

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

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In the Matter of :

**MANHATTAN COLLEGE,** :

Employer, :

**Case No. 2-RC-23543**

- and - :

**MANHATTAN COLLEGE ADJUNCT** :

**FACULTY UNION, NYSUT, AFT-NEA/** :

**AFL-CIO,** :

Petitioner. :

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**EMPLOYER'S MEMORANDUM ON REVIEW  
OF A DECISION OF THE REGIONAL DIRECTOR**

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**Preliminary Statement**

On January 21, 2011, Manhattan College (“Manhattan” or “the College”) requested review of Region 2’s Decision and Direction of Election in *Manhattan College - and - Manhattan College Adjunct Faculty Union*, Case No. 2-RC-23543. On February 16, 2011, the Board granted review on the basis that the College’s request “raises substantial issues regarding the assertion of jurisdiction over the Employer and the receipt of Employer’s Exhibit 49 into the record.”<sup>1</sup>

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<sup>1</sup> The Request for Review was denied except as to the specific issues quoted above. While this Memorandum is limited to the issues as to which review was granted, the College respectfully reserves all other points raised in the Request for Review.

## Summary of Argument

This case presents fundamental issues of First Amendment religious liberty, both with respect to the right of the College to chart and define its own identity within the bounds of Lasallian Catholic doctrine, and with respect to the limits on government inquiry into matters of religious belief.

The College asserts that, inasmuch as it is a Catholic college, the petition to organize adjunct faculty cannot be processed for lack of jurisdiction under the Supreme Court's decision in *NLRB v Catholic Bishop*, 440 U.S. 490 (1979), and its progeny, *Bayamon*, *Great Falls*, and *Carroll College*.<sup>2</sup> Those cases make it clear that the Board may not assume jurisdiction over religiously-affiliated schools and colleges, because the assertion of jurisdiction necessarily implicates rights and interests protected by the First Amendment.

In *Catholic Bishop*, the Supreme Court ruled that the Act must be construed so as to avoid constitutional questions, and concluded that the Act does not authorize the Board to assert jurisdiction where entanglement in First Amendment religious matters would result. 440 U.S. at 504, 507. The Court further cautioned that the very process of inquiry into the religious "authenticity" of an institution may itself risk prohibited constitutional entanglement. 440 U.S. at 502.

The federal appellate courts have followed *Catholic Bishop* with a consistent series of decisions which set out parameters for the Board's permissible inquiry, and for the application of the First Amendment jurisdictional bar to religious colleges. Those decisions make it abundantly clear that the Board must, consistent with the preservation of religious

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<sup>2</sup> *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1<sup>st</sup> Cir. 1986); *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002); *Carroll College v. NLRB*, 558 F.3d 556 (D.C. Cir. 2009).

liberties, frame its analysis in the confines of a three-part test to determine: (a) whether a college seeking constitutional protection holds itself out to the public as providing a religious educational environment; (b) whether the college is a legitimate not-for-profit entity; and (c) whether the college is affiliated with, controlled, or recognized by, a religious group. Those proscriptions and limitations were ignored by the Region in this case.

The Acting Regional Director, applying the Region's unilateral interpretation of the tenets and doctrine of the Roman Catholic faith, found that that the purpose of Manhattan College is secular and not the "propagation" of a religious faith. "Where, as in the instant case, a school's stated purpose does not involve the propagation of religious faith, teachers are not required to adhere to or promote religious tenets, a religious order does not exercise control over the hiring, firing and day-to-day operations, and teachers are given academic freedom, this risk of entanglement is obviated." *Decision Below*, at p. 21. Inherent in this decision was a government determination that a present-day Catholic college requires the forcible inculcation of religious belief, a rigid and unswerving enforcement of religious doctrine, and antipathy to academic freedom on the part of persons who participate in Catholic college life. Quite apart from the fact that these conclusions are simply wrong and contrary to the record, they exceed any permissible mandate afforded to any government authority by the United States Constitution.

Notwithstanding his decision as quoted above, the Acting Regional Director did recognize the courts have refused to enforce the Board's standard of "propagation," and have adopted a different test, which the Board has chosen to honor on a sporadic (and wholly idiosyncratic) basis:

"The D.C. Circuit has refused to enforce Board cases asserting jurisdiction based on the Board's test. Instead, the D.C. Circuit has set forth a test in which an organization is exempted from the Act if it: (a)

holds itself out to students, faculty and community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. [Citing *Great Falls v. NLRB*]. *The Board has not adopted the D.C. Circuit test, but it has applied that test for the purpose of particular cases.*”

*Decision Below*, at p. 21 (emphasis supplied).

The Acting Regional Director then purported to apply the three-part *Great Falls* test to Manhattan College, but determined that the College did not satisfy that test because, he concluded, the College does not hold itself out to the public as providing a religious educational environment. To arrive at this conclusion, which flies in the face of a detailed record to the contrary, the Acting Regional Director was compelled to engage in extraordinary contortions of fact. The record clearly demonstrates the pervasive presence at Manhattan College – on its campus, in its literature, and in its legal operational documents – of the Catholic religion, particularly as personified by Saint John Baptist De La Salle. He is the beatified and canonized Roman Catholic patron saint of teachers who founded the Institute of the Brothers of the Christian Schools (“Christian Brothers”) which established the College, which remains part of the College, and which continues to have a defined active role in the governance of the College. The record further demonstrates that the distinct term “Lasallian” is consistently used to define a fundamental aspect of the Catholic religious identity of the College. Notwithstanding, the Acting Regional Director decided that these pervasive Lasallian references, requirements and symbols had become “purely secular” and were not indicative of a religious affiliation to the “Church, religion or Catholicism.” *Decision Below*, at p. 22-23.

Having discounted the Lasallian Catholic identity of the College, the Acting Regional Director then reverted to the same faulty religious assumptions on which he had relied

to determine that the College did not have as its purpose the “propagation” of a religious faith: *i.e.*, his belief that it is not “Catholic” for a college to be accredited as an institution of higher learning, to respect academic freedom, to promote diversity, to honor excellence in teaching, to admit and hire non-Catholics who respect the College’s Catholic mission, and to encourage (but not force) participation in religious observance. *Decision Below*, at p. 22-23. He ignored extensive testimony about the Catholic indicia, activities and identity of the College in assessing whether the College presented itself to students, families, prospective employees and the community as providing a religious educational environment.

In the decision below, there are significant misapplications of law, misstatements and misinterpretations of fact, and (perhaps most disturbingly) material omissions of facts and portions of evidence in the record, all of which form a compelling basis for reversal. The decision goes so far as to reach conclusions which are explicitly based on materials which were *not* admitted in evidence, and consistently omits reference to (or acknowledgment of the existence of) unchallenged testimony and supporting exhibits which directly contradict the Acting Regional Director’s conclusions. This selective application of the record, rather than use of the record as a whole, severely prejudiced Manhattan College’s right to an accurate and fair application of the facts, and not incidentally violated the College’s First Amendment rights.

The Acting Regional Director purported to apply a test that neither he nor the Board has defined or applied with any consistency, or in a manner that can be understood. This approach suffers from three fundamental infirmities:

- First, any requirement of “propagation of religious faith” remains undefined – and, in fact, *cannot* be defined because to do so inherently involves the government



in establishing what it believes to constitute the acceptable practices of a religion, thus deciding which religious institutions are entitled to constitutional protection (or not).

- Second, the Board has not articulated any sort of “bright-line” test to distinguish between secular activity and religious activity in a religiously-affiliated college or university. Any analysis of this nature implicates the government in usurping the religious entity’s own right to determine what activities are religious.

- Finally, while the Acting Regional Director took the position that appellate court decisions defining the Board’s jurisdiction are not binding on the Board – an interpretation which we believe is contrary to the law – he simultaneously proceeded to interpret those decisions in a manner which the very courts rendering them have explicitly criticized.

The constitutional issues raised by this case bear directly on the issue of NLRB jurisdiction. In *Carroll College*, the Circuit Court for the District of Columbia Circuit specifically exercised its Article III authority to define agency jurisdiction under the Act and to set the constitutional parameters for permissible analysis. There is, accordingly, a compelling reason at this time for the Board to reconsider its previous position on the appropriate test to be applied to religiously-affiliated colleges.

It is clear that the prohibition against “entanglement” applies not just to issues which may arise in Board administration of labor relationships at religiously-affiliated institutions, but, more fundamentally, to the process of inquiry itself when the Board is called upon to determine the “authenticity” of a religious college’s identity and mission. It was this threshold constitutional issue that led the courts to develop the bright-line test created in *Great Falls* and confirmed in *Carroll College*. The analysis of constitutional restrictions on government intrusion is the proper province of the courts, and the Acting Regional Director had

no choice but to acknowledge that the courts have rejected the NLRB’s “propagation” test and consistently refused to enforce Board jurisdiction over religiously-affiliated colleges. The time has come to accept and follow the case law doctrine which the courts, in the exercise of their own constitutional authority, have articulated.

