No. 21-145

IN THE

Supreme Court of the United States

GORDON COLLEGE, *et al.*,

Petitioners,

v.

MARGARET DEWEESE-BOYD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* THE CARDINAL NEWMAN SOCIETY, THE INTERNATIONAL ALLIANCE FOR CHRISTIAN EDUCATION, AND THE ASSOCIATION FOR BIBLICAL HIGHER EDUCATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether professors at religious colleges perform ministerial functions when the college exists to spread its faith, and the college requires faculty, as a primary component of their position, to integrate Christian doctrine into their work and academic disciplines, engage in teaching and scholarship from a decidedly religious perspective, and serve as advisors and mentors for student spiritual formation.

2. Whether the First Amendment requires courts to defer to the good-faith characterization of a ministerial position by a religious organization or church.

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INTERESTS OF AMICI CURIAE

Amici curiae[1] The Cardinal Newman Society, the International Alliance for Christian Education, and the Association for Biblical Higher Education are dedicated to promoting and defending the value of orthodox Catholic and protestant education. They represent the religious interests of over 200 colleges, universities, and seminaries across the United States with diverse historical, cultural, and doctrinal roots. Notwithstanding material differences in religious doctrine and worship, these institutions share a common goal of providing students with an academically rigorous post-secondary education, in a broad range of subjects, each of which is grounded in and connected to the supreme Truth, who is God and his son, Jesus Christ.

Amici ask this Court to reverse the Massachusetts Supreme Judicial Court's decision because the narrowed ministerial exception it applied is inconsistent with this Court's precedent and threatens the purpose and character of every religious college and university. While each institution is unique, Amici's Catholic and protestant institutions identify with Gordon College ("Gordon") because they too exist to teach and perform scholarship inextricably integrated with faith. The standard applied by the Massachusetts Court limiting the selection and promotion of faculty who carry out their faith-based mission violates religious institutions' right to define their faith and threatens their ability to remain ***religious*** colleges and universities.

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1. Pursuant to Supreme Court Rule 37.6, no one other than Amici and their counsel authored this brief in whole or part or contributed money to fund its preparation or submission. Pursuant to Rule 37.2(a), Amici provided timely notice to all parties' counsel of record of their intent to file this brief. All parties have consented to the filing of this brief in blanket consents on file.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici ask this Court to overturn the Massachusetts Supreme Judicial Court and hold that the First Amendment mandates a ministerial exception no less robust in the context of religious higher education than applied to elementary and secondary schools. Faculty are the life-blood of every college and university, without which teaching and scholarship cannot occur. For faithful Catholic and protestant institutions, teaching and scholarship is not an end in itself. Without recognizing the "Word" through whom "all things were made" (John 1:1-3), teaching and scholarship on any subject is incomplete.

The Massachusetts Court applied an improperly narrow construction of the ministerial exception, holding that Gordon could not claim the exception as a defense to statutory claims brought by Respondent Margaret DeWeese-Boyd after Gordon denied her application to full professorship. Amici request reversal because the decision failed to follow this Court's precedent by creating a new and undefined category of "Christian teacher and scholar, but not a minister," or at least not one subject to the ministerial exception recognized by this Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184, 188 (2012) and further articulated in *Our Lady of Guadalupe School v. Morrissey-Beru*, 591 U.S. __, 140 S. Ct. 2049 (2020). The First Amendment and this Court's precedent do not recognize this distinction.

The decision disregarded Gordon's Constitutional right to decide matters of its religious governance, faith, and doctrine, including whether and in what role DeWeese-

