NO. 21-145

IN THE

Supreme Court of the United States

GORDON COLLEGE, ET AL.,

Petitioners,

v.

MARGARET DEWEESE-BOYD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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REPLY ARGUMENT SUMMARY

DeWeese-Boyd does not dispute Gordon College's religious mission nor the critical role the College's faculty play in carrying out that mission. That should be dispositive. As the 20 amici states conclude in their review of the undisputed facts, the "case for applying the ministerial exception here is compelling—so strong in fact that it is mystifying how the Massachusetts Supreme Judicial Court missed it." Nebraska Br. 10. The explanation is the lower court's disregard of this Court's teachings in *Our Lady of Guadalupe School* v. *Morrissey-Beru*, 140 S. Ct. 2049, 2055 (2020), and *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), Pet. 23–28, and its insistence that religious-college professors must act like religious grade-school teachers to qualify for the exception. In so doing, "the Massachusetts Supreme Judicial Court effectively foreclosed the application of the ministerial exception to instructors at the college level." Benedictine College Br. 6. And the court invaded the authority of a religious organization to decide for itself who is necessary to inculcate the organization's faith.

DeWeese-Boyd counters with an assortment of unfounded vehicle objections. It is DeWeese-Boyd—not Gordon—that misunderstands the record. This Court has jurisdiction to hear the case, and if Gordon prevails in this Court, the case will be resolved. The College does not ask the Court for a per se rule. And as amici explain, the decision below is devastating for religious educational institutions. Certiorari or summary reversal is warranted.

RECORD CLARIFICATION

DeWeese-Boyd does not contest the key facts necessary to resolve this case:

- The College is dedicated to "[s]cholarship that is integrally Christian." Pet.6.
- It deepens "the faith [of students] by integrating Christian beliefs and practice into *all* aspects of [the] educational experience." *Ibid.*
- The College requires its faculty to sign and adhere to a Christian Statement of Faith, a Bible-based "Statement on Life and Conduct," and a "Faculty Handbook," and to "engage students in their respective disciplines from the perspectives of Christian faith." Pet.7, 9.
- Faculty are "educators and ministers" and must "participate actively in the spiritual formation of … students into godly, biblically-faithful ambassadors for Christ." Pet.9.
- Faculty must "integrate[e]" faith and learning so students "develop morally responsible ways of living in the world informed by biblical principles and Christian reflection[.]" *Ibid.*
- Professors must "assist students in their spiritual journey" and "inculcate the Christian identity and transmit it to the next generation." Pet.10.
- All this must be done "to serve the[ ] Christian purpose of the institution." *Ibid.*
- And DeWeese-Boyd specifically understood these requirements. Pet.10, 11–13.

DeWeese-Boyd's opposition misunderstands the record. For example, the brief claims "ministerial" language was improperly added to the Faculty Handbook without faculty consultation. Opp.6 (citing R.A.227). But faculty must only be consulted for amendments to Handbook §§ 3–4, R.A.227, not faculty academic requirements, which appear in § 5.4. R.A.281–85.

DeWeese-Boyd also alleges that Handbook changes were made for "legal reasons," to "trigger judicial deference." Opp.6 (citing R.A.670). But Gordon's college counsel clarified that there were already "many places" in the Handbook where faculty "*ministry* is implied." R.A.670. The changes "do[ ] not add anything new to faculty responsibilities" but merely "shore up" principles already there. *Ibid.*

DeWeese-Boyd's brief also highlights some faculty objections to the "minister" language because Gordon faculty "are not real ministers." Opp.6 (citing R.A.626, 670). But that's because faculty did not understand the designation: they thought it made them church pastors. One professor objected, "I don't administer the sacraments." R.A.625. Another confusingly observed that "Gordon is not a church—it's an educational institution." *Ibid.* Yet another expressed reservations about "ministering on the higher levels in ways we're not trained to." *Ibid.* And another thought the designation meant faculty would be "competing" with denominational ministers. *Ibid.* Tellingly, not one faculty member objected when a professor pointed out that the "minister" statement "doesn't seek to change the substance" of Gordon faculty responsibilities. *Ibid.*

DeWeese-Boyd's brief flees from the Handbook because its language proves the importance of faculty carrying out the College's religious mission, making clear that faculty are "committed to imaging Christ in all aspects of their educational endeavors," and participating "actively in the spiritual formation of our students into godly, biblically-faithful ambassadors for Christ." R.282. Professors must "help[ ] students make connections between course content, Christian thought and principles, and personal faith and practice," while encouraging students to live "by biblical principles and Christian reflection." R.A.283–84.