## ARGUMENT

### **POINT I: THE ACTING REGIONAL DIRECTOR’S SELECTIVE REVIEW OF THE RECORD WAS PREJUDICIAL**

The facts selected by the Acting Regional Director systemically fail to reflect the record as a whole, and provide a materially incomplete account of the uncontested (and credible) facts in the record. The extent of those omissions vitiates the legitimacy of the decision.<sup>3</sup>

The Acting Regional Director’s decision begins with a description of the College’s governance structure – but while it mentions that the “Brother Provincial” (the head of the Order of the Christian Brothers in the New York District) serves on the Board of Trustees (*Decision Below*, at p. 3), it fails to address the Trustees’ reasoning for amending the By-Laws to add the Provincial as a legally-required (as opposed to simply a traditional) member of the Board. As set forth in its December, 2001 minutes,<sup>4</sup> the Board of Trustees wanted to assure that the Brother Provincial would be a member of the Board, its Vice-Chair, and a member of the

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<sup>3</sup>Indeed, the very first factual recitation made by the Acting Regional Director was wrong. In that recitation, he stated that in its earlier 1999 decision, the NLRB properly asserted jurisdiction over the College involving a unit of “full time and regular part time faculty employed by the College.” *Decision Below*, at p. 2. However, the unit as to which an election was then directed specifically excluded both part time and adjunct faculty, as set forth in a November 24, 1999 corrective ruling by the then-Regional Director. Not only does this recitation demonstrate a lack of regard for the integrity of factual statements, but it vividly underscores the infirmity of “incorporating” an earlier “record” – for the purpose of limiting the College’s proof – where the Region manifestly has little or no information about what was in a record which it discarded. In the election directed and supervised by the Board, the College’s full-time faculty voted by a decisive margin not to unionize.

<sup>4</sup> Pet. Exh. 8.

Board's Executive Committee, as against the possibility that the President of the College might not be a Christian Brother in the future.

The Acting Regional Director's decision goes on to say that the by-laws do not specify the duties and powers of the Brother Provincial. *Decision Below*, at p. 4. This purported factual finding ignores the portion of Article II of the College By-Laws which states: "[u]nder Canon Law, the Brother Provincial or the Brother designated by the Brother Provincial would be considered a 'Juridic Person.'"<sup>5</sup> Clearly, the By-Laws recognize that the Brother Provincial has legal status going beyond that of a casual invitee, but the Acting Regional Director did not respond either to the record or to the College's specific citation of the "juridic person" language in its post-hearing brief. Similarly, the decision also fails to cite the testimony of the Chairman of the Board of Trustees that when he is not presiding at a meeting of the Board or the Executive Committee, the Brother Provincial presides in his absence.<sup>6</sup> While the decision recognizes that the Provincial is a mandatory member of the Executive Committee, it neglects to mention that the Executive Committee also serves as the Nominating Committee for Trustees;<sup>7</sup> fails to note that Christian Brother members of the Board sit on *every* major Board committee, including Finance, Student Life, Academic Affairs and Admissions<sup>8</sup>; and omits the testimony of the Chair that *there are only two non-Catholics* on the 38-person Board of Trustees.<sup>9</sup>

Similarly overlooked by the Acting Regional Director was the Chairman of the Board's detailed testimony about the central role of the Brother Provincial, and the attention which was given to the Catholic identity of the College, in the search process for the recently-

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<sup>5</sup> Resp. Exh. 6, at p. 2. Under Catholic canon law, the phrase "juridic person" is used to recognize the conferral of institutional status.

<sup>6</sup> Tr. 774.

<sup>7</sup> Resp. Exh. 6, at p. 11.

<sup>8</sup> Resp. Exh. 7.

<sup>9</sup> Tr. 752.

appointed President of the College. Chairman O'Malley testified that Brother Frank Byrne, who was the Brother Provincial at the time of the search, attended every search committee meeting and played an active role, concentrating on the theological and religious issues. "I understood, as the Board's chair, that without the agreement of the Provincial it would be very hard for me to get the two-thirds vote that I would require. It's not a simple majority to elect a president.... And Frank Byrne played a crucial role in that."<sup>10</sup> In the search process itself, Chairman O'Malley testified that:

"[W]e asked the candidate to tell us what they would do to continue the mission of the college, and from our perspective it really was plain and simply, this is a Catholic College, we promote the idea of Catholicism, not exclusively, we accept all races, creeds, colors at the College, but we wanted to be clear that this was a school that had a church on the campus, in fact ... it actually has three [churches], that the identity of the school can't be confusing because you can find a crucifix basically on every building and in every classroom. You can find religious art spread around campus. We have a mission, you can receive the sacrament basically on a daily basis. Yeah, there is a daily mass at the campus. And we wanted to make sure whoever was chosen would be familiar with Catholicism, and not just Catholicism in the very general terms that I might be familiar with it, but with its more detailed theology."<sup>11</sup>

The Acting Regional Director's decision neglected to mention the prayers that open every Board of Trustees meeting, Executive Committee meeting, and virtually every other Board committee meeting. Chairman O'Malley testified about the prayer ("A Reading from St. Paul's First Letter to the Corinthians") which was said at the Trustees meeting held during October 2010:<sup>12</sup>

"The closure of every prayer said at Manhattan College says 'St. John Baptist De La Salle,' that would be in this case Brother Frank reading it, and the Board would respond 'Pray for Us,' and that's followed by 'Live Jesus in our hearts'.... And I can tell you that as a family we use the same

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<sup>10</sup> Tr. 759-760.

<sup>11</sup> Tr. 757-758.

<sup>12</sup> Tr. 754; Resp. Exh. 56.

closure ... and it's the one that hasn't varied since my attendance at Manhattan College in 1959....”<sup>13</sup>

In fact, the Hearing Officer – possibly seeing it as his role to make a detailed record of the prayers involved – questioned Chairman O’Malley about the details of prayers, who reads them, and whether they are always the same, in response to which Mr. O’Malley explained that they are different, often involve participatory, responsive readings by the entire Board and are based on “scripture and Catholic theology.”<sup>14</sup>

The Acting Regional Director’s decision did acknowledge that in 2002, Manhattan College entered into a new formal agreement with the Catholic Order of the Christian Brothers. That agreement, titled the *Sponsorship Covenant*, renewed the continued affiliation of the College with the Order and lays out part of the blueprint for maintaining the College’s Catholic mission.<sup>15</sup> Although the decision below includes quotes from the *Covenant*, it does *not* quote those portions of the *Covenant* which describe the Catholic identity of Manhattan College. Thus, omitted from the Region’s decision is the passage from the Sponsorship Covenant which states that:

“This relationship gives Manhattan its distinctive identity through the actualization of its Catholic identity; the clear definition of its Mission.... a desire to be faithful to the teachings of Vatican Council II and its emphasis on the role of the laity in the Catholic Church and on ecumenism ... the evolution of our global, pluralistic and interdependent world.”<sup>16</sup>

The Acting Regional Director quotes that section of the Sponsorship Covenant which describes that due to the dwindling numbers of Christian Brothers, “a smaller number of Brothers ... articulate the Lasallian tradition ... in collaboration with a significant number of [lay]

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<sup>13</sup> Tr. 754-755.

<sup>14</sup> Tr. 755.

<sup>15</sup> Resp. Exh. 9.

<sup>16</sup> *Id.*, p. 1.

colleagues...” (*Decision Below*, at pp. 4-5; ellipses appear in the Acting Regional Director’s original text). However, his final ellipsis conceals a significant omission from the text of the *Covenant*. The full paragraph is reproduced below, with the omitted text marked in **bold**:

“In the past, the Brothers’ influence on Manhattan College resulted from large numbers of Brothers working in every facet of the College. Now a smaller number of Brothers, dispersed throughout the College by virtue of each one’s specific expertise, articulate the Lasallian tradition **and witness its effectiveness** in collaboration with a significant number of colleagues **who choose to enlarge their roles at Manhattan to include the religious and ethical education of our students.**”<sup>17</sup>

Although not quoted by the Acting Regional Director, the *Sponsorship Covenant* also speaks about the faculty as committed to teaching excellence, and who “*witness* the intrinsic worth of both faith and science, and cultivate an atmosphere conducive to both.”<sup>18</sup>

Also not recognized in the decision below is the *Sponsorship Covenant*’s forceful statement that “the Mission and corporate purposes of the College” derive from its “continuing reality as a Catholic college in the Lasallian tradition”; that it is “guided by the moral, spiritual and religious inspiration of the Catholic tradition”; and that it “derives inspiration from the religious faith and educational ideas of John Baptist de La Salle as preserved and transmitted by the Institute of the Brothers of the Christian Schools,” and that its mission is fulfilled by the “personal and religious development” of its students.<sup>19</sup>

There are also material selective omissions in the Acting Regional Director’s discussion of the creation of the new position of Vice President for Mission, called for in the *Sponsorship Covenant*, which is a high ranking post to be filled in consultation with the Brother Provincial. As quoted by the Acting Regional Director, the *Covenant* describes the “Vice

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<sup>17</sup> Resp. Exh. 9, p. 1.

<sup>18</sup> *Ibid.* (emphasis supplied). We note in this context that the verb “witness” is used in its accepted definition as a proclamation of Christian faith.

<sup>19</sup> *Id.*, at p. 2.

President of Mission’s role as to assist the President and the College community in its understanding of the College’s Mission and Lasallian Catholic identity.” *Decision Below*, at pp.

5-6. What the Acting Regional Director edited out is shown in **bold** below:

“[T]he President will consult with the Brother provincial to employ a qualified Lasallian Educator to assist the President and the College community in its understanding **and realization** of the College’s Mission and Lasallian Catholic identity.”<sup>20</sup>

Similarly omitted is the balance of the paragraph, which speaks of the Vice President’s duties to “encourage, assist, coordinate, educate, evaluate and report on all the varied endeavors **relevant to ensuring that the Lasallian Catholic character of Manhattan thrives.**”<sup>21</sup>

In defining the ongoing role of the Christian Brothers at Manhattan College, the *Sponsorship Covenant* commits the Order both to continue and to expand activities for “administrators and faculty interested in a deeper understanding of the vision of De La Salle, Lasallian educational philosophy and practice and Lasallian spirituality.... [including] [t]he Mass of the Holy Spirit, the Mass of De La Salle and other appropriate liturgical events, in collaboration with the Campus Ministry team.”<sup>22</sup> The Acting Regional Director made no mention of this commitment to Catholic religious observance on the campus.

