

**Commonwealth of Massachusetts
Supreme Judicial Court**

No. SJC-12988

MARGARET DEWEESE-BOYD,

Plaintiff - Appellee,

v.

GORDON COLLEGE, D. MICHAEL LINDSAY, and JANEL CURRY,

Defendants –Appellants.

On Appeal from a Judgment of the Essex County Superior Court

**AMICUS BRIEF OF THE COUNCIL FOR CHRISTIAN
COLLEGES AND UNIVERSITIES AND 46 INDIVIDUAL
RELIGIOUS COLLEGES AND UNIVERSITIES
SUPPORTING APPELLANTS AND REVERSAL**

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RULE 17(C)(1) & 17(C)(5) DECLARATIONS

(1) Amici are not corporations.

(2) Neither the parties, nor their counsel, authored any part of this brief or contributed any money intended to fund its preparation and submission. Further, no person or entity other than *amici* and their counsel contributed any money intended to fund the preparation and submission of this brief. Neither *amici* nor their counsel have represented either party to the present appeal in another proceeding involving similar issues, nor have they been a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

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INTRODUCTION AND INTERESTS OF *AMICI*

The First Amendment protects religious institutions' right to decide—without government interference—who will teach the next generation of the faithful. The decision under review here is a classic example of the judiciary's ignoring that protection to the detriment of a religious institution's constitutionally protected autonomy. If affirmed, it would pose an existential threat to religious higher education in Massachusetts.

Since before the Founding, religious colleges and universities have played a crucial role in educating the next generation of believing citizens and leaders. Until now, such institutions in Massachusetts reasonably believed that their religion-based judgments about whom to employ to help them further that critical mission were protected by the “ministerial exception” recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). That is because, at such institutions, teachers of what DeWeese-Boyd calls “patently secular” subjects, *see* Appellee's Br. 15, serve essential religious functions similar

to the teachers in *Hosanna-Tabor* and *Our Lady*—by teaching their subjects through the lens of faith.

Indeed, in a typical religious college, *all* courses are infused with faith. That is the distinctive promise a typical religious college makes to students and their families—that all instruction will be shaped by the school’s particular theological understandings. Thus, the social-work course, the math course, and the English literature course are all taught and studied from a faith-based perspective. Faith is not a mere additive to the educational experience; it is the oxygen that gives it life. To deliver on that promise, all (or at least most) instructors in a college with a serious religious mission are expected to teach their courses and mentor students through an integrated combination of faith and learning.

The decision below, however, failed to properly recognize and weigh this important consideration when it rejected the *Hosanna-Tabor* defense here. Of even greater concern, the decision casts doubt on the ability of all Massachusetts religious educational institutions to choose as teachers those best suited to carry out the institutions’ religious missions, as the exception recognized in *Hosanna-Tabor* and *Our Lady* allows.

Consequently, this decision is of great concern to *Amici*, who represent a wide swath of religious higher education. Specifically, *Amici* include the Council for Christian Colleges and Universities (“CCCU”), which represents some 140 faith-based institutions across the United States. *Amici* also include 46 individual religious colleges located throughout the Nation, two of which are in Massachusetts.

Believing in the need to integrate faith into all aspects of learning, *Amici* strive to provide faith-infused, high-quality education to their students. They believe such an educational experience is necessary to prepare their students to live out their faith even as they succeed in their chosen professions. Like Gordon College, *Amici* cannot achieve those sacred missions unless they can choose for themselves , and choose how to manage, those who will “transmit[] the *** faith to the next generation.” *Hosanna-Tabor*, 565 U.S. at 192.

Amici thus have a powerful interest in ensuring that the exception continues to protect their right to act without government interference in employing teachers and administrators who are fully aligned with their institutions’ religious missions.

STATEMENT

Gordon College (“Gordon”) is a private Christian college in Wenham. Margaret DeWeese-Boyd, a professor of social work at Gordon, was responsible for integrating the Christian faith into her teaching. For example, according to Gordon’s Faculty Handbook, DeWeese-Boyd was “expected to be fully prepared in all facets of [her] tasks as [a] Christian teacher[] and advisor[]” and was tasked with “participat[ing] actively in the spiritual formation of [Gordon’s] students into godly biblically-faithful ambassadors for Christ.” Record Appendix (App.) 149, 256, 282. Indeed, “[i]n the Gordon College context, faculty members are both educators and ministers to [Gordon’s] students.” App. 149, 282. In 2017, Gordon denied DeWeese-Boyd’s application for a promotion. She maintains that this was because of her gender and her criticism of some of Gordon’s policies. App. 21-28.

Despite clear record evidence of the religious roles she was expected to (and did) fill at Gordon, the superior court determined that DeWeese-Boyd was not a “minister” for purposes of the exception recognized in *Hosanna-Tabor*. The court denied Gordon’s summary-judgment motion on that basis. App. 833.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor*, a unanimous Supreme Court held that the First Amendment “bar[s] the government from interfering with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor*, 565 U.S. at 181. The Court later clarified in *Our Lady* that this doctrine, sometimes called the “ministerial” exception, also applies when any “school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith.” *Our Lady*, 140 S. Ct. at 2069 (emphasis added). *See, infra*, pp. 19-22.

I. The superior court erred in holding that DeWeese-Boyd did not fit within the *Hosanna/Our Lady* exception. *See, infra*, pp. 22-34. The court employed an overly formalistic understanding of the exception that failed to give proper weight to the role that teachers play at religious schools. But *Our Lady* (decided after the ruling below) clarified that, although considerations like a church title “made [*Hosanna-Tabor*] an especially easy” case, such steps were not “necessary to trigger the *Hosanna-Tabor* exception.” *Id.* at 2067. “What matters, at bottom, is what an employee does.” *Id.* at 2064. And under the standard articulated

in *Our Lady*, DeWeese-Boyd easily satisfies the requirements for a religious exception.

