr. 1099, 1241–42, 1275–76, 1285–88, 1319–21, 1375–77; Er. Ex. 95 at 14–16; Er. Exs. 99, 100.)

President O’Donnell, at adjunct orientation and on other occasions, speaks to adjunct faculty about their teaching duties and makes clear that those teaching duties are not just professional subject-matter responsibilities, but also are rooted in “the Catholic intellectual tradition.” (Tr. 897–98.) President O’Donnell in meetings and presentations attended by new faculty emphasizes that “we take our identity as Catholic and Lasallian seriously and that we ask those who choose to join” the College “to do so with an appreciation of and willingness to participate in the fostering of that identity.” (Er. Ex. 995 at 16–17).

Provost Clyde also meets with adjuncts individually and in formal groups, including adjunct faculty orientation, which is specifically designed to ensure that adjuncts understand the

mission of the College and their responsibility to support that mission; Provost Clyde testified that "I say to them when I meet with them [adjuncts], they're teaching the same students that all our faculty are and so I need them to be prepared to engage...the same as all our faculty...." (Tr. 1056, 1063.) At Manhattan College there is a religious "motivation," "rational," "determination," and "commitment" to activities dealing with ethics, morals and service. (Tr. 1178.) The Provost conveys to faculty at "lectures, interviews... at public places and private places... [and] at orientation for adjuncts...." that Lasallian belief is what underlies their responsibilities as faculty members. (Tr. 1180.)

Manhattan College's hiring process and human resources documents unequivocally hold out adjunct faculty as having a role in maintaining the College's religious educational environment. The last page of the application requires the faculty applicant to sign a statement saying that he will "abide by the Mission Statement of Manhattan College." (Er. Ex. 14.) Once offered a position, adjunct faculty must sign a statement in affirmance of their agreement to abide by the mission of the College as follows: "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." (Er. Ex. 14; Er. Ex. 94D.) Faculty also sign acknowledgements of their receipt of additional publications and documents that set forth the details of a faculty member's responsibility to support the mission in their work with students; by requiring adjunct faculty members to sign these documents, the College is sending a clear and meaningful message to the prospective and hired adjunct faculty member that (1) the College is a Lasallian Catholic Institution and (2) that as a faculty member they are not only expected to perform their teaching duties as they would at a secular college, but they are further expected to support the religious mission of the institution. (Er. Exs. 14, 16, 66.)

The College gives all prospective faculty members “Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage,” which is a booklet that describes the responsibility of faculty to sustain the Catholic purpose of the College. (Er. Ex. 16 at 47; *see also* Er. Ex. 94B at signed copy of receipt.) The College encourages faculty to participate in formation programs and mission-oriented Core Identity Seminars designed to give lay faculty, administrators, and staff direction in how they can incorporate Catholic and Lasallian principles into their responsibilities on campus. (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.) The College pays for faculty to attend formation programs. (Er. Ex. 104 at 14–15; Tr. 1127.) The President testified that he tells adjunct faculty about the formation programs because they are eligible to participate. (Tr. 899.) The Core Identity Seminars are conducted by faculty who participated in external formation programs for other faculty on campus to learn how to incorporate core Lasallian values and Catholic intellectual traditions into their classroom instruction. (Er. Ex. 77 at 2–3; Er. Ex. 78.)

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.) 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, 1428.) The College would not be an accredited institution if it was not able to demonstrate that student learning conformed with the College’s mission, which can only be achieved if the faculty are fulfilling their teaching responsibilities to attain student competency in religious and ethical awareness; this is the faculty role in maintaining the religious educational environment at the College.

The Region determined that the College's requirement that faculty teach religious and ethical awareness is no different than secular college's teaching social responsibility or professional ethics in their engineering departments. Order at 13. While it may be accurate that both secular and sectarian institutions are required to teach professional codes of ethics, there is something more going on at Manhattan College; as Professor Hourani explained, what separates the College from secular institutions is that the College's commitment to teaching ethics goes beyond the professional code of ethics for engineers and is additionally motivated by its religious mission. (Tr. 1407–09.) Faculty members thus perform a religious function in the performance of their academic responsibilities by instructing students in the area of ethics.