The Acting Regional Director made no acknowledgement of – and apparently attached no importance to – the extensive and un rebutted testimony of the Chairman of the College’s Board of Trustees about the Trustees’ absolute commitment to the Catholic mission and identity of the College, to the maintenance of its Catholic activities and education, to the daily celebration of the Catholic Mass and the Sacraments, to the prevalence of Catholic art and

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<sup>20</sup> *Id.*, at p. 3 (emphasis supplied).

<sup>21</sup> *Ibid.* (emphasis supplied).

<sup>22</sup> *Id.*, at p. 4.

religious symbolism on campus, and to the financial generosity of alumni who support the continued Catholic identity of Manhattan College.<sup>23</sup>

Except for a single passing reference at page 11 of the decision below, there is no acknowledgment of the testimony and exhibits in the record explaining the impact that the Apostolic Constitution *Ex Corde Ecclesiae* had on Catholic colleges around the world, including Manhattan College, in the examination of Catholic identity and what it means to be a Catholic college.<sup>24</sup> Three of the most important exhibits in the record are the *Sponsorship Covenant*,<sup>25</sup> the Board of Trustees Report: *Manhattan College: Lasallian, Catholic, and Independent* (referred to in the decision below as the “Trustees Report”),<sup>26</sup> and *Manhattan College: An Introduction to the Catholic Culture and to our Lasallian Heritage* (referred to in the decision as the “Introduction Booklet”).<sup>27</sup> These exhibits, as well as testimony from Vice President Barbara Fabé<sup>28</sup> and Dr. William Merriman,<sup>29</sup> detail the extensive examination and re-commitment to Catholic (and, specifically, Lasallian Catholic) values and issues of identity which were undertaken in response to the Vatican’s issuance of *Ex Corde Ecclesiae*. This evidence received no attention whatever in the decision below.

Indeed, subsequent to the close of the record in the proceedings below, the United States Conference of Catholic Bishops sent a letter to the presidents of American Catholic colleges – including Manhattan College – setting out the process for a ten-year review of each Catholic college’s response to *Ex Corde Ecclesiae*. to commence in Spring 2011 “with a

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<sup>23</sup> Tr. 762-763, 772-773, 777.

<sup>24</sup> We assume that the NLRB will agree that it is the Church of Rome, rather than the United States government, which has primary jurisdiction over what it means to be a Roman Catholic.

<sup>25</sup> Resp. Exh. 9.

<sup>26</sup> Res. Exhs. 14 and 16.

<sup>27</sup> Resp. Exh. 16.

<sup>28</sup> Tr. 64-65.

<sup>29</sup> Tr. 252.



conversation between the local bishop and each university president [of a Catholic college] within his diocese,” which will be organized around the questions of “Catholic Identity and Mission,” “Communion With the Church,” “Incorporation of the Norms [of *Ex Corde Ecclesiae*],” “Service to the Wider Church and Society,” and “Continued Cooperation” between the bishop and each individual college president in the diocese. A copy of the Bishops’ letter is annexed to this Memorandum as Appendix 1. We respectfully submit that it is additional compelling evidence of the fundamental Catholic identity of Manhattan College.

Material omissions also abound in the portion of the decision below which addresses student life at Manhattan College. Not only did the Acting Regional Director disregarded extensive testimony about student life and education at the College,<sup>30</sup> but also fifteen exhibits documenting the Catholic experience for students at the College.<sup>31</sup> Notwithstanding the wealth of factual material in the record to which he could have referred but chose to ignore, the Acting Regional Director, on his own initiative, admitted into evidence a document which had merely been marked for purposes of identification (Resp. Exh. 49 for identification), but which had never been offered in evidence. The Acting Regional Director then proceeded to analyze that non-exhibit, recognizing that it included “certain references to St. John Baptist de La Salle” and “various references to Lasallian education,”<sup>32</sup> but which, he inexplicably concluded, “does not include any reference to the Catholic Church or Catholicism,” and “contains no reference whatsoever to religion, faith or the Church.” *Decision Below*, at p. 7.

Leaving aside the Acting Regional Director’s total lack of qualification to decide that references to Saint John Baptist de La Salle are not references to Catholicism or the Catholic

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<sup>30</sup> Tr. 224-235, 237-243, 246-283.

<sup>31</sup> Resp. Exhs. 20-24, 26-33, 35, 47.

<sup>32</sup> In fact, not counting pictorial representations, the document contains no fewer than thirteen separate references to Saint John Baptist de la Salle and/or Lasallian education

Church, his discussion also fails to note that the same document speaks of a “student-teacher community that is Catholic.” His decision fails to note the many prominent pictorial (iconic) representations in the document of crosses atop campus buildings, the interior of one of the campus churches, three statues of Saint John Baptist de La Salle (including a full-page color photograph of one of the statues, in his Christian Brothers habit), and depictions of Christian Brothers interacting with students.<sup>33</sup>

Among the exhibits describing the student experience at Manhattan College that were *not* described by the Acting Regional Director were:

- Resp. Exh. 20, describing the Office of Campus Ministry and Social Action. Directed at students, this document identifies the College as a “Lasallian Catholic Institution” intended “to foster the values of ‘Faith, Service and Community.’” The document discusses “faith,” “spirituality,” “liturgies,” and “prayer and worship opportunities.” It specifically informs students that “Mass is available both on weekdays and on Sunday,” and that Campus Ministry “assists members of the campus community interested in becoming Catholic or receiving sacraments” and provides “pastoral counseling.”
- Resp. Exh. 21, a brochure about Campus Ministry, which gives information about the times of the day Mass is offered, the availability of retreats throughout the year, service learning opportunities for students, assistance to students who want to become Catholic or receive the sacraments, and information about programs for students to develop personal faith and spirituality through service opportunities
- Resp. Exhs. 22 and 23, which are brochures for students about opportunities to become Lasallian Volunteers and serve for a year in Lasallian programs around the United States helping the poor and living in Christian Brothers communities. Resp. Exh. 23 features a prominent picture of a recent Manhattan College graduate who was one of eight Lasallian Volunteers that year.<sup>34</sup>
- Resp. Exh. 26 (“Lasallian Opportunities for Students”), which lists opportunities for students “who wish to engage more directly in the Lasallian mission of the college” through the Lasallian Scholars Program

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<sup>33</sup> *Ibid.*

<sup>34</sup> Tr. 235-236.

(for graduates of Lasallian high schools who are admitted to the College and wish to be campus leaders “advancing awareness and understanding of the Lasallian mission among their peers”), and through Lasallian Collegians (a student group with the motto “Faith, Service, Community”).

- Resp. Exh. 27 (*Manhattan College: A Lasallian Educational Community*), which is a paper that had been provided to new students which describes the history of the College and the Christian Brothers. It explains that the Christian Brothers’ motivation to teach “could come only from the love and grace of God”; that the teachers of the Order represent “the love of God and the person of Jesus Christ to the students”; that “John Baptist de la Salle desired that the students accept a behavior that would reflect their love and respect for God and the Church”; that “the greatest motivation for good human behavior is God”; that “[t]he expressions of God’s love for us are summarized in the mission of Jesus on earth”; and that the motivation which arises from these understandings “is at the heart of the Lasallian Educational Vision, it is at the heart of a Lasallian School, and today it is at the heart of **Manhattan College**.” (Emphasis in original). The paper stresses the core value at the College of “acceptance of and respect for the inherent dignity of each member of the academic community because he or she is created and loved by God.” The brochure ends with the closing prayer “Live Jesus in our hearts. Forever!”
- Resp. Exh. 28, which is a brochure from Campus Ministry on Liturgical Life describing the available times for Mass, Bible study, preparation for becoming Catholic, Baptism, Confirmation, First Eucharist and social action. Resp. Exhs. 29 and 30 are posters for campus from Father Hill (the campus priest) and Campus Ministry about the rite of Christian Initiation for Adults, with classes on Baptism, Holy Communion and Confirmation beginning in September. Resp. Exhs. 31 and 32 are posters for student retreats to “Reflect, Relax, Pray and Laugh,” and “Explore your Faith.”
- Resp. Exh. 33, the schedule for New Student Orientation, which begins in the Chapel of De La Salle and has a Lasallian Family Presentation as the first discussion, led by Brother Charles and the staff of Campus Ministry. Both the Lasallian Walking Tour of Campus and the Student Life Presentation are conducted by members of Campus Ministry.
- Resp. Exh. 35, the program for the Manhattan College Founders Day celebration, which is an event involving many students participating in the program both as singers and as readers of Catholic religious writings. The cover is a photograph of the stained glass window of Saint John Baptist de Las Salle, with his saintly halo, in the College’s Chapel of the Holy Infancy. The program opens with the statements:

Let us remember  
That we are in the holy presence of God!  
St. John Baptist De La Salle  
pray for us!  
Live Jesus in our hearts,  
forever!

- Resp. Exh. 47, the program of the 2010 Manhattan College Saint La Salle Honors Night, which is an event commemorating the College's offer of admission to a select group of highly accomplished high school seniors to the prestigious St. La Salle Honor Society, dedicated to Saint John Baptist de la Salle, the Catholic Church's patron saint of teachers.

All of the foregoing are materials that would be seen or received by prospective and new students, family and visitors on the College's campus.

The assertion by the Region that the College does not present itself as Catholic to students and their families, and is not considered to be a Catholic college by the public, is not merely without support in the record; rather, it is thoroughly disproven both by the documentary record and by the testimony of the Chairman of the Board, who explained that the student body of Manhattan College is 65% Catholic in a geographic region that is only 35% Catholic, and that, for example, the Graduation Mass is a standing-room-only event.<sup>35</sup> Dr. William Merriman, a long-time faculty member, the Dean of the School of Education, and the Interim Provost, testified that he meets prospective students when they visit campus and speaks to them and their parents about the Catholic identity of the College.<sup>36</sup>

The decision below recognizes that religious studies courses are required, but does not make it clear that the requirement of nine credits (three courses) in Religious Studies is the *only* graduation curricular requirement that is the same for *all* students at Manhattan College, regardless of School or major, and represents more credits than most Schools at Manhattan

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<sup>35</sup> Tr. 762, 773, 775.