Boyd could teach on its behalf. The court, and both parties, acknowledged Gordon's foundation in Christianity and requirements that DeWeese-Boyd integrate the Christian faith in her teaching and scholarship. Nonetheless, the Massachusetts Court determined that Gordon did not require sufficient ritualistic or ceremonial duties of DeWeese-Boyd for her to qualify as a minister; instead, the court found she was ***only*** a "Christian scholar and teacher." The Massachusetts Court imposed this newly minted category to permit state-imposed statutory prohibitions on retaliation, even when the employment decision at issue related to policy and practices dictated by the college's faith. Religious institutions like Gordon—not state statutes or the courts—are entitled to determine the scope and application of their religious beliefs to those who teach their faith and carry out their religious mission. Gordon's educational ministry—like that of all religious colleges and universities—depends on faculty who are willing and able to integrate the institution's faith in their teaching and scholarship. And Gordon is entitled to define its faith and determine how that faith is carried out in matters of internal government and employment, not individual faculty members. The standard the Massachusetts Court applied fundamentally threatens Gordon's and other religious institutions' ability to accomplish their missions and to maintain their pervasively religious character.

By ignoring Gordon's First Amendment rights, the Massachusetts decision threatens the existence and future contributions of religious institutions. It will ultimately harm the policy goals the Massachusetts Court intended to advance. The institutions Amici represent, and hundreds of others, enrich America's intellectual life

in myriad ways by contributing to diversity of thought and preserving alternatives to secular views. If the Massachusetts' decision stands, religious institutions will have to implement wasteful and unnecessary defensive measures that distract from their mission and diminish faculty's academic freedom. Schools such as Gordon should be allowed to permit debate and discourse within the dictates of their faith without risk to their core religious character. And institutions should not be required to add unnecessary ritualistic or ceremonial duties for faculty who are required to pervasively integrate faith in their post-secondary teaching and scholarship. Gordon's undisputed mandate that DeWeese-Boyd integrate the Christian faith in her teaching and scholarship, without more, was sufficient under the First Amendment to require application of the ministerial exception.

The questions Gordon presented for this Court's review are crucial to preserve religious institutions' faithfulness to their religious tenets and to resolve disparities among lower courts in applying the ministerial exception. This Court anticipated in *Bostock v. Clayton Cty.*, 590 U.S. ___, 140 S. Ct. 1731, 1754 (2020) that it would need to address cases like this one involving the intersection of employment discrimination and religious liberty. This Court must clarify that the First Amendment guarantees the right of religious colleges and universities to define their faith and incorporate its mandates in all aspects of teaching and scholarship, free from government intrusion. Religious colleges and universities have provided faithful teaching since America's founding. Their right to continue is protected by the First Amendment and does not depend on broader cultural shifts or jurisdictional location. Amici ask this Court to grant certiorari and summarily reverse

the Massachusetts Court, or in the alternative, grant review to clarify the proper breadth of the ministerial exception in religious post-secondary education.

ARGUMENT

I. This Court Should Summarily Reverse, or Accept Review and Reverse, the Massachusetts Court's Decision to Correct Its Errors in Applying This Court's Ministerial Exception Holdings.

This Court should summarily reverse, or accept review and reverse, the Supreme Judicial Court of Massachusetts' decision in *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000 (Mass. 2021). The First Amendment prohibits state interference with religious institutions' selection, promotion, and termination of individuals charged with teaching their faith and doctrine. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184, 188 (2012); *Our Lady of Guadalupe School v. Morrissey-Beru*, 591 U.S. __, 140 S. Ct. 2049 (2020). The Massachusetts Court violated this principle by narrowing the ministerial exception and finding it inapplicable to Gordon professor Margaret DeWeese-Boyd.

The Massachusetts Court's decision properly began with this Court's precedent in applying the First Amendment's ministerial exception to religious schools' employment decisions. *See DeWeese-Boyd*, 163 N.E.3d at 1011-12. But the decision soon departed from the functional analysis this Court prescribed. The court quoted *Our Lady,* stating "[w]hat matters, at bottom, is what an employee does. … educating young people in their faith, inculcating its teachings, and training them

