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 ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Association of Christian Schools International ("ACSI") is the largest Protestant educational organization in the world. ACSI was founded in 1978 when several regional U.S. school associations joined, becoming a united voice to advance excellence in Christian education. ACSI's mission is to strengthen Christian schools and equip Christian educators worldwide to prepare students academically and inspire them to become devoted followers of Jesus Christ. ACSI advances excellence in Christian schools by enhancing Christian educators' professional and personal development and providing vital support functions for Christian schools.

ACSI is headquartered in Colorado Springs, Colorado, and supports 18 global member offices around the world. Its members include Early Education Programs/Schools, K-12 Schools, International Schools, Higher Education Schools, and individuals. ACSI offers many services to its members, including teacher and administrator certification, school accreditation, legal and legislative information updates, and curriculum and textbook publishing. ACSI supports over 5,000 member schools throughout the United States and around the world which collectively serve more than 1.2 million students.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and counsel made a monetary contribution to fund the preparation or submission of this brief. The parties in this case have consented to the filing of this brief and were given notice at least ten days before the due date.

Through additional training programs, materials, and expertise provided to other educational groups worldwide, ACSI's overall influence and positive impact reaches over 26,000 schools, operating in over 100 countries, and serving 5.5 million children worldwide.

Gordon College is an ACSI member, along with twenty-two other Christian schools in Massachusetts and sixty-four other higher education schools in the United States.

ACSI advocates for the right of religious educational institutions to operate free of government intrusion consistent with the First Amendment's guarantee of religious freedom. ACSI argues that courts should defer to a religious institution's view of the religious nature of a job position to minimize government entanglement with religion and avoid religious discrimination. ACSI also advocates for the right of parents to freely choose the educational program that in their view best meets the academic and spiritual needs of their children.

SUMMARY OF ARGUMENT

The Massachusetts court declared war on this Court's precedents in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). In its aggressive effort to limit those cases to their facts, despite warnings from the Court not to do so, the Massachusetts court misapprehended the nature of religious education, gutted the First Amendment rights of religious schools, and discriminated against faith traditions different from those at issue in *Our Lady of Guadalupe* and *Hosanna-Tabor*.

First, the court failed to recognize that a teacher need not formally teach religious doctrine as class subject matter or lead students in specific religious rituals to transmit a religious school's faith. Teachers of all subjects at religious schools play an indispensable role in transmitting the values and beliefs of the faith traditions they serve, implicating the First Amendment's protections for religious freedom.

Second, the court's decision threatens the ability of religious schools to guarantee the religious educations they promise students and parents. If the government can force religious schools to allow faculty members to openly undermine their faith traditions, then the distinction between religious and secular schools is erased. The court's problematic decision in this case appears to extend beyond higher education and affect

the First Amendment rights of religious early education and K-12 schools.

Finally, by attempting to limit *Our Lady of Guadalupe* and *Hosanna-Tabor* to their facts, the court improperly elevated the importance of facts specific to the particular faith traditions in those cases. In doing so, the court discriminated against other faith traditions that may not fall into those specific sets of facts. Faith traditions that do not identify with a particular sect or do not recognize the same type of formal or functional distinction between clergy and laity are given second-class status under the Massachusetts court's opinion. The First Amendment cannot give Lutherans and Catholics greater protections than non-denominational Christians or people of other faiths.

If the Massachusetts court's opinion is allowed to stand, the First Amendment rights of ACSI's member institutions will be in jeopardy. The Court should grant the petition and hold that the First Amendment applies in this case.

ARGUMENT

I. Teachers of All Subjects Play an Indispensable Role in the Transmission of Faith at Religious Schools

A teacher need not formally teach religious doctrine as class subject matter or lead students in specific religious rituals to transmit a religious school's faith. The Massachusetts court ignored this and held that a religious school's employment decision for a teacher, who was in fact required to integrate her faith and her teaching, did not implicate the First Amendment. *See DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1016–18 (Mass. 2021). Such a narrow reading of the First Amendment fails to appreciate the indispensable role that teachers of all subjects play in the transmission and affirmation of faith at religious schools.

In *Our Lady of Guadalupe School v. Morrissey-Berru*, this Court explained that when a teacher is "entrusted with the responsibility of 'transmitting the . . . faith to the next generation,'" the school's First Amendment rights are at stake. 140 S. Ct. 2049, 2064 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 192 (2012)). "[E]ducating 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." *Id.* ACSI's member institutions embrace wholeheartedly that description of the core mission of a private religious school.