<sup>36</sup> Tr. 276.

College require students to complete for the English requirement.<sup>37</sup> There was uncontested testimony that the long-standing nine-credit Religious Studies requirement was changed recently so that *all* students are mandated to take one of their religious studies courses in Catholic studies.<sup>38</sup>

The Acting Regional Director attempted to dilute this requirement by stating that the required courses in Catholic studies are “academic in nature”: he stated that “the required Catholic studies course is an academic course on the Catholic intellectual tradition and does not require students to learn prayers, learn Catholic rituals, or express Christian faith.”<sup>39</sup> *Decision Below*, at p. 8-9. Relying on the union’s primary witness, Joseph Fahey of the Religious Studies Department, the decision below quotes him as explaining that the current Catholic Studies course involves the “study of Catholic ethics, **rituals** or teaching, but not to make people Catholic” (emphasis supplied), which Prof. Fahey purported to contrast with the purpose of the College in 1966 when he first joined the faculty, which was “to indoctrinate students into the Catholic faith and to proselytize students ... to make them Catholic.” *Id.*, at p. 9.<sup>40</sup>

The Acting Regional Director apparently ignored the rest of Prof. Fahey’s testimony regarding the required course in Catholic studies: he testified that it “is a course in Catholic studies which is a course that deals with Catholic **rituals**, or Catholic **dogma** and **teaching**, or Catholic **ethics**.”<sup>41</sup> Thus, the Union’s own principal witness contradicted the

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<sup>37</sup> Pet. Exh. 2, pp. 80, 93, 101, 134, 155.

<sup>38</sup> *Decision Below*, at p. 8.

<sup>39</sup> The Board may wish to reflect on whether any secular institutions of higher education require all of their students to take nine credits in religious studies, or *any* courses about Roman Catholicism. We submit that no such secular institution will be found.

<sup>40</sup> Prof. Fahey’s attempt to “create” a requirement from 1966 that required students to be proselytized was belied by his own testimony that he had never done so (Tr. 495), and by Board Chairman O’Malley’s testimony not only that when he was a student from 1959 to 1963, he was not indoctrinated (Tr. 765), but also that this is not how students are brought to faith. (*Ibid.*).

<sup>41</sup> Tr. 449 (emphasis supplied).

conclusions of the Acting Regional Director that the Catholic studies courses do not deal with ritual or dogma.

Moreover, the Acting Regional Director's conclusion is directly belied by the statement of "College-wide Core Goals, Competencies and Learning Objectives" which appears prominently in the Manhattan College *Catalogue*.<sup>42</sup> Of the seven "core competencies" that every Manhattan College graduate is supposed to gain, the last is "Religious and ethical awareness."<sup>43</sup> Of the ten "learning objectives which students are expected to fulfill by the completion of their academic programs, the last two are as follows:

- “● Assess conduct and make decisions based on ethical concerns and transcendent moral values as articulated in Christianity and other religious and philosophical traditions.
- “● Understand that Manhattan is a Catholic institution, committed to respect for individual dignity and social justice.”<sup>44</sup>

Neither Prof. Fahey, the union, the Acting Regional Director, nor any precedent under the National Labor Relations Act could offer any example of a secular college which demonstrates Manhattan College's commitment to Roman Catholic beliefs, practices, symbols and values. The suggestion that these are all mere vestiges at a secular institution ignores the record, and demonstrates a profound insensitivity to established First Amendment jurisprudence.

The final section of the Region's decision deals with the hiring of adjunct faculty, and purports to summarize the content of the various materials provided to job candidates and new faculty about the Catholic mission and identity of the College. *Decision Below*, at pp. 9-15. While the Acting Regional Director discussed some aspects of those materials as they bear on Catholic identity, what he omitted to discuss is clearly material. The Board of Trustees Report,

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<sup>42</sup> Pet. Exh. 2, p. 22

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

*Manhattan College: Lasallian Catholic and Independent*,<sup>45</sup> which is included as an insert to the job application given to all job candidates, sets out the historical and contemporary context of the College's Catholic Mission. What the Acting Regional Director did *not* acknowledge was the Report's explanation of contemporary Catholic theological thought, including references to the "more open and less monolithic ecclesiology espoused by Vatican Council II,"<sup>46</sup> demographic changes to the Catholic community from "ghettoized immigrant status," resulting in "the consequent collapse of a monolithic Catholic culture,"<sup>47</sup> and, most important, what it means to be Catholic in an evolving world and an evolving Catholic Church:

"Finally the event of Vatican Council II produced a new stance of the Catholic Church towards the modern world, a new openness to other religious traditions, a greater emphasis on the role of laity in the Church as the people of God, a new respect for religious freedom and personal conscience, new theological methodologies, a better appreciation of the Bible, a revised and vernacular liturgy, and more theologically based devotional practices. Suddenly, without touching the substance of the Catholic faith, there was more than one way for a person or an institution to be Catholic."

"These developments were bound to have a profound influence on the way Manhattan presented itself as Catholic."<sup>48</sup>

Thus, the Manhattan College Board of Trustees, after careful analysis of contemporary Catholic thought, reached the conclusion that there is "more than one way for a person or an institution to be Catholic." The Acting Regional Director disagreed with this, although it was not his province to do so.

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<sup>45</sup> Resp. Exhs. 14, 16.

<sup>46</sup> Resp. Exh. 14, at p.1.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Id.* at pp. 9-10.

In reviewing how the Catholic mission is shared between the Christian Brothers and the lay faculty of the College, the *Trustees' Report* states that the shared mission is based on a conviction that,

“God is calling each one of us according to his or her own vocation to accomplish the mission confided to St. John Baptist de La Salle.... Whether we are Christians, members of another religion or humanists, we are called to take our place in the mission that the Institute receives from God whose Spirit is at work in every culture and every religious tradition.”<sup>49</sup>

The *Trustees' Report* goes on to make it clear that this openness to participation in the Lasallian Mission is not some sort of euphemism to explain a secularized College environment; rather, the *Report* stresses that, “With the phrase ‘founded upon the Lasallian Catholic tradition,’ the College’s mission statement affirms the inextricable link between being Lasallian and being Catholic. The Lasallian tradition arises and flourishes in the Roman Catholic tradition.”<sup>50</sup> Moreover, the *Report* makes it absolutely clear that references to the Lasallian tradition are not, as the decision below would have it, a mere historical “nod” to a now-severed relationship:

“[T]he Board of Trustees interprets the reference in its mission statement to the College ‘founded on the Lasallian Catholic tradition’ to relate not only to an historical fact *but to a present reality*. \*\*\* The Brothers continue to have a presence and an influence in spite of dwindling numbers, as has been noted. *The ‘critical mass’ of Catholics continues strong in the college population, including administrators, faculty, staff and students, albeit mixed with larger numbers of non-Catholics, especially on the faculty. The nine credits in religious studies required of all students, with strong offerings in Catholic studies, is a guarantee that religion in the curriculum will not be marginalized.* \*\*\* The campus ministry and social action programs, professionally staffed and funded, *are well patronized, with the Catholic sacraments of Eucharist and reconciliation offered on a regular basis, marriage and baptism on occasion. Student retreats off-campus and prayer experiences on-campus continue to attract significant numbers of students, while religious statues and symbols are displayed at strategic places on the campus. Even a*

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<sup>49</sup> *Id.* at pp. 7-8.

<sup>50</sup> *Id.* at p. 8.



*casual visitor to the campus could not but be struck by the evidence that Manhattan remains a Catholic campus.*

*“At the same time, the College has no intention of tying its Catholic identity to the policies and practices of the pre-Vatican II era. There is no intention on the part of the Board, the administration or the faculty to impose church affiliation and religious observance as a condition for hiring or admission, to set quotas based on religious affiliation, to require loyalty oaths, attendance at religious services, or courses in Catholic theology.”*<sup>51</sup>

The Acting Regional Director ignored the quoted language, and preferred instead to decide that Manhattan College should conform to the Region’s notion that the pre-Vatican II era remains what defines a Catholic college.

Also not considered in the Region’s decision was the Board of Trustees’ further description of what makes Manhattan College a Catholic College:

*“ For all of these outward manifestations of its Catholic character, the College could not call itself Catholic if the Catholic tradition were not an important element of its academic endeavor, which is after all what constitutes the College as a college. The Catholic tradition has its roots in a highly articulated theological vision of the God of Abraham, Isaac and Jacob incarnate in Christ and manifest in the communal and sacramental expressions of the Church. Implicit in this faith are insights into the meaning of human existence in time and eternity, the relation of human beings to transcendence, to society and the world. It is this tradition that the College has a unique opportunity to explore. In the words of Bruce Douglas, the College, unlike a secular or non-sectarian institution, ‘must continually strive to develop a curriculum that would result in students becoming theologically informed and accurate; students able to speak about religious issue and articulate religious themes.’ Or, as Judith Plaskow has phrased it, the College can be a place ‘where students have the opportunity to grapple with the history, practices, teachings and documents that have shaped the Church and characterized Catholic peoples....’*

*“Beyond courses in religion or theology, the Catholic tradition, with its integration of faith and reason, religion and science, offers special opportunities to enrich the rest of the curriculum.”*<sup>52</sup>

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<sup>51</sup> *Id.* at pp. 10-11 (emphasis supplied).

<sup>52</sup> *Id.* at pp. 11-12 (emphasis supplied).

Again, the decision below attached no religious significance to the College's professions of Catholic faith.