to live their faith are responsibilities that lie at the very core of the mission of a private religious school" and "the exception should include 'any "employee" who . . . serves as a messenger or *teacher of its faith*.'" *Id.* at 1012 (citing *Our Lady*, 140 S. Ct. at 2064 (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (emphasis in original)). The court enumerated the explicit requirements Gordon established for DeWeese-Boyd and other faculty to integrate faith into teaching and scholarship in Gordon's faculty handbook and corresponding requirements within the social work curriculum DeWeese-Boyd taught. *Id.* at 1012-13; *see also* discussion *infra* Section II. The court conceded DeWeese was "required to, and did, both engage in teaching and scholarship from a Christian perspective and integrate faith into her work," and that it was "undisputed that this integrative responsibility was part of her duty and function as a social work professor" at Gordon. *DeWeese-Boyd*, 163 N.E.3d at 1012-13. The court also acknowledged the importance of integrating faith into teaching and scholarship at Gordon, noting the college's President and Provost likened joining Gordon's faculty "to responding to a formal call to religious service." *Id.* at 1013. But rather than ending its inquiry there (*see* discussion *infra* Section II), the court hesitated to apply proper functional analysis to the robust evidence of pervasive religious teaching at Gordon, dismissively minimizing the integration of Christian faith into teaching and writing in DeWeese-Boyd's academic discipline as a "more general religious reflection" insufficient "to render [DeWeese-Boyd] a minister" under this Court's precedent. *DeWeese-Boyd*, 163 N.E.3d at 1014.

The court continued by applying its own, narrow ministerial exception through a simplistic analysis prohibited by *Our Lady* and *Hosanna-Tabor*. *See Our Lady*, 140 S. Ct. at 2066-67; *Hosanna-Tabor*, 565 U.S. at 190. The court concluded that DeWeese-Boyd was not a "minister" by determining she did not fulfill a restrictive list of qualifications and ecumenical duties inapplicable to a college professor. *See DeWeese-Boyd*, 163 N.E.3d at 1017. The court found DeWeese-Boyd was not ordained nor trained regarding ministerial responsibilities, ignoring that this is true of most post-secondary faculty at religious institutions. *DeWeese-Boyd*, 163 N.E.3d at 1008. The court noted she did not "take her students to religious services," lead services, or engage in other ritualistic activities or ceremonies the court—but not Gordon or Amici's institutions—expected of Christian faculty. *Id.* The court ignored Gordon's rights as a religious employer and repeatedly credited DeWeese-Boyd's testimony on irrelevant factors, including that "[s]he never viewed herself or held herself out as a minister for Gordon,[2] nor did she understand her job to include responsibility for encouraging students to participate in religious life or leading them in spiritual exercises."[3] And the court's

2. The decision seemed to confuse the formal title of "minister"—which some might interchange with "pastor" or "reverend"—and the informal use of "minister," referring to one who engages in the act of ministry to students. Similar semantic confusion seems to have been the source for DeWeese-Boyd's and other faculty members' objection to adding "minister" to Gordon's Administrative/Faculty Handbook.

3. Spiritual exercises are a practice taught by Saint Ignatius of Loyola and continued by some Catholics and Catholic institutions (particularly Jesuit institutions). Amici are aware of no protestant institutions that use this term or apply this Ignatian teaching and practice.

finding that DeWeese-Boyd did not "teach religion or biblical studies" emphasized a dichotomy between "secular" and "religious" scholarship not recognized by Gordon or any of the institutions Amici represent. The court effectively reduced Gordon's overriding mission of expressly integrating its religious beliefs throughout academic disciplines—a hallmark of Christian higher education—to a limited set of religious duties that, if absent, obliterates the ministerial function.

Instead of a narrow construction, the Massachusetts Court should have applied a broad ministerial exception, particularly to the higher education context at issue. Unlike the elementary schools in *Hosanna-Tabor* and *Our Lady*, colleges and universities are learning communities that shepherd adolescents into adulthood. Gordon and similar religious institutions promote the spiritual formation of students by transmitting the tenets of their faiths through all academic disciplines, to a much deeper intellectual and pervasive degree than in elementary and secondary schools. Unlike young children, undergraduate and graduate students voluntarily elect, or at least are involved in the decision, to attend a religious institution. If the elementary school teachers in *Our Lady* were "entrusted most directly with the responsibility of educating [the schools'] students in the faith," how much more must professors at religious post-secondary institutions be understood as ministers who "teach[] and convey[] the tenets of the [institution's] faith to the next generation" through the very principles students will utilize in their professions, families, and communities. *See Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). That is the purpose for which Gordon and similar institutions exist. *See Our Lady*, 140 S. Ct. at 2055 ("The religious

education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission."). Government action that undermines the independence and purpose of religious colleges and universities, as the Massachusetts decision did, places religious institutions in the untenable position of having to retain faculty and staff who are not committed to their mission or foundational beliefs.