First, there can be no doubt that Gordon, an evangelical Christian College, is a religious educational institution with a distinctively Christian mission. *See, infra*, pp. 22-27. It promises to provide an “exceptional liberal arts education with an informed Christian faith.”¹ To further this promise, it requires every person who works on campus to agree to a Statement of Faith and abide by a Life and Conduct Statement.”² The Life and Conduct statement includes a requirement that all “members of the College community” will consider the Bible to be “fully authoritative in matters of faith and conduct.”³

Second, there can be no doubt that DeWeese-Boyd was expected to assist Gordon in fulfilling its religious mission. *See, infra*, pp. 28-33. To be sure, she contends she did not “proselytize or preach religious tenets

¹ Gordon College, *Mission Statement*, <https://www.gordon.edu/mission> (last visited Dec. 12, 2020).

² Gordon College, *Active Faith*, <https://www.gordon.edu/profile/faith> (last visited Dec. 12, 2020).

³ Gordon College, *Life and Conduct Statement*, <https://www.gordon.edu/lifeandconduct> (last visited Dec. 12, 2020).

or doctrine” to her students. Appellee’s Br. 48-49 (citing App.829). However, like all professors at Gordon, she was expected to be “prepared in all facets of [her] tasks as [a] Christian teacher[] and advisor[], both inside and outside the classroom.” App.149, 256. And when teaching, she was expected to “engage students in” social work “from the perspectives of Christian faith.” *Ibid.* Consistent with those requirements, she testified that she in fact teaches her students to do “scholarship which is founded on Christian principles and values.” App.153, 353.

In any event, to say these deeply religious requirements fall short of proselytizing requires the Court to first ask what proselytizing is. Such an inquiry risks the very entanglement that the Religion Clauses forbid. *See, e.g., Lemon v. Kurtzman*, 403 U. S. 602, 613 (1971).

Given these facts, the superior court should have applied the *Hosanna/Our Lady* exception. *See, infra*, pp. 27-34. Instead, the court applied a narrow, formalistic reading of the exception that looked, in part, to the *Hosanna-Tabor* considerations and DeWeese-Boyd’s perceived lack of formal proselytizing responsibility to hold she was not a minister. But *Hosanna-Tabor* itself rejected any formalistic understanding of the exception and, to the extent there was any doubt,

Our Lady clarified that the exception applies to teachers, like DeWeese-Boyd, at religious schools. Because of Gordon's status as a religious institution and the religious expectations that accompanied DeWeese-Boyd's employment, the *Hosanna/Our Lady* exception bars her claims.

II. If the superior court were affirmed, this case would seriously threaten Massachusetts religious colleges and universities, which exist both to provide an excellent education infused with faith and to encourage young people to continue in the faith. *See, infra*, p. 35. If the *Hosanna/Our Lady* exception does not apply to teachers like DeWeese-Boyd—despite her religious responsibilities—it likely would not apply to teachers employed by other religious schools in Massachusetts, many of whom perform similar roles. Those teachers, even if they are assigned to teach nominally liberal-arts courses, are usually tasked with teaching courses in a way that is infused with faith, just as DeWeese-Boyd did. And at religious colleges, teachers serve no less vital a role in furthering the school's religious aims than a pastor, imam, rabbi, or priest. Indeed, religious colleges typically evaluate their teachers on how well they further the school's religious missions.

Further, if religious schools are unable to decide for themselves who will transmit their faith to the next generation, those schools' ability to further their religious missions—their very *raison d'être*—will be seriously compromised. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). Any such weakening of religious higher education would be an enormous loss. *See, infra*, pp. 35-50. As the U.S. Congress has recognized, religious colleges offer students superior opportunities to integrate community service into their educations, to enjoy the physical and emotional safety that generally prevail in communities united by a common religious ethic, and to learn in an atmosphere of greater philosophical and political diversity than is offered in most non-religious institutions. Accordingly, the mere existence of religious colleges and universities adds valuable diversity to higher education. *See, e.g.*, 154 Cong. Rec. H7658-03 (2008); 20 U.S.C. §1011a(a)(2).

Religious colleges in Massachusetts, like their counterparts nationwide, provide these benefits. Without the ability to ensure mission alignment, religious higher-education institutions would be unable to provide those unique benefits.

The decision below would deprive religious colleges of this ability by requiring an employee to have achieved formal religious status through training or an ecclesiastical title before the *Hosanna-Tabor* exception can apply. But that incorrectly assumes—contrary to *Our Lady*—that transmission of religious viewpoints and faith through education happens only through those instructors’ meeting a formulaic test for ministers. Such a requirement would force religious schools to a Hobson’s choice: either adopt a model of formal ministry that is inappropriate for many religious communities, or waive any right to claim the *Hosanna/Our Lady* exception.

Such a regime would be detrimental to religious educational institutions, no matter the faith. *See, infra*, pp. 44-50. Requiring other faiths to act like the church in *Hosanna-Tabor* in order to exercise their constitutional rights impermissibly pressures them to tailor their practices to those of another religious body. This requirement alone violates the First Amendment’s Free Exercise and Establishment Clauses. To prevent such harm, this Court should follow *Our Lady* by looking to what religious teachers are expected to *do* to further the religious missions of their employers.

ARGUMENT

I. The Superior Court Applied An Overly Formalistic Reading Of *Hosanna-Tabor*—A Reading Squarely Contradicted By *Our Lady*.

The First Amendment’s Religion Clauses forbid courts from second-guessing the decisions of religious institutions to terminate their ministerial employees. *Our Lady* instructed courts that an employee’s “ministerial” status is determined not by a rigid formula or a checklist. Instead, if (a) the institution has a religious mission and (b) the employee is expected to play a meaningful role in furthering that mission, the *Hosanna/Our Lady* exception applies—whether or not the employee would be considered a “minister” in the traditional sense. That exception should have applied here to bar the claims of DeWeese-Boyd, a professor at Gordon who was expected to (and did) teach her students social work from the perspective of the Christian faith, thereby playing a meaningful role in Gordon’s mission.

