

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**

---

**BRIEF OF *AMICI CURIAE* BENEDICTINE  
COLLEGE AND FRANCISCAN UNIVERSITY OF  
STEUBENVILLE IN SUPPORT OF PETITIONERS**

---

RICHARD W. GARNETT IV  
*Counsel of Record*  
NICOLE STELLE GARNETT  
JOHN A. MEISER  
NOTRE DAME LAW SCHOOL  
RELIGIOUS LIBERTY INITIATIVE  
Eck Hall of Law  
Notre Dame, Indiana 46556  
(574) 631-6981  
rgarnett@nd.edu

*Counsel for Amici Curiae*

September 2, 2021

---

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES. . . . . ii

INTEREST OF *AMICI CURIAE*. . . . . 1

INTRODUCTION AND SUMMARY OF  
ARGUMENT . . . . . 4

ARGUMENT . . . . . 6

I. The Ministerial Exception Is Not Confined to a  
Narrow List of Facts Present in Prior Cases. . . . 6

II. A Constrained Ministerial Exception Denies the  
Reality of Education and Formation at Schools  
like Benedictine and Franciscan . . . . . 10

III. The Supreme Judicial Court’s Test Would  
Destroy the Ability of Schools like *Amici* to  
Define Their Educational Missions and  
Threatens Their Very Existence . . . . . 16

CONCLUSION. . . . . 21

## TABLE OF AUTHORITIES

### CASES

<i>Hosanna-Tabor Evangelical Lutheran Church &amp; Sch. v. E.E.O.C.</i> , 565 U.S. 171 (2012) . . . . .	<i>passim</i>
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020) . . . . .	<i>passim</i>
<i>Pierce v. Soc’y of Sisters</i> , 268 U.S. 510 (1925) . . . . .	20
<i>United States v. Virginia</i> , 518 U.S. 515 (1996) . . . . .	20
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002) . . . . .	20

### STATUTES

20 U.S.C. § 1011a(a)(2)(A) . . . . .	20
--------------------------------------	----

### OTHER AUTHORITIES

<i>About Us</i> , Franciscan University of Steubenville, <a href="https://bit.ly/3kB6fK2">https://bit.ly/3kB6fK2</a> . . . . .	18
Benedictine Coll., <i>Catholic Identity at Benedictine College Atchison, Kansas: Ten-Year Review of Ex Corde Ecclesiae in America</i> (2011), <a href="https://bit.ly/3mIAUI3">https://bit.ly/3mIAUI3</a> . . . . .	2, 11, 13, 14
<i>Benedictine College’s Vision</i> , Benedictine College, <a href="https://bit.ly/3zyiRrI">https://bit.ly/3zyiRrI</a> . . . . .	2
<i>Benedictine 2020 – Faculty</i> , Benedictine College, <a href="https://bit.ly/38qdGOE">https://bit.ly/38qdGOE</a> . . . . .	13

Brief of the Amicus Curiae American Ass'n of University Professors, <i>DeWeese-Boyd v. Gordon Coll.</i> , 163 N.E.3d 1000 (Mass. 2021) (SJC-12988) . . . . .	20
<i>Chemical Engineer Assistant or Associate Professor</i> , Benedictine College, <a href="https://bit.ly/3DAFUo8">https://bit.ly/3DAFUo8</a> . . .	15
<i>Faculty Openings: Full-Time Faculty Position Department of Political Science</i> , Franciscan University of Steubenville, <a href="https://bit.ly/3mKzjRP">https://bit.ly/3mKzjRP</a> . . . . .	14
<i>Faculty Openings: Full-Time Faculty Position in the Department of Political Science</i> , Franciscan University of Steubenville, <a href="https://bit.ly/3DAFZIs">https://bit.ly/3DAFZIs</a> . . . . .	15
<i>Faculty Openings: Full-Time Professor of Fine Arts</i> , Franciscan University of Steubenville, <a href="https://bit.ly/2WBdJov">https://bit.ly/2WBdJov</a> . . . . .	15
Franciscan Univ. of Steubenville, Bylaws (Rev. May 2019) . . . . .	10
Franciscan Univ. of Steubenville, <i>Staff Employee Handbook</i> (Rev. Mar. 29, 2021) . . . . .	14
Franciscan Univ. of Steubenville, <i>Student Handbook 2020–2021</i> (2020), <a href="https://bit.ly/3yuIBnx">https://bit.ly/3yuIBnx</a> . . . . .	3
André Gushurst-Moore, <i>Glory in All Things: St. Benedict &amp; Catholic Education Today</i> (2020) . .	11
<i>Human Resources</i> , Franciscan University of Steubenville, <a href="https://bit.ly/2WFGu32">https://bit.ly/2WFGu32</a> . . . . .	4, 14