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” or that a reasonable adjunct faculty member would conclude that his or her responsibilities have nothing to do with Manhattan College's religious educational mission.⁶ *PLU* at *12–13. The issue is not simply what the College has in common with secular colleges, as the Region frames the issue, but rather what is additionally required of Manhattan College faculty, including adjunct faculty, that would not be required of faculty at a secular institution of higher education. The additional requirements of faculty at Manhattan College are: to agree to abide by a faith-based mission, the obligation to prepare students to meet core competencies including religious and ethical awareness, and the responsibility to enable students to engage in the interplay between faith and reason consistent with the Catholic intellectual tradition.

For the reasons above the College meets both prongs of the *PLU* standard.

⁶ 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.”).

B. The Region Misapplied the *PLU* Standard and Engaged in Erroneous Factual Conclusions

The Region's Order relies on unsupported, erroneous and prejudicial factual assumptions and it misapplied and misinterpreted the *PLU* standard.

In the August 26th Order, the Region cites the *PLU* standard, but in its application of that standard adopts a standard more rigid than that which is required by the Board. For example, the August 26th Order uses the fact that the College "does not instruct adjunct faculty to proselytize or indoctrinate students" as proof of the College's failure to meet the second prong of the *PLU* test. Order at 9. The Region's reasoning here should not be affirmed. First, proselytization is not a requirement of the *PLU* test. 361 NLRB No. 157 at *12, n. 14. Second, 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.) The Board must understand that it is antithetical and may actually be offensive to Catholic teachings to require faculty to proselytize about Catholicism or indoctrinate students on Catholic beliefs in the classroom. Manhattan College is not a seminary but an institution of higher education providing college-level instruction. The College's decision not to require faculty to proselytize or indoctrinate students is in itself religiously motivated, it is a particularly Lasallian Catholic decision.

The Region cites the College's tolerance for diversity of beliefs among faculty and academic freedom as evidence of the College's failure to meet the *PLU* standard. Order at 9–10. The Region says that because "the College equally stressed academic freedom of the faculty" that is sending the message to faculty "that religion has no bearing on faculty members' job duties or responsibilities." Order at 12. First, there is no basis for the erroneous assumption that academic freedom translates into "religion has no bearing on faculty member's job duties" or negates all responsibility for faculty to support and promote the religious mission; academic

freedom is the ability of faculty to pursue their research and to teach about their findings and the research of others in their field in a robust and responsible manner. *See* fn.1, *supra*. As Professor Horn testified, academic freedom grants faculty the opportunity to engage in instruction on Catholic beliefs. (Tr. at 1384.) This finding demonstrates that Region does not understand what it means to be Lasallian Catholic. As President O'Donnell 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.) The Board must recognize, as the Region failed to do, that it is exactly because Manhattan College is Catholic that it welcomes diversity, encourages professional academic autonomy, academic freedom, and imposes no requirements that faculty indoctrinate students, proselytize, or receive Catholic sacraments. The Board and the Region cannot hold the College to the agency's definition of what it means be religious and how faculty at a religious institution should function. To affirm the Region's decision here based on its misguided application of the *PLU* standard would be to undermine the basic rights the Constitution protects.

The Region acknowledges that "the record demonstrates that adjunct faculty are repeatedly informed, both before and after they are hired, that they are expected to be aware of and respect the College's religious mission" and that "the College cited job advertisements, interviews, booklets, and public speeches by College leaders" in support of this point. Order at 12. Yet, the Region erroneously concludes that these representations to the adjunct faculty by the College are insufficient to meet prong two of *PLU*. The Region held that the College's communications to adjunct faculty regarding their responsibilities with regard to supporting the mission of the College are insufficient, generalized statements. *Id.* There are several problems with this holding. Primary among them is that the Region is substituting its judgment for that of

the Vatican on what is religiously sufficient, thereby entangling itself in a question of religion clearly prohibited by *Great Falls, Carroll College, Catholic Bishop* and the First Amendment. Further the mere fact that the College requires faculty to sign an affirmation that they are aware of and will respect the College's religious mission, combined with the record of job advertisements, interviews, informal conversations, publications, and public speeches by College leaders on the faculty role with regard to the mission is proof that the College is doing more than making a general connection between the mission and faculty; rather it is ensuring that a prospective applicant will conclude that performance of faculty responsibilities will require furtherance of the religious mission. *PLU* at *9. In fact, the appointment letter that adjunct faculty must sign is a contract agreeing to abide by the mission of the College. (*See e.g.* *Er. Exs.* 94A, 127.)