A. Under *Hosanna-Tabor* and *Our Lady*, the exception applies to teachers who meaningfully advance their schools’ religious missions.

In *Hosanna-Tabor*, the Chief Justice wrote for a unanimous Court that “[b]oth Religion Clauses bar the government from interfering with

the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor*, 565 U.S. at 181. At the time, the Court declined to “adopt a rigid formula” for determining whether an employee is a minister. *Id.* at 190. Instead, the majority identified four “considerations” that had guided its decision, namely: (1) the employee’s “formal title,” (2) “the substance reflected in that title,” (3) her “use of th[e] title,” and (4) “the important religious functions she performed.” *Id.* at 192.

Last term in *Our Lady*, however, the Court emphasized that, while the *Hosanna-Tabor* considerations were “relevant” to the exception inquiry, none was “essential.” 140 S. Ct. at 2062. Thus, the Court’s “recognition of the significance of those factors” in *Hosanna-Tabor* “did not mean that they must be met—or even that they are necessarily important—in all other cases.” *Id.* at 2063. As long as the institution has a religious mission, “[w]hat matters, at bottom, is what an employee does,” *id.* at 2064—that is, whether (s)he meaningfully “help[s] the school carry out [its religious] mission,” *id.* at 2066.

The Court also clarified that this standard is ordinarily met by teachers at religious schools: Such teachers, the Court declared, are tasked with “responsibilities that lie at the very core of the mission of a

private religious school,” including “educating young people in their faith, inculcating its teachings, and training them to live their faith.” *Id.* at 2064.

Furthermore, the Court highlighted the central importance of a religious school’s *own* “definition and explanation of [its teachers] roles.” *Id.* at 2066. And for those explanations the Court looked to the “employment agreements and faculty handbooks.” *Ibid.* In *Our Lady*, for example, those materials clarified that the teachers were expected to “help the schools carry out [their] mission[s]” and warned them that “their work would be evaluated to ensure that they were fulfilling that responsibility.” *Ibid.*

Finally, the Court clarified that the *Hosanna/Our Lady* exception is available to religious schools even where teachers do not directly teach religious doctrine. After all, regardless of their role in teaching doctrine, teachers at such institutions are ordinarily “expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.” *Ibid.* Like the *Hosanna-Tabor* considerations, express teaching of doctrine is relevant but not necessary. At religious colleges, the teaching role permeates every aspect of employment, and

the responsibility to train students to “live their faith” can be satisfied by example as well as direct instruction. *See, e.g., id.* at 2064.

In sum, because of the role teachers at religious schools typically play, they should generally be subject to the *Hosanna/Our Lady* exception. *Id.* at 2069.

B. Contrary to DeWeese-Boyd’s attempt to erase its religious status, Gordon is a religious college—with an important religious mission—by any objective standard.

To avoid the *Hosanna/Our Lady* exception, DeWeese-Boyd first argues that “for purposes of [her] employment,” Gordon is not a “religious institution,” but rather a “liberal arts college with a religious character.” Appellee Br. 28. But the *Hosanna/Our Lady* exception does not recognize such line-drawing.

1. To the contrary, an institution is “religious” if it has “clear or obvious religious characteristics.” *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 834 (6th Cir. 2015). Such characteristics can be gleaned from, among other things, the school’s mission statement or its governing documents. *See Our Lady*, 140 S. Ct. at 2056-57.

Here, the superior court correctly held that Gordon *is* a religious institution. Appellant’s Br. 69. And the record confirms that Gordon is,

specifically, a *Christian* college: Its Articles of Organization state that Gordon’s mission is “to prepare men and women for the work of foreign and home missions, for the duties of the Christian ministry and other special forms of Christian work[.]” App.144, 215. Other governing documents commit Gordon to a distinctly religious mission—and if it deviates, it is required to transfer its assets to the American Bible Society. App.145, 224. Indeed, the Board of Trustees committed over a century ago to hire only those professors or instructors that have a “firm genuine loyalty to [evangelical Christian] doctrines.” App.148-49, 224.

The College’s mission and objectives are also explicitly faith-based. According to its website, Gordon “combines an exceptional liberal arts education with an informed Christian faith.”⁴ To ensure this, potential students must confess the Christian faith and address it in the admissions interview. App.147, 314. The College also offers a core curriculum that “explores the liberal arts and sciences from a Christian perspective,” so as to “foster [k]nowledge of God's character as revealed in Scripture and understood in the Church.” Appellant’s Br. 58.

⁴ Gordon College, *Mission Statement*, <https://www.gordon.edu/mission> (last visited Dec. 12, 2020)

In short, Gordon's governing documents, objectives, and student requirements demonstrate its core purpose and mission as a distinctively Christian college.

2. None of DeWeese-Boyd's arguments undermine this conclusion. Certainly, Gordon's commitment to the liberal arts does not override its Christian character. Appellee's Br. 11-12. As explained, Gordon's religious roots are its lifeblood; they *inform* its entire liberal-arts curriculum.

Thus, the fact that Gordon pursues some of the same aims as other liberal-arts colleges is irrelevant: Education is no less important to religious institutions than it is to non-religious ones. And at religious colleges like Gordon, that education must include not just training in religious texts, but an education that integrates the truths found in religious texts with all other areas of study. App.149-50, 256, 282-84. If the *Hosanna/Our Lady* exception could not apply to schools with an integrated commitment to liberal arts *and* religion, many religious organizations would lose the ability to preserve the faith-focused atmosphere they find essential to educating the next generation.