Indeed, even in summarizing the section of the *Trustees Report* which addresses "new avenues to be explored to enhance the College's identity," the decision below attempts to minimize the Catholic commitment by specifically failing to quote the following:

- The Trustees' characterization of the Lasallian mission as "to provide a human *and Christian* education";<sup>53</sup> and
- The Trustees' specific statement that in maintaining "the present balance between the Catholic identity of the College and the religious pluralism of its personnel" the balance must include both "mutual respect in the face of religious differences and *refraining from all attempts to undermine the tenets of the Catholic faith*."<sup>54</sup>

In the Region's analysis of the faculty, the Acting Regional Director ignored extensive testimony about the programs in place at Manhattan College to encourage and enable faculty and administrators to learn more about the Lasallian principles, educational philosophy and faith so that the faculty can participate more fully in realizing the Catholic identity of the College. Dean Merriman testified about a program he and other faculty have participated in over the last ten years about promoting and strengthening Catholic education; and he described a program he participated in that spanned three summers and resulted in his developing a course which he subsequently taught at Manhattan College for undergraduates and graduate students on the educational practices of Saint John Baptist de La Salle.<sup>55</sup> Dean Merriman described the other seminars and workshops which he and numerous other faculty and administrators attended, all of which are designed to enhance the role of lay faculty on campus to promote Catholic identity and

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<sup>53</sup> *Id.*, at p. 14 (emphasis supplied).

<sup>54</sup> *Ibid.* (emphasis supplied)

<sup>55</sup> Tr. 247-248, 258, 268-269.

mission.<sup>56</sup> He testified about the Christian Brothers program in Rome attended by Manhattan college lay faculty.<sup>57</sup> He provided details about the many activities on campus promoting the Catholic and Lasallian mission, including the Lasallian Education Committee's activities, religious services and liturgical events.<sup>58</sup> He described starting faculty meetings of his department in the School of Education with a prayer, of starting classes with a prayer, and the presence of crucifixes in classrooms.<sup>59</sup> He described the many activities offered by the College's Office of Campus Ministry and Social Action to involve students in social action projects as part of their Lasallian Catholic education to serve the poor and vulnerable.<sup>60</sup> As a graduate of Manhattan College, Dean Merriman talked about the number of programs he has led at Manhattan College over the years to provide recreational opportunities for children and adults with severe disabilities, consistent with his own and the College's commitment to the Lasallian religious mission of helping the poor and vulnerable, and that students of Manhattan have been involved as volunteers, as part of their academic programs and as student staff.<sup>61</sup>

Finally, the decision below failed to address much of the testimony about how the College publicizes its Catholic identity to prospective and new employees. The Acting Regional Director paid no attention to the testimony and exhibits establishing that when the College advertises for employees, it posts the openings on the Catholic web site JASPA<sup>62</sup>; and that the advertisements state that the College seeks individuals who are "attracted to a college with a Catholic identity" and describe the College as a Catholic institution of higher learning.<sup>63</sup> The

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<sup>56</sup> Tr. 254-262.

<sup>57</sup> Tr. 261.

<sup>58</sup> Tr. 293-296.

<sup>59</sup> Tr. 297.

<sup>60</sup> Tr. 324-327.

<sup>61</sup> Tr. 224-232.

<sup>62</sup> Tr. 181-182; Resp. Exh. 13.

<sup>63</sup> Resp. Exh. 13.

advertisement for the Vice President for Student Life specified that “a successful candidate ... will be a professional who embraces our mission *and is able to assure that the College’s Catholic and Lasallian values remain the foundation for the student life experience.*”<sup>64</sup> (Emphasis supplied).

The decision below similarly failed to discuss the extensive testimony from Vice President Fabé about the mandatory orientation for all new faculty, during which each employee is given two books about the Catholic mission and identity of the College: *The Arches of the Years*, by Brother Gabriel Costello, and Brother Luke Salm’s acclaimed study of the life of Saint John Baptist de la Salle titled *The Work is Yours*.<sup>65</sup>

Further, no mention was made that at Orientation, the president of the College addresses employees with a detailed speech about the College and its Catholic mission and identity, calling upon them to take an active role in the Catholic life of the College.<sup>66</sup>

Perhaps the most glaring and important omission from the Region’s review of the record is its failure to make any reference to the fact that the central unifying theme of the testimony from the Union’s primary witness, Professor Fahey, involved the Union’s affirmative decision to engage the NLRB in a determination whether Manhattan College’s actions regarding unions is consistent with Catholic doctrine. Professor Fahey testified that he is a Catholic theologian.<sup>67</sup> He testified that he has helped found an organization of Catholic scholars (“Catholic Scholars for Worker Justice”), which, he testified, is committed to Catholic teaching on workers’ rights and which has “issued statements in support for union drives in both Catholic

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<sup>64</sup> *Ibid.*

<sup>65</sup> Tr. 208.

<sup>66</sup> Tr. 137-141; Resp. Exhs. 17, 18.

<sup>67</sup> Tr. 424.

and secular institutions.”<sup>68</sup> When the College’s counsel inquired how documentation about Catholic Scholars for Worker Justice was relevant to the Manhattan College case, the Union’s representative asserted as follows:

- “It’s relevant that we are talking, we’re trying to determine to what extent Manhattan College is Catholic and *here is an organization that actually acts on the social teachings of the church rather than contradicts them.*”<sup>69</sup>
- “There has been lots of testimony about Catholic faith, values and morals from Dr. Merriman, from Ms. Fabé, *and this speaks to Catholic values, faith and morals*, if not faith, then its values and morals.”<sup>70</sup>

Following its argument that the NLRB should see that “true” Catholicism requires the recognition of labor unions, the Union offered a document supporting unionization which was sent by Professor Fahey to Manhattan College adjuncts, and subsequently to the President of Manhattan College.<sup>71</sup> Professor Fahey testified that the statement derived from the Compendium of the Social Doctrine of the Catholic Church, and stood for the proposition “that labor unions are an indispensable element of social life in Catholic teaching ... and ... no one may deny the right to organize without attacking human dignity itself.”<sup>72</sup> Professor Fahey testified that he sent the statement to the President of the College when he found out that the College was going to resist the adjunct union.<sup>73</sup> The exhibit then received in evidence from the Union states as follows (emphasis below as it appears in the original):

***“We encourage the trustees and administration of Manhattan College to support their employees as they assert the right to free association that is rooted in the natural moral law and that serves as the cornerstone of Catholic Social Teaching on workers’ rights.*”**

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<sup>68</sup> Tr. 477; Pet. Exh. 3.

<sup>69</sup> Tr. 478-479 (emphasis supplied).

<sup>70</sup> Tr. 479 (emphasis supplied).

<sup>71</sup> Pet. Exh. 4.

<sup>72</sup> Tr. 480; Pet. Exh. 4.

<sup>73</sup> Tr. 481.

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Unfortunately, Catholic Scholars for Worker Justice has encountered all too many Catholic institutions that choose to respond to an organizing drive by immediately seeking recourse to the civil law.... In Catholic teaching the civil law only has legitimacy if it is rooted in the natural moral law. **Hence, we urge the Trustees and administrators of Manhattan College to consult the natural moral law that is found in Catholic Social Teaching as a *first course of action* in this matter.** We believe an adjunct union at Manhattan College will vivify and enhance the College’s mission of “**excellence in teaching, respect for individual rights and commitment to social justice inspired by the innovator of modern pedagogy, John Baptist de La Salle.**”<sup>74</sup>

The Union next invited Professor Fahey to testify how he, “[a]s a theologian and expert in Catholic Social teachings, and a faculty member for 45 years, could reconcile a Catholic college denying its adjunct faculty the right to vote in a union election.”<sup>75</sup> Having been invited to define “correct” Catholic doctrine, the witness responded to the Union’s invitation as follows:

“THE WITNESS: Well, Catholic teaching regards the freedom ... to form unions as a moral right. And the moral law in Catholic social thought always takes precedence over the civil law, because the world law is rooted in the natural law, which is rooted in divine law.... In Catholic teaching, you cannot use the civil law to trump the moral law. So I would say that Manhattan College’s action in this case is hypocritical and it’s contradictory of Catholic social teaching. And Catholic teaching states that positive civil law –

“MS. KEHL: I object.

“THE WITNESS: – which is humanly created law –

“MS. KEHL: I object. I object. We’ve just gone through moral law, natural law, what are we talking about? What does moral law mean and what does natural law mean?

“THE WITNESS: In Catholic teaching, you cannot use the civil law to trump the moral law. So I would say that Manhattan College’s action in this case is hypocritical and it’s contradictory of Catholic social teaching.

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<sup>74</sup> Pet. Exh. 4.

<sup>75</sup> Tr. 484. We note that the question was allowed by the Hearing Officer over the objection of the College. *Ibid.*

“HEARING OFFICER GUERRA: I mean I think I understood what you mean by this, but let’s just be perfectly clear. What is civil law” How do you define civil law?

“THE WITNESS: Civil law is humanly created law through the civil process such as legislatures.

“HEARING OFFICER GUERRA: Okay. And moral law?

“THE WITNESS: Moral law is rooted in the divine law which in Catholic social law is discovered through natural law.

“HEARING OFFICER GUERRA: Okay. You can continue.”<sup>76</sup>

It cannot be denied – and it clearly was not by mistake or inadvertence – that the Union chose to frame the core of its argument as that Catholic doctrine requires the College to recognize the Union:

“The Employer has put on a case that Manhattan College is a Catholic college and should be exempt from the NLRB. Dr. Fahey has testified deeper *into what being a Catholic college really is and what are the teachings of the Catholic Church*. We are asking him to reconcile how these two seemingly contrasting things can exist, how is that possible?”<sup>77</sup>

It should be clear from the foregoing, and from what followed as discussed below, that the Union’s principal witness was incapable of framing his own argument *except* in terms of Manhattan College’s Catholic identity, and that the Region permitted itself to be drawn into a dispute between the Union and the College as to whose interpretation of Catholic moral law and divine law will govern the employer-employee relationship. There could be no more stark example of the religious identity of the College, or of the religious entanglement to come should the Board assert jurisdiction.