This Court must not permit the Massachusetts Court's errors to endure. This Court should summarily reverse its decision, or alternatively, grant review and clarify that integration between faith and academia lies at the core of the ministerial exception.

II. The Decision Fundamentally Erred By Disregarding Gordon's Right to Decide Matters of Religious Governance, Faith, and Doctrine.

The Massachusetts Court's most fundamental error was disregarding Gordon's right to determine the ministerial duties of its faculty. The foundation of the ministerial exception is the "right of religious institutions '***to decide for themselves***, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady*, 140 S. Ct. at 2055 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)) (emphasis added); *see also Hosanna-Tabor*, 565 U.S. at 186. The court's decision ignored this legal foundation by relying on superficial factors, the plaintiff's opinions, and apparent disfavor of orthodox religious beliefs. Unable to disregard DeWeese-

Boyd's important duties to integrate her Christian faith into her teaching and scholarship, the court created a new, unworkable category of allegedly non-ministerial "Christian teacher and scholar" that courts are entitled to protect from discrimination on the basis of race, religion, national origin, sex, sexual orientation, or other statutory categories. *DeWeese-Boyd*, 163 N.E.3d at 1018.

Both parties acknowledged that Gordon requires all faculty to integrate Christian faith with their teaching and scholarship. As its President summarized, Gordon believes "there are no nonsacred disciplines" and every academic subject "is informed [and] shaped by" the Christian faith. *Id.* at 1004. The court noted numerous undisputed requirements and duties assigned by Gordon to DeWeese-Boyd and other members of Gordon's faculty, including mandating that each:

- "must affirm Gordon's Statement of Faith and agree to abide by the behavioral standards in Gordon's Statement on Life and Conduct."

- teach as part of "Gordon's core curriculum, which 'explores the liberal arts and sciences from a Christian perspective.'"

- are "members of a community of Christian scholars," "committed to imaging Christ in all aspects of their educational endeavors."

- "'must integrate faith and learning,' including [by] demonstrating" that he or she

- "cultivates a sense that 'knowing' is a matter not just of the intellect, but also of [Christian] faith, praxis, and intuitive insight";

- "helps students make connections between course content, Christian thought and principles, and personal faith and practice"; and

- "encourages students to develop morally responsible ways of living in the world informed by biblical principles and Christian reflection."

- must "detail how they integrate faith and learning, including submitting an 'integration paper' at the end of their third year of appointment" and

- must "befriend[] students," "model[] Christ-like behavior," and nurture "students' faith commitments and maturity."

Id. at 1004-05, 1013.

In addition to these general faculty requirements, the court found DeWeese-Boyd:

- was part of Gordon's program dedicated to education "in social work within the context of a Christian liberal arts institution" and a goal of the "integration and application of social work and Christian values" (*Id.* at 1004);

- was required to submit a second "integration paper" when seeking tenure that "more explicit[ly addressed] her understanding of integration" of

faith and scholarship than her first paper (*Id.* at 1007, n.13); and

- admitted her duty to integrate "social work and Christian values," including by "teaching students about connections between course material and the Christian faith, and reflecting on the role of Christian scholarship in the 'decidedly nonsectarian' field of social work" (*Id.* at 1013).