For many of the same reasons, the fact that professors are evaluated primarily on teaching and scholarship in their scholastic areas does not undermine a college's religious identity. Appellee's Br. 16. In *Hosanna-Tabor*, the Supreme Court recognized that the relative amount of time a teacher spends performing religious functions is not determinative. 565 U.S. at 193-94. DeWeese-Boyd's attempt to segregate religious instruction from liberal-arts instruction thus misses the point of religious schools. It is also impractical because, as the Court recognized, even the "heads of congregations themselves often have a mix of duties, including secular ones." *Id.* at 193.

Gordon's openness to Christians of different denominations also fails to undermine its religious character. Appellee's Br. 12. First, regardless of a student's denomination, that student must agree to Gordon's Statements of Faith. App. 147, 324, 328. That requirement—which also applies to staff and faculty—commits everyone on campus to the Christian faith and ensures that the entire community shares a

common religious commitment.⁵

Second, the consequences of limiting a religious college to one denomination would be disastrous. Such a requirement would require courts to determine the religious purity of the students and what constitutes membership in a faith. Courts are neither equipped nor permitted to make such doctrinal determinations. *Our Lady* itself recognized that allowing courts to decide who was a “co-religionist” before allowing the exception to apply would “risk judicial entanglement in religious issues.” 140 S. Ct. at 2068-69. A “co-religionist” requirement for students would raise the same entanglement concerns. Additionally, such a standard would hamper religious schools’ efforts to create diverse student bodies and attract new people to their faith.

In short, none of DeWeese-Boyd’s arguments undermine Gordon’s clear and obvious religious character, as reflected in its governing

⁵ Even if Gordon did not require students to sign the statement of faith, however, it would still be a religious institution because of its mandate to introduce the tenets of the Christian faith to its students through its faculty. For Gordon and other religious colleges, evangelism serves as a core goal.

documents, mission, objectives, and student requirements. The superior court correctly held that Gordon is a religious college.

C. The exception applies because DeWeese-Boyd was expected to (and did) advance Gordon’s religious mission by incorporating religion into her classes and other student interactions.

Determining that Gordon is a religious institution is only the first half of the inquiry. The latter half, as explained, looks to what DeWeese-Boyd was expected to do during her employment to determine if she was advancing the institution’s religious mission. Applying *Our Lady’s* guidance, DeWeese-Boyd easily falls within the *Hosanna/Our Lady* exception.

1. *Our Lady* made clear that *any* teacher “entrust[ed] *** with the responsibility of educating and forming students in the faith” is properly considered as advancing the institution’s religious mission and, thus, falls within the exception. *Id.* at 2069. The record below contains ample examples of how Gordon expected DeWeese-Boyd to be such a messenger of the Evangelical Christian faith.

For example, Gordon’s Faculty Handbook makes clear the expectation that each of its professors will teach “from within [the] fixed reference points of biblical theism, which provides a coherent perspective

on life and the world.” App.145, 242. To that end, Gordon professors are expected to be “fully prepared in all facets of their tasks as Christian teachers and advisors, both inside and outside the classroom.” App.149, 256. Inside the classroom, this means that Gordon professors are expected to “strive to engage students in their respective disciplines from the perspectives of the Christian faith[.]” *Ibid.* And whether inside or outside the classroom, Gordon expects its professors to “participate actively in the spiritual formation of [its] students into godly biblically-faithful ambassadors for Christ.” App.149, 282.

Unsurprisingly, the religiously grounded expectations that Gordon imposes on all of its professors applied equally to DeWeese-Boyd. The record demonstrates both that she understood that responsibility and, in her teaching, strove to satisfy it. App.157, 407. Her students even discussed how she integrated the Christian faith into her teaching: One expressed gratitude for DeWeese-Boyd’s efforts to connect “class materials with Christian faith”; another explained that DeWeese-Boyd taught her how to be a “Christian and social worker in society.” App.158-59, 427-31.

This integration of faith and teaching—and its effect on young students—was exactly what DeWeese-Boyd was looking for when she applied to work at Gordon. Her application expressed a desire to “participate in, and contribute to, Christian liberal arts education.” App.151, 342. Other application materials further demonstrated her commitment to Christian liberal arts, including her Master’s degree from Covenant Theological Seminary in General Theological Studies, which her application stressed “could be of particular benefit to Gordon College students.” *Ibid.* It is difficult to imagine how a degree in theology would be “particularly beneficial” to Gordon’s students if it were just another liberal-arts college or if its students were looking for nothing more than instruction in secular social work.

Her application also explained that Christian colleges and universities like Gordon should assist in the “pursuit of questions regarding the application of Christianity to social work” because such institutions provide an “environment” that is “expressly germane to social work education.” App.151-52, 345. She further expressed her understanding that she would be called to “provide a critical, and distinctly Christian” perspective and “guide and mentor each student ...

to help her discern how Christianity impacts” her discipline. App.153, 373.

A later tenure application shows that DeWeese-Boyd’s understanding of both Gordon’s religious status and the religious nature of her role continued throughout her employment. There, DeWeese-Boyd emphasized that her role was “fundamentally about ... pursuing scholarship that is faithful to the mandates of Scripture” and “the vocational call of Christ[.]” App.157, 407.

Under *Our Lady*, Gordon’s clearly delineated religious expectations of DeWeese-Boyd, not to mention her understanding and fulfilment of that role, qualify her for the exception.

2. The superior court, albeit without the *Our Lady*’s guidance, applied a formalistic understanding of the ministerial exception to deny Gordon’s defense. The superior court’s approach, however, cannot be squared with *Our Lady*’s insistence that “[w]hat matters, at bottom, is what an employee does.” 140 S. Ct. at 2064.

Unlike the Supreme Court in *Our Lady*, the superior court declined to give any significance to Gordon’s requirements that its professors teach their “respective disciplines from the perspective of the Christian

faith” because, in the court’s view, “the simple promotion of a religious institution’s mission” was insufficient. Appellant’s Br. 102. The court argued instead that DeWeese-Boyd did not “proselytiz[e] on behalf of [Gordon College]” and that nothing in her conduct indicated to others that she was a representative of Gordon “authorized to speak on church doctrine,” in part because she lacked a “ministerial title” and, in the court’s view, “did not perform any important religious functions.” *Id.* at 102-03. At every turn, *Our Lady* contradicts that reasoning.