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<sup>76</sup> Tr. 485.

<sup>77</sup> Tr. 484 (emphasis supplied).

As the hearing progressed, the Union moved its argument about Catholic doctrine from “moral law” and “divine law” to a claim that in opposing the Union, the College was committing mortal sin. As Professor Fahey testified, he helped prepare a five-page paper titled *Union Busting is a Mortal Sin*, which he said was an accurate reflection of Catholic social teaching, and to which was attached the “Catholic Scholars for Worker Justice” *Statement of Support: Adjunct Faculty at Manhattan College*.<sup>78</sup> Professor Fahey testified that, even as the hearing was under way before the Region, he directed the Executive Secretary of Catholic Scholars for Worker Justice to mail *Union Busting is a Mortal Sin* to the President and Vice Presidents of Manhattan College, and to the witnesses for the College participating in the hearing.<sup>79</sup> Professor Fahey explained his motivation as follows:

“I wanted to remind the people involved that at the heart forming a labor union is a moral issue that is deeply rooted in Catholic social thought and that – it should – that at the heart forming a labor union is a moral issue, a moral right that is deeply rooted in Catholic thought and it cannot be frustrated by first going to the civil law to try to block this moral right.”<sup>80</sup>

The Hearing Officer refused to admit *Union Busting is a Mortal Sin* (marked for identification as Resp. Exh. 51), *despite the fact that this very document was an attachment to a document which the Hearing Officer had accepted in evidence from the Union without demur*. On November 19, 2010, the College asked the Regional Director to rule on admissibility prior to the end of the hearing; the Region never responded. By blocking the admission of *Union Busting is a Mortal Sin*, the Region withheld material information from the record which graphically illustrates the religious entanglement which is inherent in this case. By excluding *Union Busting is a Mortal*

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<sup>78</sup> The *Statement of Support* had earlier been offered into evidence, and accepted, as Pet. Exh. 4. Professor Fahey identified *Union Busting is a Mortal Sin*, to which the *Statement of Support* was attached, at Tr. 621, 623.

<sup>79</sup> Tr. 621, 623-624.

<sup>80</sup> Tr. 622.



*Sin* from the record, the Region also excluded the Union’s closing warning to the College’s witnesses, as follows

“Are you **guilty of mortal sin** because of your actions against labor unions? Have you failed to live up to the high demands of **Catholic Social Doctrine** on workers’ rights, including the right to form labor unions and to bargain collectively. If so, **we suggest that you bring the matter to your confessor.**”<sup>81</sup>

The Union’s argument, and the Region’s response, dramatically illustrate the entanglement which follows when the National Labor Relations Board accepts a role as the arbiter of Catholic doctrine and authenticity. In this case, the entanglement was immediately injected by the Union when it drew the Region into a dispute between the Union and the College on what it means to be Catholic.

We also respectfully note that, as recently as ten days ago, the United States Court of Appeals for the Second Circuit reminded the Board that evidentiary rulings may not be based on an erroneous view of the substantive law as set forth by the courts. *National Labor Relations Board v. Domsey Trading Corp.*, \_\_\_ F.3d \_\_\_ (2<sup>nd</sup> Cir., February 18, 2011; Docket Nos. 10-3356-ag, 08-5165-ag, 08-4845-ag).

**POINT II: CONSTITUTIONAL PRINCIPLES AND APPELLATE RULINGS COMPEL RECONSIDERATION OF THE NLRB’S JURISDICTIONAL INQUIRY AND TEST FOR RELIGIOUS COLLEGES**

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The Acting Regional Director determined that the purpose of Manhattan College is secular and not the propagation of a religious faith. *Decision Below* at p. 19. He based this determination on a test often cited by the Region and the Board as to whether a college is one “whose purpose and function in substantial part are to propagate a religious faith,” taking into

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<sup>81</sup> Resp. Exh. 51 for identification (emphasis supplied).

consideration factors such as the institution's practice of not insisting on Church affiliation and religious observance as a condition for hiring or admission, not having set quotas based on religious affiliation, not requiring loyalty oaths, not requiring attendance at religious services, or not requiring courses in Catholic theology. *Decision Below* at p. 19. Further, the Acting Regional Director relied on findings that the College affirms academic freedom, responsibility, and institutional autonomy, that the Christian Brothers do not wield any control, and that faculty are hired based on academic qualifications. He concluded that he did not find adjunct faculty are required to advance a religious mission in any way, and that the Board was therefore free to exercise jurisdiction.

This Region's analytical framework was applied in a manner that intrudes into virtually all aspects of a religious college's beliefs, organization and operations, which is exactly the sort of invasive inquiry that *Catholic Bishop* sought to avoid. This approach leaves the NLRB first trolling through the substance and contours of the faith and mission of a religiously-affiliated institution, and then making its own doctrinal analysis of the *sufficiency* of religious observance and motivation. This manner of inquiry clearly risks infringing – and in this case has infringed – upon the guarantees of the First Amendment's Establishment and Free Exercise Clauses.

The Acting Regional Director tried to insulate the decision from criticism by giving cosmetic deference to the test established in *Great Falls* (and which was renewed in *Carroll College*, although *Carroll College* is nowhere cited in the decision below). However, by continuing to use the intrusive and discredited Board requirement of "propagation of a religious faith," the Acting Regional Director came to the entirely unsubstantiated conclusion that Manhattan College does not hold itself out to the public (students, staff, parents and others) as

having a “religious educational environment.” The Acting Regional Director took the position that the historical connection to the Church and Saint John Baptist de La Salle are presented to the public in a manner to signal that the College’s educational environment is *not* religious, and that ties to Saint John Baptist de La Salle have become purely secular and are not connected to the Church, religion, or Catholicism. *Decision Below* at pp. 22-23. The Acting Regional Director contended that the College’s secular nature is established by its public commitment to academic freedom, diversity and independence; by the absence of church control; by the lack of compulsory religious activities; by the lack of a religious test for admission or employment; by College eligibility for government financial aid;<sup>82</sup> and by the College’s accreditation as an institution of higher learning in New York State.<sup>83</sup>

In *Carroll College v. NLRB*, 558 F.3d 556 (D.C. Cir. 2009), the Court of Appeals for the District of Columbia reaffirmed the three-part bright-line test which it had earlier articulated in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), to determine when a college is exempt from NLRB jurisdiction as a religious institution under *Catholic Bishop*. Manhattan College easily meets each element of that test: (a) it holds itself out to the public as providing a religious educational environment; (b) it is a non-profit institution; and (c) it is affiliated with the Catholic Church and the New York Province of the Brothers of the Christian Schools. The Circuit Court, in promulgating that test, directed the NLRB to look at the representations of the College in public documents and *not* to “delve into matters of religious doctrine or motive” in its inquiry. 558 F.3d at 572, quoting *Great Falls*. This was not a novel

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<sup>82</sup> The aid in question is, in fact, less than 0.4% of the College’s annual operating budget. Pet. Exh. 7.

<sup>83</sup> The Acting Regional Director was apparently not aware that the two of the Catholic high schools involved in *Catholic Bishop* were accredited by the State of Illinois. 440 U.S. at 492.

concept: it followed directly from the teachings of the United States Supreme Court in *Catholic Bishop*.

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

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

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

After *Catholic Bishop* was decided, the NLRB proceeded to devise a framework, which it applied in this instance, for determining whether a religious institution is beyond NLRB jurisdiction, in a series of cases in which the Board attempted to decide whether an institution had a “substantial religious character.” See *Livingstone College*, 286 NLRB 1308 (1987); *St. Joseph's College*, 282 NLRB 65 (1986); *Jewish Day School*, 283 NLRB 757 (1987). However, the Board's framework for this analysis was rejected in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1<sup>st</sup> Cir. 1986). Writing for the First Circuit's *en banc* decision, now-Supreme Court Justice Breyer concluded that the *Catholic Bishop* doctrine applies not just to institutions that are “pervasively sectarian,” but also to a “college that seeks primarily to provide

*its students with a secular education, but which also maintains a subsidiary religious mission.”* *Id.*, at 398-99 (emphasis supplied). Then-Judge Breyer concluded that the NLRB’s “*ad hoc* efforts, the application of which will themselves involve significant entanglement, are *precisely* what the Supreme Court in *Catholic Bishop* sought to avoid.” *Id.*, at 402-403 (emphasis supplied).

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

In its analysis of the NLRB’s “substantial religious character” standard, the *Great Falls* court noted that the Board had attempted to minimize the religious beliefs of the University of Great Falls because the university had a nondiscriminatory admissions policy, employed faculty who were not Catholic, did not require attendance at Mass, and respected other religious beliefs. The court stated that to limit the *Catholic Bishop* exemption to religious institutions

which pursue hard-nosed proselytizing, limit enrollment to the members of their religion, and have no academic freedom, is an unnecessarily stunted view and may itself be a violation of the First Amendment. *Id.* at 1345-1347. Yet this is the very approach taken by the Acting Regional Director in this case, and explicitly defended by him in the decision below:

“The Employer suggests that concluding that it is not a Church-operated school within the meaning of *Catholic Bishop* based on the evidence that its religious activities are not compulsory and its education activities do not include indoctrination and proselytizing is a view of religion that ‘the Board cannot endorse without imposing its own definition of ‘approved’ faith in clear violation of the First Amendment.’ The Employer further contends that the Board’s assertion of jurisdiction is based on the view that ‘religious beliefs must be authoritarian and hence inconsistent with academic freedom.’ I do not agree with that contention. The Board’s inquiry into such factors is not an improper scrutiny of a school’s asserted faith. Rather, it is an integral part of the *Catholic Bishop* analysis. The purpose of considering whether indoctrination, proselytizing, or in the Supreme Court’s terminology, ‘propagation of a religious faith’, is part of a school’s purpose is because rules requiring faculty to propagate faith would require bargaining over such rules and their disciplinary consequences, and further, would require the Board to scrutinize an employer’s defense to unfair labor practice charges based on asserted enforcement of faith-based rules. *See Catholic Bishop*, supra, at p. 501-502 (describing consequences of enforcing Act for bargaining and unfair labor practice cases involving church-operated schools). Where, as in the instant case, a school’s stated purpose does not involve the propagation of a religious faith, teachers are not required to adhere to or promote religious tenets, a religious order does not exercise control over hiring, firing, or day-to-day operations, and teachers are given academic freedom, this risk of entanglement is obviated.”