Pope John Paul II, Apostolic Constitution  
on Catholic Universities *Ex Corde Ecclesiae*  
(1990)..... *passim*

*The Mission, Vision, and Charisms of Franciscan  
University of Steubenville, Franciscan  
University of Steubenville,*  
<https://bit.ly/3gKKVAI> ..... 3, 4, 11, 12, 15

*The Benedictine College Mission, Benedictine  
College, <https://bit.ly/38phr6J>* ..... 10, 11

**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are two deeply religious and distinctly Catholic institutions of higher education: Benedictine College and Franciscan University of Steubenville. The central mission and animating purpose of both schools is to provide an academically rigorous, religiously integrated, and profoundly Catholic education in which young men and women are formed to be leaders in the world and authentic witnesses of Christ. *Amici* therefore seek to preserve their First Amendment right to define and to direct their religious educational missions free from the interference of the state. That right requires recognition of a robust ministerial exception at the college level so that *amici* may determine who teaches and transmits their faith to the next generation of students.

*Amicus* Benedictine College (“Benedictine”) is a Catholic, liberal arts college in Atchison, Kansas, sponsored by the monks of St. Benedict’s Abbey and sisters of Mount St. Scholastica Monastery. Benedictine has inherited and now continues the 1500-year Benedictine educational tradition which prepares students for service to the Church and to society. With foundations in the 1850s, today’s college was formed in 1971 by the merger of St. Benedict’s College for men with Mount St. Scholastica College for women. It offers

---

<sup>1</sup> Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici curiae*’s intent to file this brief at least ten days prior to the due date. All parties have consented to the filing of this brief.

49 undergraduate majors, 2 master's degree programs, and multiple pre-professional courses to over 2000 students. Benedictine strives to be the “flagship college of the New Evangelization,” academically and spiritually equipping students to become leaders in the Benedictine tradition and to go out and transform the world. See Benedictine Coll., *Catholic Identity at Benedictine College Atchison, Kansas: Ten-Year Review of Ex Corde Ecclesiae in America* 1 (2011), <https://bit.ly/3mIAUI3> [hereinafter *Catholic Identity at Benedictine*]. Over the last few decades, Benedictine has been a success story within Catholic higher education. It has expanded enrollment, increased full-time faculty, and significantly enhanced academic and extracurricular resources for its students.

Benedictine puts Jesus Christ at the center of everything it does and encourages students, faculty, and staff to do the same. Benedictine educates the whole person, not just the intellect, so that students may come to wholeheartedly love and follow God through Jesus Christ. Benedictine's faculty play an integral and indispensable role in the Christ-centered mission of the college and all faculty must integrate the Catholic faith into their work. This “distinctively Benedictine approach to education culminates in graduates who are committed to living their lives so that in all things God may be glorified.” *Benedictine College's Vision*, Benedictine College, <https://bit.ly/3zyiRrI> (last visited Aug. 31, 2021) (internal quotation marks omitted).

*Amicus* Franciscan University of Steubenville (“Franciscan”) is a Catholic university founded in Ohio

in 1946 by the Franciscan Friars of the Third Order Regular at the request of Bishop John King Mussio. It continues the 800-year educational tradition of the Third Order of St. Francis of Assisi, and offers over 90 academic programs, including 45 undergraduate degrees and 12 graduate programs, to its more than 3000 students. Since its beginnings, Franciscan has endeavored to produce “men and women of faith whose moral, spiritual, and intellectual formation enable[s] them to provide exemplary leadership in their careers, communities, and churches.” Franciscan Univ. of Steubenville, *Student Handbook 2020–2021*, ch. I (2020), <https://bit.ly/3yuIBnx>. It is Franciscan’s vision, in the spirit of St. Francis of Assisi, to “become the leading instrument for worldwide renewal at the service of the Catholic Church.” *The Mission, Vision, and Charisms of Franciscan University of Steubenville*, Franciscan University of Steubenville, <https://bit.ly/3gKKVAI> (last visited Aug. 31, 2021) [hereinafter *Franciscan Mission & Vision*]. Franciscan strives to fulfill this vision by “embrac[ing] the call to dynamic orthodoxy” in order “to educate, to evangelize, and to send forth joyful disciples” who will “be a transforming presence in the Church and the world.” *Id.*