The Region further cites the fact that the College does not impose on adjunct faculty church affiliation and religious observance as a condition for hiring, does not require their attendance at religious services, and does not set hiring quotas based on religious affiliation as reasons for the College's failure to meet prong two of *PLU*. Order at 7. *PLU*, however, does not require loyalty oaths, attendance at services, or quotas. *PLU* at *10 ("We recognize that an institution that does not require faculty members to attend religious services or be a member of any particular faith may still hold out its faculty members as performing a religious function in the performance of their academic responsibilities.") Therefore Manhattan College, consistent with *PLU*, has no obligation to impose the Region's criteria and can satisfy the second prong by setting its own, College-specific criteria appropriate to the faculty's teaching duties and responsibilities. The Region's erroneous and prejudicial holding cannot be used as a basis for disqualifying Manhattan College under the second prong of the *PLU* test.

Catholic higher education is not the draconian system the Region demands it to be in its August 26th Order. The Region says that documents signed by adjuncts affirming their respect and agreement to abide by the mission do not satisfy the requirement that adjunct faculty are expected to “further” the mission. Order at 12. The Region faults the College for not requiring its faculty to serve as “religious advisors to students, propagate the Catholic faith” or conform “to the tenets of Catholicism.” While *PLU* proposes as examples of how a college might hold out petitioned-for faculty as performing a role in maintaining a religious educational environment, conforming to religious doctrine, serving as religious advisors, and engaging in religious indoctrination are not requirements for compliance with prong two and are not requirements set by the Catholic Church. *PLU* at *11–12. *PLU* cautions that its examples are “intended only to demonstrate that there must be a connection between the performance of a religious role and faculty members’ employment requirements.” *Id.* at *12, n. 14. The Region is using these examples instead as essential requirements to satisfy the *PLU* test and this is a prejudicial misapplication of the Board’s decision. The College has amply demonstrated that faculty member’s employment requirements include an agreement to abide by and respect the mission; that the College communicates to faculty members in meetings, booklets, interviews, and speeches how adjuncts, as teachers, fit into the religious mission; that it sets forth the requirement in the College’s core competencies that student’s be able to demonstrated they have learned religious and ethical awareness from their studies; and systemically promotes the emphasis on the interplay between faith and reason, ethical issues – social justice and service to the community. The Region has imposed in its August 26th Order requirements for compliance with *PLU* that were not set forth or intended by the Board.

Notably, the Region does not address in its August 26th Order the example proposed in *PLU*, regarding whether faculty integrate the mission into their teaching, likely because the College does do so by expecting that faculty educate students consistent with the required core competencies that include “religious and ethical awareness” and expecting that students be able to “[a]ssess conduct and make decisions based on ethical concerns and transcendent moral values as articulated in Christianity and other religious and philosophical traditions.” The evidence in the record that ethics based on the Catholic faith are a factor in the students’ education is similarly not accurately credited in the Region’s findings. The clear integration of mission with teaching is a basis for assessment of the curriculum and is part of the College’s accreditation process. The complete absence of this evidence in the Order is a prejudicial error and a basis for review of the Region’s determination. While the Region and Board take the unsupported position that the only way faculty can fulfill their duty is if the College gives specific compulsory directions on teaching duties, the College on the other hand understands that faculty, as teaching professionals who have received the various communications from the College regarding the connection between their role and the mission, will therefore align courses to achieve outcomes expected of their students.

The Region discounts the role of formation programs as a means for the College to communicate to all faculty their role in maintaining the mission of the College. Order at 13. The Region does so because faculty participation in formation programs is not mandatory, even though the Region recognizes that adjunct faculty have participated in formation programs. *Id.* This again demonstrates the misinterpretation of *PLU* and a profound lack of understanding of faculty in higher education. Faculty culture of higher education is not founded on compulsory conduct. *PLU* looks only at what the College holds out as the responsibility of faculty and

specifically states it will not look beyond those representations. Order at 11. Therefore, the fact that the College tells adjunct faculty about the formations programs so they can participate as part of their role in the religious mission, and the Region recognizes that adjuncts do participate, is sufficient to satisfy the standard of “whether a reasonable prospective applicant would conclude that performance of their faculty responsibilities would require furtherance of the university’s religious mission.” Order at 11 (quoting *PLU* at *9); (Tr. 899.) There is no requirement in *PLU* that any of these activities must be mandatory to satisfy the second prong. The faculty culture of higher education is not founded on compulsory conduct.