It makes no difference that DeWeese-Boyd (now) claims she did not understand these to be *her* responsibilities. Opp.28. The ministerial exception vanishes if disgruntled *professors* decide how the faculty should inculcate faith in students.

And DeWeese-Boyd's suggestion that her Complaint has no impact on Gordon's Statements of Faith and Conduct, Opp.31, is erroneous. While DeWeese-Boyd now says she was always "committed to Gordon and its mission," *id.* at 31 n.5, her Complaint ¶¶ 17, 25, 29, and 39, alleges that DeWeese-Boyd disagreed with and sought to overthrow those very religious beliefs and practices.

ARGUMENT

I. The lower court's judgment is final.

DeWeese-Boyd says there is no "final judgment" to review. Opp.12–19. That is wrong. This suit tracks two types of cases in which this Court has treated a state-court ruling on a federal issue "as a final judgment" for purposes of 28 U.S.C. 1257. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). First, this suit concerns a finally-decided federal issue that may become moot but—if resolved now—could bar "further litigation" on relevant claims and prevent the serious erosion of "federal policy." *Id.* at 482–83. Second, the federal issue is "separable from, and collateral to," the merits, and if left uncorrected, will cause irreparable harm. *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985) (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *Cox*, 420 U.S. at 482 n.10.

A. Immediate review would prevent the erosion of federal policy.

This Court reviews cases where "the federal issue has been finally decided," the petitioner could win on "nonfederal grounds," immediate reversal would bar "further litigation" on relevant claims, and declining review "might seriously erode federal policy." *Cox*, 420 U.S. at 482–83. This suit easily passes that test.

First, the federal questions presented were finally decided. The lower court affirmed summary judgment dismissing Gordon's ministerial-exception defense. Pet.App.36a. Gordon cannot relitigate it. *E.g.*, *Porcaro* v. *Chen*, No. 0402896, 2005 WL 3729056, at *5 (Mass. Super. Ct. Dec. 29, 2005) (summary judgment dismissal precludes affirmative defense at

trial). While Gordon may learn "new information," Opp.18, it could not resurrect this defense without court permission, Mass. R. Civ. P. 15, 54(b), 60(b), and such discovery is improbable since Gordon knows the functions it assigned its faculty.

Second, Gordon could win on nonfederal grounds. DeWeese-Boyd might, for example, fail to prove her state-law claims at trial, rendering this Court's review of the ministerial-exception issue "unnecessary." *Cox*, 420 U.S. at 482.

Third, immediate reversal would bar further litigation on the "relevant *cause[s] of action*," *Cox*, 420 U.S. at 483 (emphasis added). DeWeese-Boyd does not contest that reversal would preclude further litigation on at least some claims. That is enough. Under *Cox*, the Court aims to prevent the erosion of a "federal policy," which, in its judgment, outweighs the possible costs of immediately deciding the issue while also litigating the remaining "cause[s] of actions," *ibid.*—even those with federal issues, see *id.* at 477 n.6 (contemplating this possibility).

DeWeese-Boyd suggests reversal would not bar further litigation on *all claims* because Gordon did not present a question on whether the ministerial exception covers "state-law contract claims." Opp.18. But that's not the test. Moreover, her complaint does not allege a breach of a specific contractual promise; it merely says that the same conduct giving rise to her civil-rights claims *also* "constitutes breach of contract." R.A.30. So, the same ministerial principles apply. That's why Gordon requested summary judgment below as to all claims.

Moreover, while *Cox* does not require this, the Court could simply "rephrase[] the question[s] presented," *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992); *e.g.*, *Ankenbrandt* v. *Richards*, 502 U.S. 1023 (1992), or add another question for review if necessary, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 n.12 (1981); *e.g.*, *Wright* v. *West*, 502 U.S. 1012 (1991); *Payne* v. *Tennessee*, 498 U.S. 1080 (1991); *Sch. Bd. of Nassau Cnty.* v. *Arline*, 475 U.S. 1118 (1986). Regardless, this issue poses no jurisdictional barrier.