Like Benedictine, Franciscan is a leading success story in Catholic higher education and has seen its enrollment grow tenfold over the past half-century through a reinvigorated commitment to its religious mission. With a robust and passionate integration of its Catholic faith throughout its academic programs, Franciscan has built “an environment in which students, faculty, and staff seek ongoing personal

conversion in the power of the Holy Spirit.” *Id.* The school is today “a visionary organization in service of the Catholic Church.” *Human Resources*, Franciscan University of Steubenville, <https://bit.ly/2WFGu32> (last visited Aug. 31, 2021). As with Benedictine, faculty play a necessary and active role in Franciscan’s mission both inside and outside the classroom. All faculty at Franciscan must integrate the Catholic faith into their teaching, participate in the life of the Church on campus, and model the Catholic faith, as their vocations at Franciscan are “central to the reform and the renewal of the Catholic Church.” *Id.*

### INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant certiorari to make clear that the First Amendment guarantees religious *colleges and universities* the same vital protections that safeguard a religious *grade school’s* freedom to select the teachers who personify and teach its faith. Despite this Court’s recent admonition that such protections apply to a religious school’s selection of “*any* ‘employee’ . . . who serves as a messenger or teacher of its faith,” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063, 2064 (2020) (emphasis added), the Supreme Judicial Court of Massachusetts determined they cannot apply in this case because Professor Margaret DeWeese-Boyd’s integration of faith into her work at a Christian college did not look enough like the teaching of religious education at a Christian grade school. That is, despite DeWeese-Boyd’s duty to imbue her teaching and scholarship with Gordon College’s Christian faith, the court opined that

she could not be a “minister” of that faith because she did not directly teach “religious doctrine,” lead her students in prayer or worship services, or provide formal religious guidance to them. *See* Pet. App. 26–34.

The Supreme Judicial Court’s restriction of the ministerial exception to the context of grade-school religious education both defies this Court’s precedent and denies the reality of religious formation at many pervasively religious colleges and universities. As the example and experience of *amici* demonstrate, the religious missions and ministries of such schools sweep far beyond teaching the basic tenets of the faith or performing the few ritualistic activities the Massachusetts court deemed to be sufficiently “religious” in nature. For colleges and universities, like *amici*, who sincerely believe it is their religious duty to integrate their faith deeply into *all* their educational endeavors, there can be no segregation of those professors who will teach “religious” matters from those who will cover “all the rest.” The line suggested by the Massachusetts court is not simply difficult to draw; for these schools it does not exist.

Not all religiously affiliated colleges and universities choose to have religion pervade all aspects of their educational programs in this way. Many do not. But the First Amendment protects the right of schools to choose to do so at the college level just as they may at the grade-school level. Institutions like *amici* therefore ought to be afforded the full protections of the ministerial exception and not forced to erect what they believe to be an artificial divide between

their religious faith and employment decisions related to those professors who will fulfill their distinct educational missions.

Unfortunately, the Massachusetts Supreme Judicial Court effectively foreclosed the application of the ministerial exception to instructors at the college level, regardless of the degree of religiosity of the institution at issue. Review by this Court is therefore needed to make clear that such protections do indeed apply to schools like *amici*, thus preserving their freedom to be truly religious in the way they sincerely believe they must.

## ARGUMENT

### **I. The Ministerial Exception Is Not Confined to a Narrow List of Facts Present in Prior Cases.**

Little over one year ago, this Court reaffirmed that the First Amendment guarantees religious schools the right to select—free from government interference—teachers and other individuals who play “key roles” in service of “the institution’s central mission.” *Our Lady of Guadalupe*, 140 S. Ct. at 2060. Under this so-called “ministerial exception,” courts must “stay out of employment disputes involving those holding certain important positions” at religious schools, including “*any* ‘employee’ who . . . serves as a messenger or teacher of [their] faith.” *Id.* at 2060, 2063 (emphasis added) (internal quotation marks omitted); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 202 (2012) (Alito, J., concurring) (“The Constitution leaves it to the collective conscience of each religious group to determine for

itself who is qualified to serve as a teacher or messenger of its faith.”). In so doing, this Court rejected the Ninth Circuit’s attempts to reduce the ministerial exception to a “rigid test” and instructed courts instead to “take *all* relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception.” *Our Lady of Guadalupe*, 140 S. Ct. at 2067 (emphasis added).