This litany of undisputed ministerial duties abundantly shows that Gordon's professors—even those teaching so-called "secular" subjects—are required to teach and conduct post-secondary scholarship incorporating and integrating the Christian faith. This is essential to fulfill the college's mission "to graduate men and women distinguished by intellectual maturity and Christian character" and dedicated to "[t]he historic, evangelical, biblical faith." *DeWeese-Boyd*, 163 N.E.3d at 1004. Nonetheless, the Massachusetts Court sought to avoid the obvious conclusion that DeWeese-Boyd had sufficient ministerial duties to be exempt from discrimination laws by relying on irrelevant, superficial factors and unconstitutional balancing regarding Gordon's rights. The court expressed alarm at "expansion of the ministerial exception . . . eclipsing and eliminat[ing] civil law protection against discrimination . . . ." *Id.* at 1017. Seeking to avoid this exception, the court created a new category of ministerial employee heretofore unrecognized by the courts: "a Christian teacher and scholar, but not a minister" who is permitted to claim retaliation and discrimination on the basis of any protected factor, such as race, religion, national origin, sex, or sexual orientation. *Id.* at 1018. This finding is incompatible with the law.

Gordon, not DeWeese-Boyd, is entitled to "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2061. This Court has long held that religious institutions "have an interest in autonomy in ordering their internal affairs, so that they may be free to[] 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341–42 (1987) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)). "[J]udges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition" and ***Gordon's*** "explanation of [DeWeese-Boyd's] role . . . in the life of the religion in question ***is important***," not the reverse. *Our Lady*, 140 S. Ct. at 2066 (emphasis added).

Once the Massachusetts Court found Gordon was a religious institution that required DeWeese-Boyd to follow mandates such as those enumerated above, the court was required to find DeWeese-Boyd to be ministerial. The Massachusetts Court's further inquiry into Gordon's religious views and practices was "not only unnecessary but also offensive. It is well established . . . courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887 (1990)); *see also Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1341-44 (D.C. Cir. 2002). The "process of inquiry

leading to findings and conclusions" regarding a religious institution's beliefs and practices "may impinge on rights guaranteed by the Religion Clauses . . . ." *N.L.R.B. v. Cath. Bishop of Chicago*, 440 U.S. 490, 502, 517 n.10 (1979).

A court's policy preference to broadly apply state statutes may not limit protected religious exercise and expression. States "***shall make no law*** respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend. I. The court's finding that DeWeese-Boyd is a "Christian teacher and scholar," but not a ministerial employee, is a distinction without a difference. In *Our Lady*, this Court found that to be an exempt ministerial employee, the employee need not be a co-religionist for fear of "judicial entanglement in religious issues." 140 S. Ct. at 2068–69. Such semantic distinctions will inevitably require courts to resolve "controversies over religious doctrine" that "courts must take care to avoid . . . ." *Id.* at 140 S. Ct. at 2063 n. 10 (quoting *Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969)).

Examining DeWeese-Boyd's claim in its full context illuminates the court's error. If Gordon is to remain a religious institution, it must be allowed to define its faith, dictate how this faith is taught across academic disciplines, and decide who will carry out its teaching ministry free from government interference. Whether DeWeese-Boyd is labeled a minister, or simply a "***Christian*** teacher and scholar," does not change Gordon's right to determine who teaches its message, how, and whether "vocal opposition" to Gordon's faith-informed policies and practices should disqualify such person from promotion or employment.

Implicit in the Massachusetts Court's holding is that the lower court may find Massachusetts' discrimination statute to limit or prohibit Gordon from exercising its Christian beliefs. This outcome is untenable under the First Amendment and this Court's precedent. The Court should reverse, or accept review and reverse, the Massachusetts decision.

III. Failure to Protect the Rights of Religious Colleges and Universities Will Diminish Their Contribution to the Greater Good and Limit, Not Advance, the Massachusetts Court's Policy Goals.

Religious colleges and universities have advanced and enriched higher education since the early Middle Ages. Today, Catholic and protestant colleges and universities, and institutions adhering to other faiths, continue to operate as forces for good and unique bastions enabling diversity of thought. The conception of a "Christian teacher and scholar," subject to none other than her personal beliefs or the majority cultural view on religion and statutory discrimination protections, will inevitably harm religious institutions and produce consequences antithetical to those the Massachusetts Court sought to advance. Its decision contravenes Professor Michael McConnell's prescient warning "that a principle born of opposition to dogmatism not itself become dogmatic and authoritarian."[4]

4. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 Law & Contemp. Probs. 303, 314 (1990).