*Decision Below*, at pp. 20-21.

This faulty and over-reaching analysis ignores not only the decision in *Catholic Bishop*, but also the entire First Amendment jurisprudence of the Religious Rights clauses of the First Amendment. When a government agency claims the right to determine what may properly constitute a religious organization’s method and manner of propagating its faith, what follows is the precise error which we have seen here: the promulgation of a rule that in order to

“propagate” its belief in God, an institution must require adherence from all employees to particular religious faith, must hire and fire for religious reasons only, and must ban scholarly inquiry and academic freedom. The Board has no legal basis for a one-size-fits-all definition of “propagation” for every religious entity: it is fundamental to American liberty that the form and actualization of faith may be different for Quakers than it is for Southern Baptists, or for Muslims. The Board has no legal authority to decide that academic freedom (which was a wholly-undefined concept in the Acting Regional Director’s decision) cannot flourish in a college with a religious mission and identity.

What the Supreme Court and the Circuit courts have said repeatedly to the NLRB is that the Board does not have the constitutional authority to sift through religious convictions and practices in order to determine which convictions and practices it finds “substantial.” The definition of what it means to “propagate” a religious belief belongs to the religion and its constituency to establish, and not to the Government. It belongs to the entity, and not to the Government, to determine how that belief, and its propagation, are to evolve over time.

What constituted Catholic identity – and the means by which Catholic faith might be propagated – was different before and after Vatican Council II; but the evolution of Catholicism did not secularize either the Catholic Church or Manhattan College. Subsequent to Vatican Council II, the Catholic colleges once again examined their missions and practices in response to the Vatican’s Apostolic Constitution *Ex Corde Ecclesiae*; but it is for the Catholic Church and for the Catholic colleges to engage in that self-scrutiny without intrusion, approval, disapproval, or any other form of spiritual measurement from federal authorities. The Board’s unwillingness to recognize that religious faith and the manner in which it is propagated are not

static, are not identical among religions, and are not required to be authoritarian wholly discredits its “propagation” test.

By contrast, the three-part standard crafted by *Great Falls* and *Carroll College*, which relies on objective, publicly-available documents, would let the NLRB distinguish between spurious and *bona fide* religious affiliations without setting itself up as an arbiter of doctrinal legitimacy. The Board can, under that standard, readily distinguish between religious and secular institutions without trying to create a government doctrinal “litmus test.”

And it is *exactly* this doctrinal “trolling” which the Region pursued with respect to Manhattan College. Indeed, the Region ruled that the Christian Brothers Lasallian charism *is no longer Roman Catholic or religious but “purely secular.”* The Constitutional consequences of this over-reaching represents a fundamental incursion on religious liberty long recognized by the Supreme Court.<sup>84</sup>

In *Carroll College*, the D.C. Circuit was faced with a situation similar to that in *Great Falls*: a religiously-affiliated college had asserted its religious mission as the basis for exemption from NLRB jurisdiction, but had again encountered the Board’s rigid application of the “substantial religious character” test. Enforcement was denied by the Circuit Court under the three-part bright-line test promulgated earlier in *Great Falls*. The court held that Carroll College easily satisfied the *Great Falls* test: it was a non-profit private college affiliated with the

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<sup>84</sup> Indeed, it has been noted that “What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. \*\*\* A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.” *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343-344 (1987) (concurrence by Justices Brennan and Marshall).



Presbyterian Church, which was a recognized religious organization. The Court considered the college's public documents to determine whether it held itself out to students, faculty and the broader community as providing a religious educational environment. In particular the Court noted that the college's Mission Statement provided that the college would "demonstrate Christian values by ... example" and would "provide a learning environment devoted to academic excellence and congenial to Christian witness"; and that an agreement between the college and the Synod of the Presbyterian Church committed the trustees of the college to "recognize and affirm [its] origins and heritage in the concern of the Church for the intellectual and spiritual growth of its students, faculty, administration and staff." 558 F.3d at 572-573. These objective indicia – certainly met and exceeded by Manhattan College here – satisfied the *Great Falls* test.

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

It is instructive to note where the *Carroll College* court took exception to the Board's approach:

"In determining whether a school is exempt from the NLRA under *Catholic Bishop*, the NLRB may not 'ask how effective the institution is at inculcating its beliefs.' [Citation omitted]. To do otherwise and require

proof of ‘actual religious influence or control’ as the Regional Director did here ...is tantamount to questioning the sincerity of the school’s public representations about the significance of its religious affiliation. *This neither the Board nor we can do.*”

558 F.3d at 573 (emphasis supplied). The court further quoted *Great Falls* to the effect that courts “cannot ask about the centrality of beliefs or how important the religious mission is to the institution.” *Ibid.* Finally, the court squarely rejected the Regional Director’s conclusion that there was no “affiliation” under the *Great Falls* test because the Presbyterian Church did not own the college’s campus, did not sponsor the college, and did not have any right of ultimate control over the college. The court stated that the test is satisfied if the institution is “affiliated with *or* owned, operated or controlled ... by a recognized religious organization.” *Id.* at 574 (emphasis in the original). The court’s conclusion in *Carroll College* should be heeded here:

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

*Ibid.*

We respectfully remind the Board that while it has authority to interpret labor policy matters embodied in the National Labor Relations Act, it does *not* enjoy a similar writ of authority or expertise as to issues of avoidance under the First Amendment. In the latter area, it is the federal courts which have the expertise, and have unchallengeable primacy of authority under Article III of the Constitution. The courts have spoken clearly and unequivocally as to where the line between the First Amendment and the NLRA must lie, and we ask the Board to be

mindful of that Constitutional mandate. Thus, in *Great Falls*, the Court made it clear that it owed no deference to the Board because the question of jurisdiction rests with the courts, *id.* at 1340-1341; *see also Leedom v. Kyne*, 358 U.S. 184 (1958), where the authority of the courts to decide questions of Board jurisdiction under the NLRA was unequivocally stated by the Supreme Court.

The “bright-line” test of *Great Falls* and *Carroll College* holds that an institution is exempt from NLRB jurisdiction if it: (i) holds itself out to students, faculty and the community as providing a religious educational environment (described alternatively in the decision as “holds itself out to the public as a religious institution”); (ii) is organized as a non-profit entity; and (iii) is affiliated with, or owned, operated or controlled by a recognized religious organization. 558 F.3d at 572. As noted above, this objective inquiry avoids the constitutional infirmities of the NLRB’s “substantial religious character” test by forgoing inquiry into the institution’s motives or beliefs, the centrality of those beliefs, or the importance of its religious mission, while providing assurance of a *bona fide* religious identity.

Here, the Acting Regional Director recognized that there was no dispute about the fact that the College is a nonprofit entity; and he grudgingly admitted that it “could arguably satisfy the affiliation factor based upon the Catholic Church’s recognition of the College as a Catholic institution.” *Decision Below* at p. 21. We note in this regard that Manhattan College’s is listed in the *Official Catholic Directory*, a compilation of institutions recognized by the Catholic Church, through the diocesan Archbishop, as Catholic institutions,<sup>85</sup> and that this was the evidence of affiliation that the Court relied upon in *Great Falls*. 278 F.3d at 1345.

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<sup>85</sup> Resp. Exh. 2

The Acting Regional Director determined, however, that it had not been shown that Manhattan College holds itself out as providing a religious educational environment. *Decision Below*, at p. 22. That determination was clearly erroneous.

It is undisputed that Manhattan College publicly identifies itself as Catholic to students, staff and the community. This is done through the following:

- The widely disseminated *Mission Statement* stating that Manhattan is an “independent Catholic institution of higher learning ... founded upon the Lasallian tradition of excellence in teaching, respect for individual dignity, and commitment to social justice inspired by ... John Baptist de La Salle ... [and with a] mission ... to provide a contemporary, person-centered educational experience characterized by high academic standards, reflection on faith, values and ethics, and life-long career preparation.”<sup>86</sup>

- The public affiliation with the New York Province of the Brothers of the Christian Schools, as documented by the *Sponsorship Covenant*.<sup>87</sup> This was the very evidence of affiliation and religious identity that the Court relied upon in *Carroll College*. 558 F.3d at 573-574.<sup>88</sup>

- The Manhattan College Catalogue, which contains numerous other references to the Catholic heritage and culture of the College; sets out the nine-credit Religious Studies requirement (including a required course in Catholic Studies); and describes the College-wide Core Goals and learning objectives which include religious and ethical awareness, understanding that Manhattan College is a Catholic institution, commitment to respect for individual dignity and social justice, and the need to take action based on ethical concerns and transcendent moral values as articulated in Christianity and other religious and philosophical traditions.<sup>89</sup>

- Job advertisements, which include multiple references to Manhattan as a Catholic college, and state that the College seeks applications from “those attracted to a college with a Catholic identity.”<sup>90</sup>

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<sup>86</sup> This statement is provided both to students through the College Catalogue (Pet. Exh. 2) and to applicants for jobs by Human Resources. (Resp. Exh. 14). Applicants for employment sign an acknowledgment that they have received a copy of the *Mission Statement* and will abide by it. (Resp. Exh. 14). The appointment letters which are provided to many employees include a statement that the individual must commit to fulfill the obligations of the *Mission Statement*, and those letters must be signed and returned to the College. (Resp. Exh. 37).