First, because DeWeese-Boyd was responsible for “educating and forming students in the faith,” the *Hosanna/Our Lady* exception forbids “judicial intervention into disputes between” her and Gordon. 140 S. Ct. at 2069. In other words, what the superior court considered the “simple promotion” of Gordon’s religious mission through DeWeese-Boyd’s faith-infused teaching was *sufficient* to qualify for the exception.

Second, contrary to the holding below, by virtue of her position, DeWeese-Boyd *did* serve an important religious function at Gordon—she was tasked with teaching its students, guided by its faith. *Our Lady* made clear that the “concept of a teacher of religion is loaded with religious significance.” *Id.* at 2067. And here the religious significance of

that role does not turn on whether DeWeese-Boyd was tasked with “proselytizing”⁶ or was endowed with authority to speak on church doctrine. Her professorship placed her in a position to “preach[], teach[], and counsel[]” in a way that could “contradict [Gordon’s Statement of Faith] and lead [its students] away from the faith.” *Id.* at 2060. The *Hosanna/Our Lady* exception was developed precisely to “preserve a church’s independent authority in such matters.” *Id.* at 2060-61.

3. DeWeese-Boyd’s arguments are equally unpersuasive. First, the fact that the title in Professor DeWeese-Boyd’s appointment letter, faculty contract, directory, college website, and school magazine is not overtly “ministerial” is of no moment. Appellee’s Br. 15. *Our Lady* clarified that titles are not “all-important.” 140 S. Ct. at 2064.

Second, contrary to Deweese-Boyd (at 13), the exception does not require employees to lead students in Bible studies or deliver sermons.

⁶ Moreover, by saying that DeWeese-Boyd did not proselytize, both the superior court and DeWeese-Boyd answered a question that impermissibly entangles a court with religious doctrine, namely: what is proselytizing? *See, e.g., Lemon v. Kurtzman*, 403 U. S. 602, 613 (1971). Gordon College may have a different answer than other Christian institutions. But the answer is Gordon’s to give.

The Supreme Court has instructed courts *not* to “place[] too much emphasis on [teachers’] performance of secular duties.” *Hosanna-Tabor*, 565 U.S. at 193. Even heads of religious congregations have a mix of non-religious duties. So the proper inquiry should be whether teachers “educat[e] young people in [the school’s] faith, inculcat[e] its teachings, and train[] them to live their faith.” *Our Lady*, 140 S. Ct. at 2064. As explained, DeWeese-Boyd performed each of these duties.

Moreover, integrating liberal-arts education with religious instruction is a core mission of religious schools like Gordon. If teaching a liberal-arts subject were dispositive, many religious colleges would lose the protection of the *Hosanna/Our Lady* exception and the ability to be selective about who can educate their young people in the faith.

Third, it does not matter that DeWeese-Boyd teaches what she calls a “patently secular” subject. Appellee’s Br. 15. For a religious college, no subject is “patently secular.” As explained, Gordon—like most religious universities—does not check its religion at the door. Its faith informs everything it does. No less than the teacher in *Hosanna-Tabor*, Gordon tasked DeWeese-Boyd with transmitting its faith to the next generation

when it asked her (and she agreed) to teach students how to be *Christian* social-workers.

Fourth, it is similarly inconsequential that DeWeese-Boyd had never gone through “any commissioning or ordination process.” Appellee’s Br. 15. DeWeese-Boyd’s lack of formal ordination does not change her unequivocal commitment to the Christian faith and a “Christian Liberal Arts Education.” App.151, 342. Nor does it undermine the fact that Gordon set clear expectations that, when teaching, she was expected to “engage students in their respective disciplines from the perspectives of the Christian faith[.]” App.149, 256.

In sum, neither the superior court nor DeWeese-Boyd offers any sound reason why the *Hosanna/Our Lady* exception should not foreclose DeWeese-Boyd’s suit. Her role as a teacher tasked with teaching social work through the lens of Gordon’s Christian faith demands application of the exception here.

II. Massachusetts Receives Enormous Benefits From Religious Colleges And Universities, Benefits That Would Be Lost If Such Institutions Were Excluded From The *Hosanna/Our Lady* Exception.

The formalistic understanding of the *Hosanna/Our Lady* exception applied below would substantially harm the many religious colleges in Massachusetts.⁷ Largely because of their religious character, these institutions serve important societal purposes and provide important societal benefits, both in Massachusetts and nationwide. A refusal to apply the *Hosanna/Our Lady* exception to these institutions would severely limit their ability to decide who will further their faith, thereby curtailing their ability to provide the unique benefits they offer.

A. Religious colleges and universities bring unique benefits—including much-needed diversity—to higher education.

In addition to being academically competitive with non-religious schools, religious colleges and universities offer advantages that are often not as readily available in non-religious institutions. These include the opportunity to study academic disciplines guided by faith and to

⁷ See College Simply, *Massachusetts Religious Colleges*, <https://www.collegesimply.com/colleges/massachusetts/religious-colleges/> (last visited Nov. 14, 2020).

naturally integrate community service into higher education. Religious colleges also often provide greater physical safety to their students and a broader diversity of philosophical and political perspectives among professors and students.

1. Part of the appeal of religious colleges to students and their families is the promise of studying academic disciplines in a way that integrates faith. For Christian colleges, for example, faith, learning, life, and work all come under “the Lordship of Jesus Christ,” as famously emphasized by theologian Abraham Kuyper.⁸ Religious colleges from other faith traditions strive for a similar integration of faith and learning.⁹ To students and families, this integration is extremely valuable and important. And, as discussed above in Section I.B, it is well illustrated in Gordon’s own educational approach.