It is important to acknowledge the longstanding contributions to higher education by people of faith. Western law schools and the first universities were founded by Church scholars studying Roman Catholic canon law. *See* Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 896 (1977). Shortly after the founding of the first universities in Bologna and Paris, Pope Honorius III's intervention granted scholars and students corporate autonomy from local authorities. G. Post, *Papacy and the Rise of the Universities*, 158-59 (2017). This Court has acknowledged the contributions of these first and intrinsically religious institutions to the intellectual awakening of Europe. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 836 (1995). In the American colonies and later United States, protestant churches founded the vast majority of its early universities, including Harvard, Yale, Princeton, Columbia, and Brown universities or their precursors. Throughout American history, religious colleges and universities—including the Catholic and protestant institutions Amici represent—have made inestimable contributions to scholarship in all academic subjects without sacrificing faithful adherence to their unique beliefs and practices. Throughout its history, the Church and religious colleges and universities have promoted rigorous scholarship free from intrusion by civil law and authorities. Gordon, Amici, and other religious institutions continue this tradition of seeking autonomy, which remains essential for "intellectual life by contributing to the diversity of thought and preserving important alternatives to post-Enlightenment secular orthodoxy."[5]

5. McConnell, *supra* note 4, at 312.

Institutions represented by Amici produce these contributions by engaging in research, scholarship, and teaching in all academic subjects, integrated with the particular dictates of their theology and faith. *Ex corde Ecclesiae*, the Apostolic Constitution on Catholic Universities, summarizes the essential nature of such integration:

> a Catholic University is completely dedicated to the research of all aspects of truth ***in their essential connection with the supreme Truth, who is God***. It does this without fear but rather with enthusiasm, dedicating itself to every path of knowledge, aware of being preceded by him who is "the Way, the Truth, and the Life", the Logos, whose Spirit of intelligence and love enables the human person with his or her own intelligence to find the ultimate reality of which he is the source and end and who alone is capable of giving fully that Wisdom without which the future of the world would be in danger.

Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities, Introduction § 4 (1990), *available at* https://www.vatican.va/content/johnpaulii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html (last visited Aug. 31, 2021) (emphasis added). The concept is equally important to protestant institutions. For example, the Association for Biblical Higher Education summarizes the same concept in its accreditation manual requiring each school demonstrate "[e]vidence that the integration of curricular components supports development of a biblical worldview" in every academic program. The Association for Biblical Higher

Education, *Commission on Accreditation Manual*, 28 (2021), *available at* https://www.abhe.org/wp-content/uploads/2021/07/2021-COA-Manual-2021-07-28.pdf. These standards are essentially the same as Gordon required DeWeese-Boyd to fulfill. The Massachusetts Court's refusal to acknowledge and protect a college's right to determine and apply its theological standard would forever harm the scholarship and contribution of schools Amici represent.

For these institutions, their faith requirements are of eternal importance. They recognize there is no profit in worldly prestige, academic prominence, or even statutory compliance if it results in forfeiting their institutional souls. In response to recent sweeping cultural and legal changes, religious colleges and universities have been forced to engage in a policy "arms race" attempting to faithfully apply their religious beliefs under evolving mandates that may conflict with their faith obligations. These concerns are not hypothetical. It appears[6] that in response to such concerns, both before and during DeWeese-Boyd's litigation, Gordon:

- Added the word "minister" to its handbook description of faculty (*DeWeese-Boyd*, 163 N.E.3d at 1006);

- Now "holds a 'Vision Day' for new faculty, which includes prayer and commissioning" (*Id.* at 1008, n.17);

6. Neither Amici nor their counsel have consulted with or otherwise have any actual knowledge of Gordon's policies, practices, or modifications to same beyond those identified in this case's published decisions.

- Now "conducts seminars concerning the integration of faith and learning to assist second-year faculty in writing their third-year integration paper" (*Id.* at 1008, n.18); and

- Eliminated its social work major (*Id.* at 1004, n.7).