Unfortunately, the Supreme Judicial Court of Massachusetts has breathed new life into the same error this Court sought to end in *Our Lady of Guadalupe*. All but ignoring what this Court actually wrote in *Our Lady of Guadalupe*, the Massachusetts court dissected that case and *Hosanna-Tabor* to their constituent facts and then compiled them into a checklist against which it measured the circumstances here. *See* Pet. App. 27–34. In the end, the court refused to apply the ministerial exception because Margaret DeWeese-Boyd “was not required to, and did not” do exactly what the plaintiffs in those earlier cases did. *Id.* at 24. That is, because DeWeese-Boyd did not formally “meet with students for spiritual guidance, pray with students, directly teach them [religious] doctrine, or participate in religious rituals or services with them,” the Massachusetts court found her role to be “significantly different from the . . . teachers of religion at primary or secondary schools in the cases that have come before the Supreme Court.” *Id.* at 26, 31.

Such a blinkered view of the ministerial exception cannot be squared with what this Court actually held

in *Our Lady of Guadalupe*. There, this Court explicitly rejected such a “checklist” approach and demanded that courts instead consider *all* relevant circumstances to determine, “at bottom, . . . what an employee does”—and whether she serves an important religious function for the school. *Our Lady of Guadalupe*, 140 S. Ct. at 2064. What DeWeese-Boyd *did* for Gordon College appears to be undisputed. She was “required to, and did, both engage in teaching and scholarship from a Christian perspective and integrate her faith into her work.” Pet. App. 24. DeWeese-Boyd was well aware that Gordon “expected and required [her] to be a Christian teacher and scholar,” *id.* at 36, and even she advertised her ability to do so, *see id.* at 128. And she did these things ultimately in service of Gordon’s mission to be “an intentional Christian community” that “combines an exceptional liberal arts education with an informed Christian faith.” *Id.* at 43.

Yet, to the Supreme Judicial Court, DeWeese-Boyd’s position did not fall within the ministerial exception because she did not perform tasks that the court found to be as overtly “religious” as those in *Hosanna-Tabor* and *Our Lady of Guadalupe*. *See, e.g., id.* at 27 (“DeWeese-Boyd’s responsibility to integrate the Christian faith into her teaching, scholarship, and advising . . . is not tied to a sectarian curriculum: it does not involve teaching any prescribed religious doctrine, or leading students in prayer or religious ritual.”). Under any fair understanding of religious education, the fact that DeWeese-Boyd’s integration of faith into her teaching at the collegiate level appeared to be “different from . . . teachers of religion at primary or secondary schools,” *id.* at 31, should be

unremarkable. *See infra* Parts II–III. And under any fair reading of *Our Lady of Guadalupe*, the availability of the ministerial exception cannot turn on whether the job duties of the individual in question happen to check the same boxes as those in the few “cases that have come before the Supreme Court,” Pet. App. 31. *See Our Lady of Guadalupe*, 140 S. Ct. at 2067.<sup>2</sup>

For these reasons, review by this Court is needed to make clear that the Court meant exactly what it wrote in *Our Lady of Guadalupe* and to end the continued diminishment of the ministerial exception.

---

<sup>2</sup> The Supreme Judicial Court’s opinion repeated nearly the exact method of analysis advocated by the *dissenting* Justices in *Our Lady of Guadalupe*. There, the dissenting Justices focused on specific factors listed as relevant in *Hosanna-Tabor*—such as the employee’s job title, formal religious training, whether she held herself out as a “minister,” and whether she led “devotional exercises”—and opined that Morrissey-Berru’s role was not sufficiently religious because she was too “unlike the teacher in *Hosanna-Tabor*.” 140 S. Ct. at 2079–81 (Sotomayor, J., dissenting). The dissenting Justices criticized the majority for explicitly *rejecting* such a narrow application of the ministerial exception in favor of a “laissez-faire analysis” that applies the exception “[s]o long as the employer determines that the employee’s ‘duties’ are ‘vital’ to ‘carrying out the mission of the church.’” *Id.* at 2082.

It may well be that the Massachusetts Supreme Judicial Court believes the dissenting Justices had the better of the argument in *Our Lady of Guadalupe*. But the path charted by the dissenters was rejected, and indeed closed, by a majority of this Court in that case. Disagree as it might, the Massachusetts court cannot now evade the consequences of that decision by acting as if it did not occur.

