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 Massachusetts Supreme Judicial Court

BRIEF OF *AMICI CURIAE* BILLY GRAHAM EVANGELISTIC ASSOCIATION, SAMARITAN'S PURSE, CONCERNED WOMEN FOR AMERICA, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

in Support of Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENTS OF INTEREST[1]

The **Billy Graham Evangelistic Association** (BGEA) was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square; to cultivate prayer, and to proclaim the Gospel. BGEA believes its mission to be primarily a spiritual endeavor and further believes that, to fulfill its mission, its employees must share its religious beliefs and acknowledge that those beliefs are put into action through their employment with BGEA in pursuit of its religious mission and objectives.

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people

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[1] All parties have filed consents. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund its preparation or submission, and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The Family Foundation (TFF) is a Virginia nonpartisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia. Its interest in this case is derived directly from its concern to preserve religious freedom for all.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Massachusetts, seek to ensure that a historically accurate understanding of the Religion Clauses is presented to our country's judiciary.

The **Pacific Justice Institute** (PJI) is a nonprofit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area.

SUMMARY OF ARGUMENT

This Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), endorsed the "ministerial exception" as required by the First Amendment's Religion Clauses and recognized that the exception broadly applies to all religious institutions. In those decisions, this Court settled some key issues, but left many unanswered, including the critical question of how much deference should be granted to religious institutions in determining which of its employees must conform to its belief and practices and, thus, to qualify for the "ministerial" exception.

This case presents this Court with an opportunity to clarify that the government's judicial officers should defer to the good-faith understanding of a religious organization as to who qualifies for the exception. Such deference would vindicate the overriding intent of the Religion Clauses that courts refrain from second-guessing decisions made by religious institutions about whom they employ to support their mission. This has full applicability to the faculty of religious schools.

ARGUMENT

I. The Religion Clauses Prohibit Governmental Personnel from Interfering with a Religious Organization's Good-Faith Determination of Which Employees Must Conform to the Organization's Religious Beliefs and Practices for It to Carry Out Its Ministry Purposes

All manner of religious organizations exist in America. Some are traditional churches, synagogues, and mosques with formal worship services and a strict hierarchy. Others operate independently with little formal structure or supervision. Still others operate medical or food service missions, schools, or missionary ministries. *Amici* represent many of these different types of organizations. All of these diverse organizations operate their missions through people. Many religious organizations, including *Amici*, have a good-faith, sincere belief that the best way for them to fulfill their mission is to associate with employees who are faithful, both in belief and conduct, to the organization's doctrines and purposes.

In *Hosanna-Tabor*, the Court found that the Religion Clauses protected a Lutheran school from claims of discrimination when it terminated its school teacher. 565 U.S. at 192. While the Court outlined multiple factors that supported its decision, it fundamentally held that "imposing an unwanted minister" on a religious organization would violate both the Free Exercise Clause, which guarantees to a religious group the "right to shape its own faith and mission," and the Establishment Clause, which "prohibits

government involvement in such ecclesiastical decisions." *Id.* at 188-89.

In *Our Lady of Guadalupe*, this Court emphasized that the organization bestowing the title of "minister" on its employee was not critical for application of the ministerial exception. Instead, this Court explained that "[w]hat matters, at bottom, is what an employee does." 140 S. Ct. at 2064. In making this determination, this Court stated that it would defer to the religious institution's judgment:

> [T]he schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, 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. A religious institution's explanation of the role of such employees in the life of the religion in question is important.

Id. at 2066. This deference precluded second-guessing the organization's judgment that an employee needed to, but did not, adhere to the faith and practice requirements of the religious group, as this "would risk judicial entanglement in religious issues." *Id.* at 2069.