If the Massachusetts' decision stands, Gordon and other schools are subject to a Catch-22. To ensure they may continue to require faculty to fulfill their primary mission—teaching and scholarship consistent with their Christian worldview—these institutions will inevitably divert faculty from this mission to engage in irrelevant, but not prohibited, rituals imposed by judges who may not fully appreciate an institution's unique religious tradition. *See Our Lady*, 140 S. Ct. at 2066. Yet an institution may prefer adding unnecessary procedure or religious formalities to leaving faculty free to define and integrate their personal theology, unmoored from the institution's beliefs, inevitably causing the institution to lose its essential character.[7] Determining whether a position is ministerial cannot depend on the quantum of quasi-religious ritual when it exists to teach and pervasively integrate scholarship with the Christian faith. "This holds true regardless of whether the teacher provides instruction in religious or secular subjects." *Duquesne Univ. of the Holy Spirit v. N.L.R.B.*, 947 F.3d 824, 829 (D.C. Cir. 2020) (citing *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-02 (1979)). Schools should not be required to redirect faculty from accomplishing their essential teaching and scholarly mission merely to satisfy judicial expectations for ritual, preaching, or prayer, when faith-saturated scholarship and teaching is a full-time job.

7. McConnell, *supra* note 4, at 313.

To be clear, reexamining and revising faculty and employment policies and practices is not without value. Institutions should periodically review policies to ensure applicants and employees accurately understand their employer's expectations. However, this process should be driven by the needs of the school, not an arbitrary standard imposed by courts unfamiliar with an institution's religious beliefs and practices. Such a process, motivated by avoiding litigation rather than accomplishing educational mission, will inevitably reduce individual academic freedom. Religious colleges and universities that hope to maintain their religious character will be forced to promulgate increasingly detailed descriptions of conduct connected to faith to ensure that employment disputes become religious disagreements, the most advantageous legal ground.

This Court recognized the concerns present here thirty-four years ago:

> Th[e] prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church [or religious college] may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. 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.

Amos, 483 U.S. at 343–44. These concerns related to employment decisions regarding a gymnasium's building engineer with no duties "even tangentially related to any conceivable religious belief or ritual of the" church facility owner. *Id.* at 332. This case presents similar concerns, but with far more dramatic consequences for the future of religious higher education.

Leaving the Massachusetts Court's decision in place will require religious colleges and universities to change. Internal policies, personnel decisions, and accomplishing the core faith-infused teaching mission of religious educational institutions should be determined by faith and the search for truth, not judicial decrees. Additional duties and unnecessarily restrictive policies may provide additional legal defenses, but also limit diversity of thought and debate. Religious institutions must be allowed to decide through whom and how they accomplish teaching and scholarship within their religious worldview. The Massachusetts Court violated Gordon's First Amendment rights when it examined not only whether Gordon required integrating faith into its teaching and scholarship, but whether that was ***religious enough*** for the court's shifting expectations. The Court should reverse the decision and ensure religious colleges and institutions remain free to define and practice their faith across any academic subject as their faith requires.

IV. The Questions Presented Are Crucial To Preserve Religious Institutions' Faithfulness to Their Religious Tenets Despite Cultural Shifts and to Resolve Existing Disparities Among Lower Courts in Applying the Ministerial Exception.

Not unexpectedly, the decision below arose in the context of alleged retaliation for a professor opposing a religious college's committed beliefs and related policies concerning sexual orientation and gender identity. *DeWeese-Boyd*, 163 N.E.3d at 1003. This Court predicted such cases would arise. *See Bostock v. Clayton Cty.*, 590 U.S. ___, 140 S. Ct. 1731, 1754 (2020). Justice Gorsuch anticipated that the Court would in the future need to address cases involving the intersection of employment discrimination questions under Title VII (or, as relevant here, state discrimination laws) with doctrines protecting religious liberty. *Id.* One year later, here we are.