Fourth, immediate review would prevent the erosion of federal policy. "Adjudicating the proper scope of First Amendment protections … merits application of an exception to the general finality rule." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989). The lower court's ruling "restricts [religious colleges'] present exercise of [their] First Amendment rights." *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974). The "possible limits the First Amendment places on" the application of state-employment-nondiscrimination laws to religious colleges "should not remain in doubt." *Fort Wayne Books*, 489 U.S. at 56. If the First Amendment bars Massachusetts from holding Gordon liable for declining to promote DeWeese-Boyd from associate to full professor, "this litigation ends." *Cox*, 420 U.S. at 486. Failure to review now would have the "intolerable" result of leaving every religious college in Massachusetts "operating in the shadow of the civil … sanctions of a rule of law … the constitutionality of which is in serious doubt." *Id.* at 485–86 (quotation omitted).

B. Immediate review would prevent irreparable harm to Gordon College.

Gordon's ministerial-exception defense "[i]s [also] separable from and independent of the merits," and "later review of [this] federal issue cannot [reasonably] be had." *Cox*, 420 U.S. at 481, 482 n.10. This defense is "conceptually distinct" from the merits because its resolution turns only on DeWeese-Boyd's role, not the reasons for Gordon's employment decision. *Mitchell*, 472 U.S. at 527. And if Gordon were to raise this claim "in a new set of appeals, the courts below would simply reject the claim under the law-of-the-case doctrine." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 48 n.7 (1987); accord *id.* at 47–49 (applying *Cox*'s third category).

The finality doctrine "would be ill served by" these "wasteful and time-consuming procedures," *id.* at 48 n.7, because "the harm that [Gordon] seeks to avoid," *id*. at 49—secular courts trolling through its religious beliefs, practices, and reasoning—will have already been "irreparably" suffered, *Cox*, 420 U.S. at 482 n.10 (citing *Cohen*, 337 U.S. at 546).

The lower court's judgment is final under both justifications. The *Cox* analysis showcases the urgent need for this Court's review to preserve federal policy and protect Gordon from irreparable harm.

II. Gordon does not ask for a per se rule, and *Hosanna-Tabor* and *Our Lady of Guadalupe* do not disclaim a rule that defers to religious organizations' good-faith understanding of who is a "minister."

1. DeWeese-Boyd misstates the first question presented as asking this Court to hold that "an 'integration' policy automatically renders all professors ministers." Opp.19. Not so. The College's unremarkable position is that the ministerial exception applies to a religious college's faculty when they perform numerous functions central to the institution's religious mission. Pet. i, 24–28.

DeWeese-Boyd tries to rehabilitate the lower court by arguing that it appropriately compared her duties to those of the teachers in *Hosanna-Tabor* and *Our Lady*. Opp.20–22. But that type of "checklist-based approach" is precisely what *Our Lady* rejected in favor of a functional analysis. Nebraska Br. 11, 14–20; Benedictine College Br. 6–9 & n.2. And the "narrow checklist applied by the Supreme Judicial Court simply does not map onto college education." Benedictine College Br. 16.

Grade-school teachers often spend all day with their pupils and teach all subjects, including religion. *Id.* at 17. In contrast, college professors normally see a student for a single class and only in the professor's area of expertise. *Ibid.* "By myopically presuming that the *only* religious ministry in an educational setting that matters is one that mirrors a grade-school religion class, the Massachusetts court would effectively deny [religious] colleges … the indispensable 'authority to select, supervise, and if necessary,

remove' the individuals who are at the heart of this calling." *Id.* at 18–19 (quoting *Our Lady*, 140 S. Ct. at 2060).

The lower court's legal test also diminishes the crucial role that professors play at religious schools and disadvantages minority religions. Jewish Coal. Br. 4–10 ("minority religions like Judaism … consider study and religious practice as important as worship"); Islam & Religious Freedom Br. 9–10 ("when any Muslim interprets and applies Scripture or the teachings of the Prophet, … he or she is engaging in what—in Western thought—is an essentially ministerial activity"); ACSI Br. 12–16 (highlighting test's discrimination against non-denominational colleges). The Court should not allow that test to stand.

2. As for deference, DeWeese-Boyd says that Gordon is asking this Court to "overturn" *Hosanna-Tabor* and "scrap" *Our Lady*. Opp.32. Again, not so. Gordon merely asks that courts not second-guess a religious college's good-faith determination of which positions are sufficiently religious and important to merit First Amendment protection. Pet. 37–38.