A final contradictory finding by the Region, not based in fact and inconsistent with the record, is that there is a difference between the teaching responsibilities of faculty who are full time and those who are adjunct. The Region does find correctly that “there is an overwhelming amount of evidence on how it holds out full time faculty and how its full time faculty members are expected to maintain the College’s religious environment, including its Distinguished Lasallian awards, formation programs, and full-time faculty interviews.” Order at 13. The Region then mistakenly leaps to the conclusion that “adjunct faculty are not subject to the same obligations as full time faculty.” *Id.* There is no basis in the record for this final conclusion. The testimony was clear that the primary role for all faculty is teaching; that adjuncts have the same teaching responsibilities as full-time faculty; that the only difference between adjuncts and full-time faculty is that adjuncts spend less time on campus, do not have offices, and may not be invited to departmental meetings; that adjuncts can and do fluctuate between full-time and adjunct status often based on course loads per semester; that adjuncts and regular faculty have to meet the same core competency expectations for their teaching; and that adjuncts are eligible for nomination for the Distinguished Lasallian award and participation in formation programs. (Tr.

at 899, 902-07, 974, 1055-57, 1063, 1113, 1321-22, 1416-17, 1428.) There is no evidence cited that College's expectations for full-time and adjunct faculty differ with regard to faculty obligations to support the religious mission. The Region's prejudicial, erroneous finding on this issue is also a basis for review and the record supports a finding that Manhattan College clearly satisfies both prongs of *PLU*.

The Region inexplicably focuses on what the College does not do, instead of focusing on the ways in which the College *does* hold out to the adjunct faculty their role with regard to supporting the mission. The Board must recognize that religiously-affiliated institutions will hold out faculty in different ways, depending on the culture of the college and the beliefs of the religion with which they are affiliated. For the Region and Board not to recognize these nuances is to undermine the assessment process and further demonstrates that administrative agencies are particularly ill-suited to evaluate issues of religious and Constitutional import.

CONCLUSION

For the foregoing reasons, the Board should grant review and decline to exercise jurisdiction over Manhattan College.

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Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By: /s/ Shelley Sanders Kehl
Shelley Sanders Kehl
E. Katherine Hajjar
600 Third Avenue, 22nd Floor
New York, New York 10016
Telephone: (646) 253-2300
Facsimile: (646) 253-2381
skehl@bsk.com
khajjar@bsk.com

Attorneys for Employer Manhattan College

CERTIFICATE OF SERVICE

The undersigned hereby certify that true and correct copy of the foregoing was filed electronically and copies were served via email on the following on this the 9th day of September, 2015:

Keith J. Gross
Office of Richard E. Casagrande
52 Broadway, 9th Floor
New York, New York 10004
kgross@nysutmail.org

Karen P. Fernbach
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
Karen.Fernbach@nllrb.gov

Stanley J. Brown
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
stanley.brown@hoganlovells.com

Elizabeth Meers
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Elizabeth.meers@hoganlovells.com

James B. Coppess
Katrina Dizon
American Federation of Labor and Congress of Industrial Organizations
General Counsel's Office
815 Sixteenth Street, NW
Washington, DC 20006
Jcoppess@afcio.org
kdizon@afcio.org

Jeffrey A. Berman
Seyfarth Shaw LLP
2029 Century Park East, Suite 3500
Los Angeles, CA 90067-3021
jberman@seyfarth.com

James M. Harris
Seyfarth Shaw LLP
2029 Century Park East, Suite 3500
Los Angeles, CA 90067-3021
jmharris@seyfarth.com

John J. Toner
Seyfarth Shaw LLP
975 F Street, NW
Washington, DC 20004
jtoner@seyfarth.com

Edward R. McNicholas
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
emcnicholas@sidley.com

Gordon D. Todd
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
gtodd@sidley.com

Paul D. Clement
Bancroft PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com

BOND, SCHOENECK & KING, PLLC

By: /s/ Shelley Sanders Kehl
Shelley Sanders Kehl
E. Katherine Hajjar
600 Third Avenue, 22nd Floor
New York, New York 10016
Telephone: (646) 253-2300
Facsimile: (646) 253-2381
skehl@bsk.com
khajjar@bsk.com

Attorneys for Employer Manhattan College