Importantly, the Court already set the stage in *Bostock* for the result it must find here. The Court recognized "the First Amendment can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers.'" *Id.* (citing *Hosanna-Tabor*, 565 U.S. at 188). Justice Alito, in his dissent, cautioned the breadth of issues that would come before this Court as a result of the *Bostock* decision, warning it would "threaten freedom of religion" as the Massachusetts Court's decision in fact does. *Id.* at 1781 (Alito, J. dissenting). He anticipated the very issue on which Gordon now petitions this Court:

> A school's standards for its faculty "communicate a particular way of life to its students," and a "violation by the faculty of those precepts" may

> undermine the school's "moral teaching."[8] Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment.

Id. Justice Alito acknowledged that the ministerial exception recognized in *Hosanna-Tabor* may protect some institutions from discrimination claims, but also noted the exception's scope is disputed and provides limited protection in some lower courts. *Id.*

The *Bostock* opinion and Justice Alito's dissent highlight two issues of particular concern for Amici, supporting their request to grant certiorari. First, religious institutions must retain their ability to respond to social and policy issues consistent with their longstanding religious beliefs. The cultural shifts reflected in *Bostock* are not the only ones religious institutions face. Such ongoing shifts impact all disciplines, including those that conflict with religious schools' foundational principles. First Amendment protections must solidly guarantee these institutions' freedom to navigate this cultural landscape consistent with their faith, and to require faculty to educate students accordingly. Religious institutions should not be required to revise their governing documents, policies, or titles to avoid judicial scrutiny based on evolving law. Gordon's second question presented is particularly vital for this Court to address to ensure religious institutions can remain faithful

8. McConnell, *supra* note 4, at 322.

to their missions without abandoning their faith or internal governance based on each new court decision or statute. Religious institutions' foundational documents should remain their controlling authority, free from government or judicial interference. *See supra* Section II.

Second, as Justice Alito noted, disparities exist in the fundamental rights afforded religious institutions across different jurisdictions due to disagreement among lower courts in applying the ministerial exception. *See Bostock*, 140 S. Ct. at 1781; *see DeWeese-Boyd*, *petition for cert.*, at Section III (U.S. Aug. 2, 2021) (No. 21-145). This significantly impacts Amici, whose members are spread across the United States. While dedicated to the same purpose of providing academically rigorous education grounded in the Christian religion and with the same overriding mission to integrate faith principles within their academic communities, individual institutions are subject to differing legal precedent that applies the ministerial exception to varying degrees depending on where they reside. A religious institution should not be required to alter its parameters for hiring, retaining, or promoting faculty who teach its disciplines (or limit the constituents it desires to serve[9]) based on jurisdictional differences in applying religious liberty principles.

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9. Thomas Aquinas College must account for different religious liberty protections between its California and Massachusetts campuses. The college "may admit only Catholic students to the [Massachusetts] campus" in order to receive the full extent of religious-liberty protections under Massachusetts state law, while its California campus is open to students of all faiths. *See* https://www.thomasaquinas.edu/about/one-program-two-coasts/new-england (last visited Aug. 29, 2021). This result arises from Massachusetts' mandate, permitting the college to prefer hiring Catholics in Massachusetts only if it agreed to restrict admission to Catholic students. *See* Application of Thomas Aquinas College to

The only party equipped to determine who serves as a minister in a religious higher educational institution is the religious institution itself. *See supra* Sections I and II. Our Constitutional framework forbids federal and state governments and courts from usurping that role. And the breadth of a religious institution's First Amendment protection should not differ based on its location. Accordingly, the Massachusetts Court overstepped its bounds and should be reversed.

CONCLUSION

The Court should grant Gordon College's petition for a writ of certiorari and summarily reverse the Massachusetts Court's decision, or in the alternative grant review to consider the two questions presented.

Respectfully Submitted,

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Award the Bachelor of Arts in Liberal Arts, Massachusetts Board of Higher Education Request for Committee and Board Action, 14 (Oct. 23, 2018), https://www.mass.edu/bhe/lib/documents/AAC/05_AAC%2019-03%20Thomas%20Aquinas%20College%20FINAL.pdf.