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 the Islam & Religious Freedom Action Team of the Religious Freedom Institute as *amicus curiae* in support of Petitioners

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INTEREST OF *AMICUS CURIAE* [1]

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

Though the facts underlying this appeal do not involve Islamic expression or beliefs, the lower court's misapprehension of the proper application of the ministerial exception is of great concern to all faith groups and to minority religions especially. In particular, the IRF fears the Supreme Judicial Court's reasoning and holding—particularly its determination that courts, rather than religious entities themselves, are best suited to determine which employees are ministerial in nature—will, if not corrected, have especially deleterious effects on minority religious faiths.

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[1] The parties' counsel were timely notified of and consented to the filing of this *amicus* brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amicus curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the Supreme Judicial Court of Massachusetts and hold that the First Amendment requires courts to defer to religious organizations' good-faith characterization of the ministerial nature of specific roles, activities, and position. Such deference preserves the autonomy of religious groups; recognizes and respects their unique knowledge of and expertise in their respective faiths and practices; preserves the rights of religious minorities; and avoids First Amendment violations.

The alternative—allowing courts to second-guess religious organizations' definition of the ministerial role—would have an outsized and especially pernicious effect on minority faith groups whose beliefs, practice, and roles are unfamiliar to the courts. In *amicus'* own faith, for instance, individuals often engage in activities that, in Western thought, may not appear clerical, but which, in fact, are specifically undertaken as religious obligations to carry out a religious mission or to share the faith.

In the absence of judicial deference, religious groups of all faiths—and particularly of minority faiths—will be subject to unconstitutionally coercive pressure to conform in belief and practice to prevailing secular understanding of clerical roles or, worse yet, to alter or limit their religious mission and practices.

ARGUMENT

One question presented in the Petition is whether the First Amendment requires courts to defer to religious groups' good-faith determinations of the roles, activities, and position that are ministerial. The answer to that question is of critical import to Muslims and other minority faith groups in the United States who wish freely to exercise their religions, to fulfill their religious missions, and to maintain their religious identity and autonomy. As explained more fully below, the Court should grant the Petition and answer the question in the affirmative.

I. Courts should defer to religious groups' definitions of ministers.

In applying the First Amendment's Ministerial Exception, courts should "defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'" *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S.Ct. 2049, 2069–70 (2020) (Thomas, J., concurring).

Such deference is warranted for at least four distinct reasons, many of which were recognized by Justice Thomas in his concurring opinions in *Our Lady of Guadalupe* and *Hosanna-Tabor Evangelical Lutheran Church and School* v. *E.E.O.C.*, 565 U.S. 171, 196 (2012). First, deference preserves the autonomy of religious groups. Second, deference recognizes and respects the unique self-knowledge and expertise of religious groups. Third, deference preserves the rights of religious minorities. Fourth, deference avoids First Amendment violations.

A. Deference preserves the autonomy of religious groups.

First, as Justice Thomas recognized in *Hosanna-Tabor*, deference to religious organizations preserves their autonomy by allowing the organizations to make their own determinations about ministerial status. Recognizing the dangers posed by a judicially-crafted definition of ministerial employees, Justice Thomas suggested that "uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Hosana Tabo*r, 656 U.S. at 197 (Thomas, J., concurring).

Justice Thomas was hardly the first person to recognize the dangers posed to religious autonomy by judicial intervention in religious practice. Writing for this Court almost twenty-five years before the decision in *Hosana-Tabor*, Justice White observed:

> Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. *Amos*, 483 U.S. 327, 336 (1987).

The lower courts have recognized similar autonomy concerns. For example, writing for the United States Court of Appeals for the Fourth Circuit, Judge Wilkinson described the effect of judicial intervention on religious autonomy: "There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

Legal commentators have also recognized these autonomy concerns. Professor Laycock, for example, articulated the autonomy concerns posed by judicial or government intervention:

> Even if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal. Regulation may be thought of as taking the power to decide a matter away from the church and either prescribing a particular decision or vesting it elsewhere—in the executive, a court, an agency, an arbitrator, or a union. And regulation takes away not only a decision of general policy when it is imposed, but many more decisions of implementation when it is enforced.

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, 1399 (1981)

In short, Justices, judges, and legal scholars have all recognized the straightforward and somewhat common-sense proposition that judicial determination of the scope of religious practice necessarily deprives religious groups of the autonomy to make the decision for themselves.

B. Deference recognizes and respects the unique self-knowledge and expertise of religious groups.

Deference is also owed to religious groups based on their own deep "understanding and appreciation of" their respective religious traditions. *Our Lady of Guadalupe*, 140 S.Ct. at 2066. As this Court recently recognized, "judges 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." *Id*. Indeed, in a country with at least 221 recognized religions, it would be impossible for any judge to understand the central tenets—much less the nuances—of all those faiths. See Kimberly Winston, *Defense Department expands its list of recognized religions*, RELIGIOUS NEWS SERVICE (April 21, 2017), *available at* https:// religionnews.com/2017/04/21/defense-department-expands-its-list-of-recognized-religions/.

In other contexts, courts routinely grant deference to various entities based on those entities' knowledge or expertise. See Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1792 (2008). For example, in expressive association cases, this Court has given deference to an association's own assertions regarding the nature of its expression. See *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the

nature of its expression, we must also give deference to an association's view of what would impair its expression."). In academic promotion or tenure cases, courts have been willing to defer to the expertise of educators. See, e.g., *Kunda* v. *Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980) ("Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges."). Perhaps most famously, many early decisions on deference to administrative agencies were based at least in part on agency expertise. See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 741 (2002) ("Skidmore, Chenery, and Cement Institute all invoke enhanced agency expertise as the rationale for affording agency work product deference on judicial review.").