2. Congress recognized an additional benefit of religious institutions in the Higher Education Opportunity Act of 2008—i.e., that

⁸ Abraham Kuyper: A Centennial Reader 488 (James D. Bratt ed., 1998).

⁹ Yeshiva University, *About*, <https://www.yu.edu/about> (last visited Dec. 12, 2020).

they help students integrate community service into their educations. Pub. L. No. 110-315 (2008). That is one reason why the Act requires accrediting bodies to “respect[] the *** religious missions” of such institutions. 154 Cong. Rec. H7668 (2008). Noting that “[t]he time to recognize and encourage an increased commitment to public service is now,” the House Report on this legislation emphasized, as a reason for congressional protection, the growing number of students at religious colleges who serve religious missions or perform other kinds of service. 154 Cong. Rec. H7661 (2008). These observations reflect that community service is one important way religious colleges contribute to society.

It is no accident that religious colleges foster community service. Students and professors are typically encouraged by their foundational religious texts, traditions, and teachings to take care of the foreigner, the poor, and the needy.¹⁰ They are consequently more likely to embrace the

¹⁰ See, e.g., Deuteronomy 10:18-19 (“Love the sojourner, therefore; for you were sojourners in the land of Egypt.”); Matthew 25:40 (KJV) (“Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.”); Quran 16:90 (Sahih International) (“Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression.”); Mosiah 2:17 (from the

principle that the value of one's life is measured not predominantly by what one achieves, but by how well one serves others.¹¹

Thus, for instance, the Book of Exodus might inspire a sociology major at a Jewish college to address the plight of refugees from war-torn lands,¹² the Quran might lead a student in a Muslim school to look for opportunities to serve local immigrants,¹³ or the New Testament might move a student at a Catholic law school to give *pro bono* assistance to unwed mothers or foster children.¹⁴ Studies show that this is not merely hypothetical; students at religious colleges spend more time in

Book of Mormon) (“[W]hen ye are in the service of your fellow beings ye are only in the service of your God.”).

¹¹ See, e.g., Luke 12:15 (“[A] man’s life consisteth not in the abundance of things which he possesseth”).

¹² See, e.g., Exodus 22:20, https://www.chabad.org/library/bible_cdo/aid/9883/jewish/Chapter-22.htm (“And you shall not mistreat a stranger, nor shall you oppress him, for you were strangers in the land of Egypt.”).

¹³ See, e.g., Quran 17:26 (“Give * * * to the needy and the wayfarers.”).

¹⁴ See, e.g., Matthew 25:35-40; James 1:27.

community service than students at non-religious colleges, public or private.¹⁵ Their service brings immense benefits to their communities.

Students at Massachusetts religious colleges serve communities both locally¹⁶ and globally.¹⁷ Mission trips can serve traditional (evangelizing) ends, but they also regularly focus on the temporal needs

¹⁵ See CCCU, *The Case for Christian Higher Education* 8-10 (2018), https://www.cccu.org/wp-content/uploads/2018/08/2018-Case-for-CHE_WEB_pages.pdf.

¹⁶ Assumption University, *Community Service*, <https://www.assumption.edu/student-experience/community-service> (last visited Dec. 12, 2020) (“Assumption students collectively volunteer more than 100,000 hours per year in support of the Worcester community[.]”).

¹⁷ Eastern Nazarene College, *Spiritual Life & Service*, <https://enc.edu/undergraduate-studies/student-life/spiritual-development/> (last visited Dec. 12, 2020) (highlighting how students went on mission trips in 2018 and 2019 that “assisted a Christian relief agency provide food, bed nets, school visits, and home visits to those affected with HIV/AIDS” in Zambia); Stonehill College, *Service & Community Engagement*, <https://www.stonehill.edu/connect-with-community/service-community-engagement/> (last visited Dec. 12, 2020) (“Whether it’s helping out at a local nursing home [in Easton, MA], participating in the Relay for Life, or building houses in Nicaragua, our students are constantly finding new and inventive ways to change the world.”)

of those they serve.¹⁸ Both the students and the communities they serve benefit from this service, not only because of the physical relief it provides, but also because it tends to reduce cultural divides. Massachusetts itself thus benefits from religious colleges because their students enter society with a better understanding and appreciation of the world around them.

3. Religious colleges and universities also often provide increased physical safety for learning and academic inquiry. Indeed, of the top twenty-five safest universities in America, eighteen (or 72 percent) are religious.¹⁹ In 2019, Gordon itself was rated the safest

¹⁸ See Anna Maria College, *Change the World*, <https://annamaria.edu/campus-life/campus-ministry/alternative-break-trips/> (last visited Dec. 12, 2020) (describing how Paxton, MA’s Anna Maria College sends its students on week-long trips “serving others” through, among other things, “manual labor”); Boston Baptist College, *Student Handbook* 46 (2020) (addressing “community service projects” organized by the Student Government Association).

¹⁹ Tanya Loudenback, *The 25 safest college campuses in America*, Business Insider (Jan. 12, 2016), <http://www.businessinsider.com/safest-college-campuses-in-america-2016-1>.

college in the country.²⁰ Moreover, colleges classified as “most religious” consistently report lower rates of sexual assault than the national average.²¹ *Amici* have no reason to believe that other religious schools in Massachusetts deviate from these national trends.

Accordingly, for students and parents concerned about physical safety, religious colleges and universities are an attractive option.²² And the mere existence of such options in the higher-education market helps ensure that other institutions place greater emphasis on student safety.

4. Religious colleges also contribute substantially to the diversity of American higher education. In most religious traditions, the call of faith is a challenge to think and live differently from the rest of society.

²⁰ State University, *Top 450 Ranked Colleges - Safest Colleges and Universities*, https://www.stateuniversity.com/rank/safety_score_rank.html (last visited Dec. 12, 2020).