Teachers of all academic subjects at religious schools serve the goals of "educating young people in their faith" and "training them to live their faith." *Id.* Subjects that some may consider non-religious are usually rife with religious significance for people of faith. For a religious school to achieve its educational mission, it must have the protection afforded by the First Amendment to ensure that its faculty's teachings are informed by and integrated with the school's faith tradition.

As this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, the "exercise of religion" includes participation in the day-to-day activities of the world, such as business and commerce, in a manner that is "compelled or limited by the tenets of a religious doctrine." 573 U.S. 682, 710 (2014). Consider the following examples of how various academic subjects can be approached in ways that are either hostile to or consonant with faith.

In the natural sciences, some believe that faith is contrary to science while others believe that scientific discoveries reveal the nature of God's creations. *Compare* RICHARD DAWKINS, THE GOD DELUSION (2006), *with* FRANCIS S. COLLINS, THE LANGUAGE OF GOD: A SCIENTIST PRESENTS EVIDENCE FOR BELIEF (2006).

In the humanities, some read texts from a secular perspective while many read texts from a religious perspective. *Compare* JASPER NEEL, PLATO, DERRIDA, AND WRITING (1988), *with* CHRISTIAN PLATONISM: A HISTORY (Alexander J.B. Hampton & John Peter Kenney eds., 2021), MAJID FAKHRY, AL-FĀRĀBI,

FOUNDER OF ISLAMIC NEOPLATONISM: HIS LIFE, WORKS AND INFLUENCE (2002), *and* NEOPLATONISM & JEWISH THOUGHT (Lenn E. Goodman ed., 1992).

In the fine arts, some use art for secular purposes while others use art to glorify God. *Compare Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (discussing computer-generated child pornography), COMMUNIST POSTERS (Mary Ginsberg ed., 2017) (compiling Communist propaganda posters), *and* BRITNEY SPEARS, . . . BABY ONE MORE TIME (Jive Records 1999) (exemplifying commercial music), *with* ANJA GREBE, THE VATICAN: ALL THE PAINTINGS (2013) (compiling religious paintings); FRANCIS A. SCHAEFFER, ART AND THE BIBLE 18 (rev. ed. 2006) ("A Christian should use these arts to the glory of God, not just as tracts, mind you, but as things of beauty to the praise of God."), *and* ANDREA BOCELLI, MY CHRISTMAS (Decca Records 2009) (celebrating Christmas).

Though some may not see a connection between sports management and Christianity, in describing its sports management concentration, Petitioner Gordon College explains that "[a]ll courses are taught within a framework of the Christian faith, showing how the gym, field, court, office and studio can be used to live out the gospel." *Sports Management Concentration*, GORDON COLLEGE, bit.ly/3ryB5G8 (last visited Aug. 31, 2021). This conclusion is rooted in the Christian scriptures, which teach that Christians should express and transmit their faith by the example of right action. *See Matthew* 5:16 ("[L]et your light shine before others, that they may see your good deeds and glorify your Father in heaven."); 1 *Timothy* 4:12 ("[S]et an example

for the believers in speech, in conduct, in love, in faith and in purity.").

Respondent DeWeese-Boyd was a professor of social work at Gordon College. Social work is an area of study with unquestionable significance for Christians. The Bible extolls God's call to care for other human beings. *See, e.g.*, *Matthew* 25:31–46; *Mark* 12:31; *Luke* 10:30–37; *Philippians* 2:4; 1 *John* 3:17–18. Religious institutions provided social services in this country long before state and local governments did. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874–75 (2021); *see also id.* at 1885 (Alito, J., concurring). In *Fulton*, this Court recognized that a religious social-service agency was entitled to the religious-freedom protections of the First Amendment. *Id.* at 1882. The Massachusetts court's opinion, which pre-dates *Fulton*, cannot be squared with that holding. It is anomalous to hold that the First Amendment protects the provision of social services by a religious organization, but not the training of social-service providers by a religious organization. The Court should grant the petition to correct this anomaly and recognize that teachers of all subjects play an indispensable role in the transmission of faith at religious schools.

II. The Massachusetts Court's Decision Threatens the Ability of Religious Schools to Guarantee the Educations They Promise Students and Parents

Many religious schools advertise the integration of faith and learning in their mission statements. If the government could preclude religious schools from

ensuring that their faculty members impart religious principles with education, that would compromise the ability of religious schools to guarantee the educations they promise students and parents. The following are a few examples of ACSI's member institutions that promise an education integrating faith and learning:

Patrick Henry College promises students and parents that it "will remain true to the Word of God, as evidenced by our Statement of Faith, our Statement of Biblical Worldview, and the permeating presence of the biblical worldview in every course." *Distinctives & Non-Negotiable Principles*, PATRICK HENRY COLLEGE, bit.ly/3shcqWZ (last visited Aug. 31, 2021). The Statement of Faith promises that each faculty member will "fully and enthusiastically" subscribe to its Statement of Faith. *Statement of Faith*, PATRICK HENRY COLLEGE, bit.ly/3x62Y9R (last visited Aug. 31, 2021).