<sup>87</sup> Resp. Exh. 9.

<sup>88</sup> Further, the Manhattan College campus includes a residence for the Christian Brothers who work at the College, have retired from work with the College, or have duties for the Order of Christian Brothers in the local area. (Resp. Exh. 5).

<sup>89</sup> Pet. Exh. 2.

<sup>90</sup> Resp. Exhs. 12, 13.

- Orientation training for new employees as to the Catholic mission, and provides them with a publication on the College's Catholic culture which includes major documents setting forth the Catholic identity of the College, among which are the Board of Trustees' 1999 Report, *Manhattan College: Lasallian, Catholic and Independent*; the 1999 statement of the Council for Faculty Affairs acknowledging that Manhattan College is a Catholic institution; and the *Sponsorship Covenant*.<sup>91</sup>

- The By-Laws, which set forth the requirement that the Brother Provincial of the Christian Brothers must be a member and Vice-Chair of the Board of Trustees, a mandatory member of the Board's Executive/Nominating Committee, and, under Canon Law the "Juridic Person" for the College.

- The further requirement of the By-Laws that a minimum of five Christian Brothers be members of the Board of Trustees, and that upon a dissolution of the College, the property and assets, as permitted by law, are to be distributed equally to the Order of Christian Brothers and to another Lasallian Catholic college.

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

- The physical campus, which is adorned by numerous physical symbols of religious faith. The center of the campus is dominated by the Quadrangle, which includes two chapels, the smaller of which is located inside Memorial Hall opposite the Trustees' Board Room. The cupolas atop major buildings on or near the Quadrangle display visible crosses. The Quadrangle also includes a statue of Saint John Baptist de La Salle, and throughout campus buildings there are numerous portraits of Christian Brothers and Catholic clergy, and murals of the Christian Brothers. There are crosses on the walls of the classrooms.

The many objective indicia of the College's public identity as a religious institution – its public documents, its public activities and institutions, and its physical character – fully meet, and exceed, the judicial criteria articulated to determine whether the University of Great Falls and Carroll College met the first part of the three-part test. In those cases, the court reviewed similar public documents of the respective institutions, including mission statements,

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<sup>91</sup> Resp. Exh. 16.

covenants with religious organizations, relevant statements adopted by Trustees and corporate Articles of Incorporation, and course catalogues, and found them sufficient to satisfy the analysis.

Manhattan College satisfies all three tests of *Great Falls* and *Carroll College*: it is a non-profit college; it is inextricably affiliated with the Catholic Church and the Christian Brothers; and it holds itself out to the public as providing a religious educational environment.

**POINT III: THE ABSENCE OF AN INTELLIGIBLE BOARD TEST CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS RAISES IMPORTANT QUESTIONS OF LAW**

While the analysis in Point II above is sufficient to show that Manhattan College is not subject to the Board's jurisdiction, the factual record further demonstrates that Manhattan College should be exempt from Board jurisdiction under *Catholic Bishop* even if the Board were, inexplicably, to ignore the constitutional lessons of *Great Falls* and *Carroll College*. Thus, notwithstanding the Board's apparent reluctance (to this point, at least) to heed those judicial admonitions, jurisdiction should be declined.

The Board's earlier applications of a more intrusive analysis than the one approved by the Courts has not resulted in a coherent or consistent application of *Catholic Bishop*. An examination of cases where the NLRB has *declined* to exercise jurisdiction reveals fact patterns seriously at odds with decisions where the NLRB has *asserted* jurisdiction. In applying the Board's own precedents to this matter, the Region ignored those contradictions and inconsistencies. However, those contradictions render the NLRB's test useless in determining what types of religious colleges are subject to jurisdiction in a 21<sup>st</sup> Century religious environment.

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

By contrast, in *Jewish Day School*, 283 NLRB 757 (1987), the NLRB *declined* to assert jurisdiction, finding "sufficient" evidence of the religious purpose of the school. A close reading of the case, however, establishes that the school was a private non-profit corporation established by the United Jewish Appeal Federation of Greater Washington – a fundraising organization that sought to raise money for Jewish welfare but which clearly was *not* any type of recognized religious organization or entity. *Id.*, at 757. The Jewish Day School board of directors consisted of individuals active in the Jewish community, but included only three rabbis; and a number of the directors were elected by parents of the school children. *No* directors were appointed or elected by any recognized religious organization. Members of the board constituted the education committee, which was responsible for determining educational policies and curriculum; and no religious body controlled what was taught. The school did not prohibit attendance by non-Jewish students, and did not adhere to one particular branch of Jewish religious thought, but instead taught and recognized them all. *Id.*, at 758-759. Notwithstanding, the Board found an exemption even though the school was not controlled by a recognized

religious organization, but rather by a lay board of citizens who owned the assets and property, and who made decisions about what would be taught. In fact, in *Jewish Day School*, the NLRB *overruled* its earlier decision in *Bishop Ford Central High School*, 243 NLRB 49 (1979), a case where the NLRB had asserted jurisdiction because the school, even though it was clearly religious, was owned by a separate corporation and not controlled by the local Archdiocese.

The record in this case documents an institution, and a Board of Trustees, with much greater participation by the Order of the Christian Brothers, and with closer religious affiliation to the Roman Catholic Church, than was the case in *Jewish Day School*. Accordingly, if *Jewish Day School* is to control, jurisdiction should be declined.

In *St. Joseph's College*, 282 NLRB 65 (1986), the NLRB *declined* to assert jurisdiction over a college founded by the Sisters of Mercy. In its analysis, the Board found, that the college recognized the concept of academic freedom, had never taken action against a faculty member for taking a position inconsistent with church belief, made attendance at Mass voluntary, and offered courses comparable to offerings at a secular college. *Id.*, at 66-68. These factors (which are prevalent at most religious colleges) did *not* deter the NLRB from declining to assert jurisdiction.<sup>92</sup> Accordingly, if *St. Joseph's College* is to control, jurisdiction should be declined.

What the history of Board decisions demonstrates is that the existence of factors, such as voluntary Mass, recognition of academic freedom, a lay Board, and secular courses at college have *not* consistently led the Board to assert jurisdiction. At the same time, the courts

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<sup>92</sup> It is worth noting that the Court of Appeals in *Great Falls* pointed out the similarity in corporate structure between the University of Great Falls and St Joseph's College, and found that the NLRB's attempt to distinguish the former was unpersuasive: "Both schools teach secular subjects, both offer mass but do not require it, both have non-Catholic faculty, both espouse belief in academic freedom. Both are religious schools trying to find their place in a twenty-first century world without giving up what makes them religious." 278 F.3d at 1347.



have consistently ruled since *Universidad Central de Bayamon, supra*, that the Government may not propagate some uniform definition or concept of religion, and that the Government may not set a standard for what makes a college “sufficiently religious.” Religious beliefs are a matter of Constitutionally-protected faith, and “need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection.” *University of Great Falls v. NLRB, supra*, 278 F.3d at 1344.

What may be unique to this proceeding is that here, the Union’s case to the Board was all about “correct” religious belief. Virtually all of the Union’s presentation was offered to portray Manhattan College as a Catholic college which had hypocritically deviated from Catholic doctrine by failing to stifle academic freedom, by declining to enforce doctrinaire rigidity, by encouraging but not compelling religious practice, and – last but not least – by engaging in the “mortal sin” of “union-busting.”<sup>93</sup>

What is abundantly evident is that the Union has chosen to make its organizational campaign, and these proceedings, a referendum on Catholic thought. Its arguments make it absolutely clear that any subsequent involvement with the Union will inevitably raise issues of Catholic doctrine and belief regarding rights to be granted to workers. This is the quintessence of “entanglement.”

### **CONCLUSION**

Under any reasonable analysis, Manhattan College is and has been a Catholic college, strongly committed to its religious mission, for more than 150 years. The College and its affiliated religious sponsors are vested with the responsibility and authority to define the

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<sup>93</sup> It should not escape the Board’s notice that every single point which the Union attempted to establish through Professor Fahey’s testimony was explicitly couched in Catholic religious terms.

College's actualization of its Catholic identity. Those fundamental religious decisions are not subject to government scrutiny, and are not subject to government determinations about what constitutes a religions method or manner of propagating its faith.

As is abundantly clear from the record, Manhattan College's Catholic identity is not grounded on rigid, unchanging principles and practices, but grows and responds to developments in the Church, in the examination of faith and ritual which followed Vatican Council II, in the examination of Catholic higher education invited by *Ex Corde Ecclesiae*, in the centuries-old tradition of the Order of Christian Brothers, and in the proud tradition of its own College community.

It is appropriate for the Board to revisit its standard for governing this question and to adopt the objective, non-intrusive test set forth by the Circuit Court so that constitutional rights are protected as Congress intended.

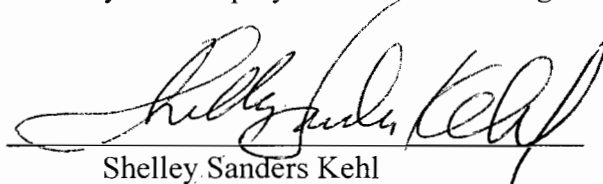
For all of the reasons hereinabove set forth, review should be granted, and jurisdiction should be declined.

Dated: New York, New York  
February 28, 2011

Respectfully submitted,

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