²¹ EDSmart, *College Sexual Assault Statistics of Top Ranked Schools 2015*, <http://www.edsmart.org/college-sexual-assault-statistics-top-ranked-schools/#stats> (last visited Dec. 12, 2020).

²² Indeed, though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. *See, e.g.*, Richard Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sep. 2, 2012), <http://www.nytimes.com/2012/09/03/education/muslims-enroll-at-catholic-colleges-in-growing-numbers.html>.

From the Islamic command to “[b]e in the world as if you were a stranger or traveler” to Jesus’ command that his disciples be “a light to the world,”²³ people of faith are encouraged to transcend the cultures in which they live.

Throughout the Nation’s history, this effort to live differently has encouraged numerous religious schools to depart from contemporary norms—compelling them, for example, to help lead the fight against slavery long before it became fashionable.²⁴ Thus, it is no surprise that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

²³ See also Sahih al-Bukhari 6416, <https://sunnah.com/bukhari/81/5> (“Be in this world as if you were a stranger or a traveler.”); Avi Lazerson, *Holiness and Judaism*, Jewish Magazine (Jan. 2001), <http://www.jewishmag.com/39mag/holy/holy.htm> (directing Jews to “liv[e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences”); Matthew 5:14-15 (Christians are to be a “light” to the world).

²⁴ Yale, Slavery & Abolition, *The Story of Yale Abolitionists*, <http://www.yaleslavery.org/Abolitionists/abolit.html> (last visited Dec. 12, 2020).

For example, the most comprehensive study addressing the political leanings of university faculties to date confirms that religious colleges and universities provide value in part because they do a better job than most in attracting professors and students from across the political spectrum. The study found that at non-religious, public universities, 65.7 percent of faculty across disciplines self-identify as either “liberal” or “far left,” while only 7.8 percent identify as “conservative” or “far right.”²⁵ In contrast (aside from Catholic colleges²⁶), only 42.6 percent of faculty identify as “liberal” or “far left” while 25.9 percent identify as “conservative” or “far right”²⁷—still far lower than the

²⁵ Ellen B. Stolzenberg, et al., Higher Education Research Institute at UCLA, *Undergraduate Teaching Faculty: The HERI Survey, 2016-2017*, at 38 (2019), <https://heri.ucla.edu/monographs/HERI-FAC2017-monograph.pdf>.

²⁶ The study does not explicitly provide a category for non-Catholic religious universities as opposed to colleges. *Ibid. Amici* have no reason to believe that the ideologies of professors at non-Catholic religious universities differ in any meaningful respect from those at non-Catholic religious colleges.

²⁷ *Id.* at 38. Professors in Catholic colleges more closely align with national ideological averages, with 57.5 percent identifying as “liberal” or “far left” and 13.5 percent identifying as “conservative” or “far right.” *Ibid.*

percentage who identify as “liberal,” but nearly four times the percentage of faculty identifying as “conservative” at non-religious institutions.

As a result, religious colleges are more likely than others to provide students meaningful exposure to diverse political views. This includes not only the more “conservative” views that are often largely missing in many non-religious institutions, but also progressive views leavened by religious perspectives.²⁸

The diversity that religious colleges add has long been recognized and valued by Congress. As Congress found in the Higher Education Opportunity Act, “the diversity of institutions and educational missions is one of the key strengths of American higher education.” 20 U.S.C. §1011a(a)(2). Massachusetts, no less than the nation as a whole, benefits from the existence of such educational diversity.

²⁸ CCCU, *The Case for Christian Higher Education*, supra, at 12 (67% of CCCU students report that their courses “often” or “very often” address topics such as religion).

B. The superior court’s approach would destroy the unique benefits that Gordon and other religious schools provide.

These unique educational benefits stem, in large part, from the ability of religious colleges to decide who will further their religious missions. For this reason, if this Court were to affirm the superior court’s decision here, Massachusetts would lose these unique benefits.

1. Most immediately, Massachusetts would lose the significant educational diversity that religious colleges and universities provide. By protecting the right of religious schools to choose those “with the responsibility of educating and forming students in the faith,” the *Hosanna/Our Lady* exception allows them to provide an excellent education and to ensure that the faith is taught and taught properly. *Our Lady*, 140 S. Ct. at 2069. For religious colleges and universities, this is their entire reason for being. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). As discussed above in Section II.A., faith-based lessons permeate all aspects of campus life, resulting in communities with unique perspectives absent from non-religious institutions.

But if religious colleges lack the authority to “shape [their] own faith and mission” by choosing whom to appoint to serve as teachers, those unique perspectives will be lost, and their missions will be severely

compromised. *Hosanna-Tabor*, 565 U.S. at 188. Affirming the superior court here would, for example, deprive Christian colleges of the right to ensure that their teachers—to borrow again from Gordon—approach their “educational task from within [the] fixed reference points of biblical theism.” App. 145, 242. And the “coherent perspective on life and the world” that religious colleges like Gordon offer will also be lost. *Ibid.* In short, refusing to apply the *Hosanna/Our Lady* exception to teachers who further their schools’ religious missions, whether directly or less so, would impede their ability to police compliance with their own policies and the purity of their doctrines.

2. This would be enormously harmful to religious schools in Massachusetts and, consequently, to the Commonwealth. District-court decisions applying approaches similar to the superior court’s here (also before *Our Lady*) highlight the adverse impact of its reading of the *Hosanna/Our Lady* exception. For example, in *Richardson v. Northwest Christian University*, the district court declined to apply the exception to a claim involving a professor of exercise science. 242 F.Supp.3d 1132, 1145-46 (D. Or. 2017). The court relied in part on the fact that the teacher’s title lacked religious significance, even though—no less than

DeWeese-Boyd here—she “was expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith,” “provide a solid model of ethical leadership,” and “contribute to the integration of faith and learning.” *Id.* at 1139, 1145. Despite this, the court rejected a “broad reading” of the exception and held that it did not apply. *Id.* at 1146. As a result, Northwest Christian lost its ability to “hire[] only Christian faculty and expressly require[] those faculty to integrate their Christian faith into their jobs, including their instruction to students.” *Id.* at 1138. A formalistic approach to the exception there thus resulted in a religious college’s being forced to employ someone tasked with faith-based responsibilities despite the college’s desire to terminate that relationship.