Such deference is consistent with the Court's historic religious freedom jurisprudence. In *Watson v. Jones*, 80 U.S 679 (1871), *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian Orthodox Diocese vs. Milivojevich*, 426 U.S. 696 (1976), this Court consistently and strongly affirmed that religious groups have the right to determine their own rules and mission without oversight by secular

authorities. This Court made these determinations in the context of some of the most contentious issues of the day. In *Watson*, this Court deferred to religious authorities in a case originating out of a slavery dispute that spanned the Civil War. Despite the compelling state interest, this Court deferred to religious authorities, noting that the church is the exclusive judge of religious issues within its own jurisdiction and that the decision of a religious authority on such questions is binding on the secular courts. 80 U.S. at 728-36. In *Kedroff*, this Court faced a dispute between American and avowedly pro-communist Soviet churches during the height of the Cold War. The Court ruled in favor of the pro-Soviet church, explaining that the New York legislature's decision to favor the American church improperly "intrude[d] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." 344 U.S. at 119.

Justice Thomas captured well this Court's historic approach to such church-state issues in his concurrences in *Hosanna-Tabor* and *Our Lady of Guadalupe*. In those opinions, he stated that the "Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is ministerial." *Our Lady of Guadalupe*, 140 S. Ct. at 2069-70 (Thomas, J., concurring); *see also Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring). Justice Thomas, therefore, rightly limited his inquiry to whether the religious groups asserted in good faith that the worker needed to believe and exercise the faith consistently with that espoused by the organization in order for it to carry out its religious mission to the best of its ability.

II. This Case Shows Why Deference to Religious Organizations' Views of Who Is a "Minister" Is Required Under the Religion Clauses

This case is a perfect illustration of the need for this Court to adopt the deferential approach indicated by this Court in *Our Lady of Guadalupe* and explicitly called for by Justice Thomas' concurrences in *Hosanna-Tabor* and *Our Lady of Guadalupe*. Professor Deweese-Boyd alleged that Gordon College had refused her promotion in violation of anti-discrimination laws because of her advocacy on behalf of the LGBTQ+ community. Gordon was founded in 1889 as an evangelical, Bible-focused, Christian college, and continues as such. Gordon mandates that faculty sign a religious statement of faith and expects professors to integrate historic Christian faith into their teaching and scholarship. That Gordon believes in good faith that its faculty members must act consistently with its religious purposes in both faith and practice is not challenged. Indeed, it is hard to imagine how Gordon could continue to be the same organization if it had no religious control over its faculty.

Despite conceding that Gordon is a "Christian community"; that Gordon required, and Deweese-Boyd signed, a statement of faith; and that Deweese-Boyd's seminary attendance played a role in Gordon's decision to hire her, the Massachusetts Supreme Judicial Court did not defer to Gordon's good-faith belief that Deweese-Boyd was an employee covered by the ministerial exception. Instead, it held that the exception did not apply to her, even though "Deweese-Boyd was expected and required to be a Christian teacher and

scholar." *DeWeese-Boyd v. Gordon Coll.*, 487 Mass. 31, 54 (2021).

In so doing, the court relied upon several factors that demonstrated its lack of understanding of how Gordon, and many other religious colleges, view their mission. For example, the court focused on the fact that Deweese-Boyd was a social work professor, which the court viewed as a secular discipline, not one that directly involved spiritual or religious activities. *Id.* at 32-33. The court drew a distinction between a "Christian teacher and scholar" and a "minister," despite Gordon's clearly stated desire that its professors integrate their Christian faith into their scholarship, regardless of the discipline taught by the professor. *Id.* at 54. This is precisely the kind of distinction that this Court warned about in *Our Lady of Guadalupe* when it instructed courts not to interfere with the "religious diversity" of the U.S. by second-guessing a religious institution's decisions. 140 S. Ct. at 2066.[2]

Not only is it clear that the Massachusetts Supreme Judicial Court erred in its determination that Deweese-Boyd was not an integral part of Gordon's religious mission, it is also evident that the court's analytical framework was problematic. This Court should accept the petition to clarify that courts should not

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[2] The Massachusetts Supreme Judicial Court also placed heavy emphasis on Deweese-Boyd's lack of ordination or formal religious training. *Deweese-Boyd,* 487 Mass., at 37, 40, 50-53. This is directly contrary to this Court's statements in *Our Lady of Guadalupe* that a lack of formal training or title should not be barriers to application of the ministerial exception. 140 S. Ct. at 2064.