Biola University believes that "truth exists, is found in the person of Jesus Christ, and is revealed in the Bible and in the created order." *Mission, Vision and Values*, BIOLA UNIVERSITY, bit.ly/2WjI6zb (last visited Aug. 31, 2021). The "art of pursuing truth is, indeed, at the center of a Biola University education," and Biola promises that its "faculty teach and model this pursuit in order to develop in our students patterns of thought that are rigorous, intellectually coherent and thoroughly biblical." *Id.*

Dordt University commits to providing students with "[a]n education that is Christian not merely in the sense that devotional exercises are appended to the ordinary work of the college, but in the larger and

deeper sense that all the class work, all of the students' intellectual, emotional, and imaginative activities shall be permeated with the spirit and teaching of Christianity." *Our Mission & Vision*, DORDT COLLEGE, bit.ly/3secua9 (last visited Aug. 31, 2021).

These are but a few examples of ACSI's member institutions that promise to deliver a religious education integrating faith and learning. If the government could preclude religious schools from managing their faculty members in accordance with their faith traditions, religious schools would no longer be able to guarantee the educational experiences they promise students and parents. Indeed, if the decision of the Massachusetts court is permitted to stand, religious colleges would be forced to choose between deceptively promising religious educations they cannot guarantee or renouncing their faith traditions entirely. The distinction between religious and secular schools would be erased.

Though this case involves higher education, the Massachusetts court's flawed decision also appears to affect early and K-12 education. The court's explanation of who constitutes a "ministerial employee" does not differentiate college professors from early education and K-12 teachers. Thus, the court's opinion may implicate the First Amendment rights of early education and K-12 schools. ACSI represents thousands of religious schools that provide early and K-12 education. Twenty-two of those member schools are in Massachusetts. *See Find a School – Massachusetts*, ACSI, bit.ly/3iLNVwL (last visited Aug. 31, 2021).

This Court has long recognized that parents have a fundamental right to educate their minor children in the manner they see fit. In *Meyer v. Nebraska*, the Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." 262 U.S. 390, 399, 401 (1923). In *Pierce v. Society of Sisters*, the Court reiterated that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." 268 U.S. 510, 534–35 (1925). And in *Wisconsin v. Yoder*, the Court recognized again that the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." 406 U.S. 205, 232 (1972). "The liberty interest . . . of parents in the care . . . of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

The Massachusetts court's decision threatens religious schools' First Amendment right to provide distinctly religious educations. That in turn compromises parents' fundamental right to raise their children in accordance with their faith traditions, compounding the constitutional problems. The Court should grant the petition to protect the constitutional rights of religious schools and the students and parents they serve.

III. The Massachusetts Court's Decision Discriminates Against Many Faith Traditions

Of note, the Massachusetts court did not dispute that DeWeese-Boyd had a "responsibility to integrate the Christian faith into her teaching, scholarship, and advising," and it acknowledged that she was "expected and required to be a Christian teacher and scholar." *DeWeese-Boyd*, 163 N.E.3d at 1017–18. Nevertheless, the court held that the First Amendment did not apply because DeWeese-Boyd was "not a minister." *Id.* at 1018.

The term "minister" appears nowhere in the text of the First Amendment, and this Court has been careful to avoid limiting the First Amendment's protections to only religious organizations whose employees are called "ministers." *See Our Lady of Guadalupe*, 140 S. Ct. at 2060–61 (noting that the "so-called ministerial exception" acquired that name only because "the individuals involved in pioneering cases were described as 'ministers'" according to their faith traditions); *see also id.* at 2069 n.1 (Thomas, J., concurring) ("As the Court acknowledges, the term 'ministerial exception' is somewhat of a misnomer. . . . The First Amendment's protection of religious organizations' employment decisions is not limited to members of the clergy or others holding positions akin to that of a 'minister.'").