C. Deference preserves the rights of religious minorities.

Deference also preserves the rights of religious minorities, whose traditions may be less familiar to the judiciary. As Justice Thomas observed in his concurring opinion in *Hosanna-Tabor*, "[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." 565 U.S. at 197 (Thomas, J., concurring). Judge O'Scannlain acknowledged a similar point in his concurring opinion in *Spencer* v. *World*

Vision, Inc.: "While these questions [about the scope of an organization's religious activities] are relatively easy in some contexts, they might prove more difficult when dealing with religions whose practices do not fit nicely into traditional categories." 633 F.3d 723, 732 n.8 (9th Cir. 2011) (O'Scannlain, J., concurring).

To the extent judges' own religious preferences or affiliations may inform their decisions in a particular case, it is noteworthy that many courts are composed almost exclusively of jurists from a Judeo-Christian heritage. See Sepehr Shahshahani and Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeal*, 14 JOURNAL OF EMPIRICAL LEGAL STUDIES 716 (2017) (describing the religious affiliation of federal appellate judges).[2] Although these judges may be expected to be familiar their own faith traditions, they are almost certainly less familiar with other faith traditions. This lack of familiarity necessarily hinders any attempt to judicially define religious practices and roles.

D. Deference avoids First Amendment violations.

Finally, as Justice Thomas recognized in *Our Lady of Guadalupe*, deference allows courts to avoid further First Amendment violations. *Our Lady of Guadalupe*, 140 S.Ct. at 2070 (Thomas, J., concurring). In seeking to determine which employees qualify as ministers, "the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the

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[2] The Senate confirmed the Honorable Zahid Quraishi as a United States District Judge on June 10, 2021. Judge Quraishi is the first Article III judge of the Muslim faith in American history.

state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decision." *Hosanna-Tabor*, 656 U.S. at 188–89.

II. Judicial second-guessing of the ministerial role has an especially deleterious effect on minority religions.

Even assuming *arguendo* that judges could reliably determine what counts as a "minister" in faith traditions they are familiar with, they are especially ill equipped to do so in the context of faith traditions whose beliefs, liturgy, clerical roles, spiritual obligations, and duties are unfamiliar to them.

Take *amicus*' Muslim faith, for example. Across the nation, as around the world, Muslims organize together, often in incorporated form, to provide social services to the poor and needy. To an outsider, these groups and their activities may appear indistinguishable from similar social services provided by the government or by secular charitable organizations. And, to an outsider, not every Muslim engaged in the provision of these services may appear to be a minister.

To a Muslim, however, or to one familiar with Muslim belief and practice, these tasks, and the individuals who perform them, may well clerical in nature. Indeed, as a formal matter, Sunni Islam does not even have an ordained clergy with special authority over rites and rituals. Rather, any Muslim with sufficient knowledge may lead prayers or perform rituals. Accordingly, when any Muslim interprets and applies Scripture or the teachings of the Prophet, whether in formal worship or in seemingly secular activities and interactions with the community, he or she is

engaging in what—in Western thought—is an essentially ministerial activity. Indeed, the social services noted above, as well as other deeds in service of the public good, are commanded in the Hadith. See, e.g., *Musnad Ahmad ibn Hanbal*, Vol. 12 at 208 (Ahmad Zayn, ed.) (1994) ("Honor the guest, be generous to the orphan, and be good to your neighbor."); *Ṣaḥiḥ Ibn Ḥibban bi-Tartib Ibn Balaban*, Vol. 2 at 262 (Shuʿayb al-Arnaʾuṭ, ed.) (1993) ("There are rooms in Paradise which God has prepared for those who feed others, spread greetings of peace, and pray at night while others sleep."). Indeed, even a general disposition of friendliness is itself part of the mission of the Muslim believer, and by being beneficent to others, one is ministering. See Abu Hamid Muhammad al-Ghazali, *Ihya Ulum ad-Deen*, Vol. 5 at 112 (2016) ("The believer is friendly and befriended, for there is no goodness in one who is neither friendly, nor befriended. The best of people are those who are most beneficial to people.").

To a jurist unfamiliar with Islam (including its absence of an ordained clerical class with exclusive authority to perform sacerdotal tasks and duties), it would be easy erroneously to miss the fact that Muslim individuals working together in a religious enterprise engaged in caring for orphans or the needy do so as a way of sharing their faith or carrying out the organization's religious mission. The result of such a misapplication of the law—which would land with outsized impact on minority or unfamiliar faith groups—would be the very evils the ministerial exception is intended to avoid, e.g., coercive pressure to conform in belief and practice to prevailing secular understanding of "ministers" or, worse yet, to alter or limit one's religious mission and practices. See *Hosana*

Tabor, 656 U.S. at 197 (Thomas, J., concurring); *Amos*, 483 U.S. at 336.

In contrast, judicial deference to a religious organization's good-faith determination of which individuals are engaged in ministerial roles would avoid this misstep and would better protect the autonomy and free exercise of the organization and its faith community.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests this Court grant certiorari to review the judgment of the lower court and bring further clarity to First Amendment jurisprudence involving the ministerial exception.

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