undertake to determine which positions are sufficiently "religious" or "important" to merit application of the ministerial exception. This type of analysis will, as the Massachusetts Supreme Judicial Court's analysis did, take from religious colleges the ability to determine who is best suited to defend and teach its faith tradition. If this Court does not act, the result will often be that a college will be forced to promote or retain a professor (like Deweese-Boyd) who, in the institution's view, expressly advocates for a position contrary to the religious beliefs central to its mission. That is exactly the sort of religious interference that this Court in *Hosanna-Tabor, Our Lady of Guadalupe, Watson, Kedroff*, and *Milivojevich* prohibited.

In *Hosanna-Tabor*, Justice Thomas warned that a rule that encouraged judicial entanglement in religious decision-making would cause religious institutions to adjust their practices to obtain favorable results. *Hosanna-Tabor*, 565 U.S. at 197. This case also illustrates that risk. Apparently in reaction to this Court's ruling in *Hosanna-Tabor*, Gordon clarified in its faculty handbook that it considered professors to be "ministers." The Massachusetts Supreme Judicial Court appeared to view that insertion as a subterfuge, pointing out that Gordon's counsel had made the change over objections of some of the faculty. 487 Mass. at 37-38, 49-50. The negative inference drawn by the lower court demonstrates that Justice Thomas' concern was well-founded:

> 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.

Hosanna-Tabor, 565 U.S. at 197. In this case, Gordon tried "to conform its practices" to a court decision and was apparently penalized for doing so. The give-and-take over the term "minister" between Gordon's faculty and its counsel, *see Deweese-Boyd,* 487 Mass., at 37-38, reflects only on different legal and religious uses of the term and demonstrates the wisdom of relabeling the "ministerial exception" to indicate the legal concept's greater scope. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060-61 (noting that the "so-called ministerial exception" is based on the principle of the autonomy of religious organizations and sweeps broader than classically defined ministers).

One potential criticism of the "good-faith understanding" test is that it will allow religious organizations almost unbridled discretion. But this is not actually the case, as it is well established that adjudicating questions of the sincerity of religious claims is justiciable. *See United States vs. Seeger*, 380 U.S. 163, 183-85 (1965); *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981); *see also* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185, 1231-39 (2017). Courts routinely determine religious sincerity in draft exemption, prison accommodation, and Religious Freedom Restoration Act claims. *See, e.g.*, *Seeger,* 380 U.S. at 183-85; *Sterlinski* v. *Catholic Bishop of Chicago,* 934 F.3d 568, 571 (7th Cir. 2019) (noting that courts are competent in "separating pretextual justifications from honest ones"); *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988); *Krishna,* 650 F.2d at 441. Courts applying the "good-faith understanding" test to

ministerial exception claims can and should undertake that same analysis.

Amici represent a broad spectrum of beliefs and practices with respect to religious employment, but they share in the reality that all of their actions and missions depend upon the people they hire. *Amici*'s decisions about which employees to employ must adhere to the organization's beliefs and practices to allow the organizations to best serve their religious purposes. Such decisions are reserved to the religious organizations by both the Free Exercise and Establishment Clauses. It lies at the core of the church autonomy doctrine.

While the Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe* were a welcome affirmation that the Religion Clauses allow religious organizations to make decisions about at least some of their employees without interference, this case demonstrates that, without further guidance from this Court, even longstanding institutions with clear policies cannot reliably decide who is to teach and defend their faith consistent with their principles and beliefs when that decision is left in the hands of judges, rather than their own. Governmental actors are no better equipped to decide which employees must conform to an organization's principles for it to best satisfy its religious mission than they are to determine whether an employee has violated those religious principles.

CONCLUSION

This Court should grant the petition and reverse the decision of the Massachusetts Supreme Judicial Court. This Court should make clear that it will defer

to a religious institution's good-faith understanding of who qualifies as a "minister" for the exception's purposes before further encroachments are made upon the freedoms of religious organizations.

Respectfully submitted
this 2nd day of September 2021,

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