The Massachusetts court, however, repeatedly used the words "ministerial" and "minister" to limit the First Amendment's scope. *See, e.g.*, *DeWeese-Boyd*, 163 N.E.3d at 1002 ("We conclude that . . . DeWeese-

Boyd . . . is not a ministerial employee."); *id.* at 1009 ("[T]he difficult issue is who is a minister."); *id.* at 1014 ("We do not find DeWeese-Boyd's title or training to provide decisive insight into resolving the difficult question whether she was a minister."); *id.* at 1016 ("[S]he never held herself out as a minister or referred to herself as such . . . ."); *id.* at 1018 ("In sum, we conclude that DeWeese-Boyd was expected and required to be a Christian teacher and scholar, but not a minister.").

In *Hosanna-Tabor*, Justice Alito, joined by Justice Kagan, warned against excessive reliance on the word "minister":

> The term "minister" is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christians churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy . . . .

565 U.S. at 198 (Alito, J., concurring). In *Our Lady of Guadalupe*, the Court reiterated that "[r]equiring the use of the title ['minister'] would constitute impermissible discrimination." 140 S. Ct. at 2064.

The Massachusetts court ignored this Court's warnings and relied excessively on the term "minister." In its aggressive effort to limit *Our Lady of Guadalupe* and *Hosanna-Tabor* to the specific facts of those cases, the Massachusetts court considered factors in its First Amendment analysis that discriminate against many faith traditions.

First, the court placed form over substance by declaring it relevant that DeWeese-Boyd's "integrative function is not tied to a sectarian curriculum," even though her job required "integrating the Christian faith generally into teaching and writing about social work." *DeWeese-Boyd*, 163 N.E.3d at 1014. That analysis discriminates against religious institutions that eschew sectarian labels, such as Gordon College, which is a non-denominational school with a distinctive set of Christian beliefs. *See Statement of Faith*, GORDON COLLEGE, bit.ly/3CyZSPw (last visited Aug. 31, 2021); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2065–66 (noting that the "rich diversity of religious education in this country" includes "non-denominational Christian schools" that "expressly set themselves apart from public schools that they believe do not reflect their values"). This Court has previously warned about the arbitrariness and "futility" of "sifting sectarian from nonsectarian" activities. *Town of Greece v. Galloway*, 572 U.S. 565, 581–82 (2014). The First Amendment must be "unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 582.

Second, the court overlooked that "non-denominational" is, in fact, a well-recognized sect in

modern American Christianity. *See, e.g.*, Frank Newport, *More U.S. Protestants Have No Specific Denominational Identity*, GALLUP (July 18, 2017), bit.ly/3CuG4wC (finding that "the percentage of Americans who identify with a specific Protestant denomination has dropped from 50% in 2000 to 30% in 2016, while Christians who don't name a specific . . . denomination have doubled in number, from 9% to 17%"); Ed Stetzer, *The Rise of Evangelical "Nones*,*"* CNN (June 12, 2015), https://cnn.it/3fPFsI8 ("Many analyses of religious data in the U.S. miss the growing presence of nondenominational churches. . . . [M]ost of the top 100 largest churches in the United States are now nondenominational.").

Third, the court found it relevant that DeWeese-Boyd was "not ordained" or given a "different [job] title" because of her formal religious training. *DeWeese-Boyd*, 163 N.E.3d at 1015. That analysis discriminates against faith traditions that lack a concept equivalent to ordination or do not recognize the same type of formal or functional distinctions between clergy and laity found in other traditions. *See, e.g.*, *The Bahai'i Faith*, BAHAITEACHINGS.ORG, bit.ly/2VGnS2l (last visited Aug. 31, 2021) ("Baha'is believe in each person's capacity to find the truth for themselves, and there is no clergy."); *cf. Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring) (cautioning against drawing conclusions based on "ordination status" or "formal title").

The Massachusetts court improperly elevated the importance of the particular facts that were specific to the distinct faith traditions at issue in *Hosanna-Tabor*

and *Our Lady of Guadalupe*. There is no legal justification for giving Lutherans and Catholics greater First Amendment protections than non-denominational Christians or people of other faiths. The Massachusetts court's holding amounts to impermissible religious discrimination. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064 (warning against "impermissible discrimination"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (noting that in interpreting the First Amendment "we can also find guidance in our equal protection cases").

This Court has expressed concerns about "excessive entanglement between government and religion." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *but see Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092–93 (2019) (Kavanaugh, J., concurring). Allowing lower federal courts and state courts to pronounce their own definitions of the word "minister" gives judges excessive discretionary control over religious institutions. The term "minister" as used by the Massachusetts court does not appear in the text of the First Amendment, has not been accepted by this Court as controlling, and improperly discriminates against many faith traditions. The Court should grant the petition to protect the principle it articulated in *Our Lady of Guadalupe*: "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." 140 S. Ct. at 2069.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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