Before *Our Lady*, other religious colleges also saw their religious defenses denied by courts applying too formalistic an understanding of the doctrine.²⁹ These decisions confirm that formalistic interpretations of

²⁹ See *Garrick v. Moody Bible Inst.*, 412 F.Supp.3d 859, 871 (N.D. Ill. 2019) (“Weighing heavily in Garrick’s favor is the fact that her position, Instructor of Communications, has no obvious connection to religion.”).

the exception, like the superior court’s approach here, would permit civil courts to interfere with religious colleges’ ability to align their teaching with their religious aims.

One example close to home is Merrimack College in North Andover. It commits itself and its students to a “search for knowledge that is illuminated by faith so that, in turn, the discovery of knowledge will clarify and deepen faith.”³⁰ College of the Holy Cross likewise promises its students “opportunities for spiritual and moral development.”³¹

Without the *Hosanna/Our Lady* exception shielding the “internal governance” of these and other religious schools from government interference, those promises would be empty. *Hosanna-Tabor*, 565 U.S. at 188-89. Instead, the constant threat of government oversight would either compel them to conform to secular mandates or risk financial ruin because of protracted lawsuits.

³⁰ Merrimack College, *The College and Its Mission*, <http://catalog.merrimack.edu/content.php?catoid=2&navoid=43> (last visited Dec. 12, 2020).

³¹ College of the Holy Cross, *Mission Statement*, <https://www.holycross.edu/about-us/mission-statement> (last visited Dec. 12, 2020).

3. Affirming the decision below would also endanger the other benefits that religious colleges provide the Commonwealth. The increased emphasis that religious colleges place on service, for example, is grounded in a community-wide, and faith-based, commitment to serve others. Service projects and trips are often led by faculty.³² And so, if the *Hosanna/Our Lady* exception does not apply to faculty tasked with fostering the school's service-oriented religious missions, it is possible that even that campus-wide commitment could be lost. The resulting loss of hundreds of thousands of community service hours each year would be devastating to the people of the Commonwealth.

In sum, the superior court's erroneous and formalistic application of the religious exception threatens to seriously undermine religious higher education in Massachusetts.

³² See Anna Maria College, *Change the World*, <https://annamaria.edu/campus-life/campus-ministry/alternative-break-trips/> (last visited Dec. 14, 2020).

CONCLUSION

Our Lady teaches that teachers at religious schools should ordinarily be covered by the *Hosanna/Our Lady* exception. Properly understood, that exception applies here because of Gordon's religious character and the role DeWeese-Boyd was expected to play in furthering Gordon's religious mission. Because the decision below was wrongly decided and, if affirmed, would be devastating to religious higher education in Massachusetts, it should be reversed.

Respectfully submitted,

The Council for Christian Colleges and Universities and
46 Religious Colleges and Universities

By their attorneys,

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CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rule of Appellate Procedure (MRAP) 17(c)(9), I certify that this brief complies with the requirements of Rule 17 and Rule 20. I further certify that this document follows the typeface and type-style requirements of Rule 20(a)(3)(E) because, it contains 7,464 words and has been prepared in size 14 Century Schoolbook font, which is proportionally spaced. The brief was created using Microsoft Word.

/s/ Dwight G. Duncan

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CERTIFICATE OF SERVICE

Pursuant to MRAP Rule 13(e), I certify that on this 14th day of December 2020, I have served the foregoing brief in Supreme Judicial Court No. SJC-12988 via email and the Massachusetts Tyler Host electronic filing system on the following counsel of record:

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Associations

Council for Christian Colleges and Universities

Individual Universities and Colleges

Anderson University, Anderson, SC

Asbury Theological Seminary, Wilmore, KY

Asbury University, Wilmore, KY

Belhaven University, Jackson, MS

Bethel University, Saint Paul, MN

Bluefield College, Bluefield, VA

Bushnell University, Eugene, OR

College of the Ozarks, Point Lookout, MO

Colorado Christian University, Lakewood, CO

Columbia International University, Columbia, SC

Corban University, Salem, OR

Cornerstone University, Grand Rapids, MI

³³ The name of each amicus in this appendix is hyperlinked to its mission statement.

Dordt University, Sioux Center, IA
Eastern Nazarene College, Quincy, MA
Evangel University, Springfield, MO
Emmanuel College, Boston, MA
Geneva College, Beaver Falls, PA
Greenville University, Greenville, IL
Houghton College, Houghton, NY
John Brown University, Siloam Springs, AR
Kentucky Christian University, Grayson, KY
Indiana Wesleyan University, Marion, IN
Lee University, Cleveland, TN
Liberty University, Lynchburg, VA
Malone University, Canton, OH
Mid-Atlantic Christian University, Elizabeth City, NC
Missouri Baptist University, Saint Louis, MO
Montreat College, Montreat, NC
Multnomah University, Portland, OR
Northwest University, Evanston, IL
Northwestern College, Orange City, IA

Nyack College & Alliance Theological Seminary, Nyack, NY

Ohio Christian University, Circleville, OH

Olivet Nazarene University, Bourbonnais, IL

Point University, West Point, GA

Regent University, Virginia Beach, VA

Southern Wesleyan University, Central, SC

Southwest Baptist University, Bolivar, MO

Southwestern Christian University, Bethany, OK

Spring Arbor University, Spring Arbor, MI

Taylor University, Upland, IN

Trinity International University, Deerfield, IL

Trevecca Nazarene University, Nashville, TN

Union University, Jackson, TN

William Jessup University, Rocklin, CA

Zaytuna College, Berkeley, CA