This is a modest request. Since the question whether an employee is a minister is a religious inquiry, judicial second-guessing impinges on a religious organization's right to choose its ministers. When courts second-guess, "the result will often be that a college will be forced to promote or retain a professor … who, in the institution's view, expressly advocates for a position contrary to the religious beliefs central to its mission." Billy Graham Evangelistic Assoc. Br. 10. Deference "preserves the

autonomy of religious groups." Islam & Religious Freedom Br. 4–6. It "recognizes and respects the unique self-knowledge and expertise of religious groups." *Id.* at 6–7. And it "preserves the rights of religious minorities" while "avoid[ing] First Amendment violations," *id.* at 7–9, and "judicial entanglement," Jewish Coal. Br. 11.

This approach does not abrogate *Hosanna-Tabor* or *Our Lady*. When evaluating a religious organization's good faith, the Court should analyze the organization's designation using the functional approach that *Our Lady* adopted. Here, for instance, the designation tracks the College's requirements that faculty integrate Christian doctrine into their teaching and academic writing, to engage in both from a religious perspective, and to serve as spiritual mentors to students.

What makes no sense is to defer to DeWeese-Boyd's opinion about whether she plays a vital "role in … carrying out" Gordon's religious mission. *Our Lady*, 140 S. Ct. at 2063. DeWeese-Boyd relies on her own vague, oscillating perspective on whether her work is—or is not—sufficiently religious and relies on how *she* held *herself* out to the public. That cannot be the rule. It would allow any disgruntled employee to void the ministerial exception and is beyond judicial competence. "After all, it is 'unacceptable' and beyond the judiciary's competence 'to question the centrality of particular … practices to a faith.'" Nebraska Br. 12 (quoting *Emp. Div., Dep't of Hum. Res. of Oregon* v. *Smith*, 494 U.S. 872, 887 (1990)).

III. Lower courts are split over *how to weigh* the integration of faith and teaching in applying the ministerial exception to educators.

The Supreme Judicial Court's decision "conflicts with this Court's caselaw," Nebraska Br. 10–20, and that is enough. But DeWeese-Boyd also misreads Gordon's petition to suggest that lower courts are split on whether the integration of faith and teaching *alone* is dispositive as to whether college professors are ministers. Opp. 23–27. That's not the problem. Lower courts differ on whether professors who integrate faith and teaching *pass along the faith to the next generation*, compare *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) (per curiam), with *Kant* v. *Lexington Theological Seminary*, 426 S.W.3d 587, 594–95 (Ky. 2014), which in turn has created a split over whether these professors are ministers compared to professors who *otherwise serve equivalent religious functions but also teach formal doctrine*. Pet.29–37.

Were Gordon College in Chicago, the outcome would likely change. DeWeese-Boyd's duties are no less religious than the educator's in *Grussgott*. Pet.30–31. Because the Seventh Circuit holds that educators who integrate faith into their teaching pass the faith "to the next generation," and that this factor "outweigh[s] other considerations," *Grussgott*, 882 F.3d at 661, the court would find DeWeese-Boyd a "minister." Other jurisdictions, like Massachusetts, analyze this factor differently and conclude the opposite in a similar case.

This debate highlights another problem. Some courts feel free to answer a quintessential religious

question: whether integrating faith into an academic discipline *is* a religious function. Courts impermissibly become arbiters determining whether an academic discipline is "religious" or "secular." The line between teaching doctrine and teaching students to apply doctrine to so-called secular disciplines—if there can be one—"is highly subjective." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1262 (10th Cir. 2008). Answering this question "depends as much on the observer's point of view as on any objective evaluation." *Id.* at 1263. The First Amendment forbids "government" from judging the doctrine "quotient" of teaching that a college deems religious. *Ibid.*

IV. The decision below will be deleterious to religious colleges.

DeWeese-Boyd calls the Supreme Judicial Court's decision an insignificant one-off, Opp.30–32, much like respondents did in *Hosanna-Tabor* and *Our Lady*. But substituting a grade-school-teacher checklist for this Court's mission-based analysis is disastrous. "If the government [can] 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." ACSI Br. 10. The decision "would destroy" religious colleges' ability "to define their educational missions and threaten[ ] their very existence." Benedictine College Br. 16. And it "will diminish" religious colleges' "contribution to the greater good and limit, not advance, the Massachusetts court's policy goals." Cardinal Newman Soc'y Br. 15–21.

A course correction is sorely needed.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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