## II. A Constrained Ministerial Exception Denies the Reality of Education and Formation at Schools like Benedictine and Franciscan.

The Supreme Judicial Court's cramped understanding of the ministerial exception not only defies this Court's precedent, but, more fundamentally, it denies the reality of education and formation at colleges like *amici*. To be sure, at such colleges one might encounter individuals who perform the few tasks credited by the Massachusetts court as "ministerial." But, as the examples of Benedictine and Franciscan demonstrate, religious ministries at some institutions of higher learning extend far beyond that.

Benedictine and Franciscan's Catholic faith pervades all aspects of their educational missions. Indeed, their religious faith is the very reason they engage in such missions in the first place. *See The Benedictine College Mission*, Benedictine College, <https://bit.ly/38pnr6J> (last visited Aug. 31, 2021) ("[Benedictine College's] mission as a Catholic, Benedictine, liberal arts, residential college is the education of men and women within a community of faith and scholarship."); Franciscan Univ. of Steubenville, Bylaws, art. II, § 1(b) (Rev. May 2019) ("It shall be the . . . purpose of the University, publicly identified as a Catholic and a Franciscan institution, to promote the moral, spiritual, and religious values of its students."). These commitments enjoy a rich lineage. Benedictine, for example, continues a 1500-year educational tradition inspired by St. Benedict of Nursia, which pursues "peace, the balance of activity and contemplation, and the glorification of God in all

undertakings.” *The Benedictine College Mission, supra*. This “oldest continuous form of Catholic education”—in which young, old, clergy, and lay alike have been taught—“in all its breadth and inclusiveness, leads back to this higher (or deeper) purpose: compunction of heart, the turning of the soul towards God.” André Gushurst-Moore, *Glory in All Things: St. Benedict & Catholic Education Today* 16–17 (2020). Similarly, Franciscan continues the 800-year tradition of the Third Order of St. Francis of Assisi and is “guided by [his] example and teaching” to “rebuild [God’s] church” through a university that is “truly Catholic in its full submission to the teaching authority of the Catholic Church.” *Franciscan Mission & Vision, supra*.

At the heart of each school’s mission is the call of *Ex Corde Ecclesiae*, Pope John Paul II’s apostolic constitution on Catholic universities. See *Catholic Identity at Benedictine, supra*, at 3; *Franciscan Mission & Vision, supra*. Under this teaching, a Catholic university is not simply to provide a generic secular course of study in a setting adorned with certain hallmarks of religious life. Rather, *Ex Corde Ecclesiae* instructs that “the objective of a Catholic University” is to provide a “Christian presence” in the world of higher education to “confront[] the great problems of society and culture.” Pope John Paul II, Apostolic Constitution on Catholic Universities *Ex Corde Ecclesiae* ¶ 13 (1990) [hereinafter *Ex Corde Ecclesiae*]. According to *Ex Corde Ecclesiae*, the Catholic university is thus to be one where “Catholicism is vitally present and operative” and “Catholic ideals, attitudes and principles penetrate and inform university activities.” *Id.* ¶ 14. The religious mission of a school in the mold

of Benedictine or Franciscan cannot be limited to a discrete subset of functions for “Catholic teaching and discipline are to influence *all* university activities.” *Id.* at Pt. II, art. 2, § 4 (emphasis added). The Church has entrusted Catholic universities with this “cultural and religious [mission] of vital importance because it concerns the very future of humanity.” *Id.* at Conclusion.

To fulfill these commitments, Benedictine and Franciscan express their religious faith throughout their curricula. These schools believe deeply in their central call to “promote dialogue between faith and reason” and to perform “all the basic academic activities” of higher education in “connect[ion] with and in harmony with the evangelizing mission of the Church.” *Id.* ¶¶ 17, 49 (emphasis omitted). Consequently, *amici* sincerely believe that they cannot separate their teaching, scholarship, or other educational activities from their faith—and they cannot simply set aside some classes to teach “religion” while allowing the bulk to handle “all the rest.” There is no purely “secular” subject of study according to Benedictine and Franciscan’s religious beliefs. Franciscan therefore allows “no artificial separation of the intellectual and the faith life,” and insists that its students are to be distinguished by their “concentrat[ion] on intellectual development through studies while integrating faith and learning in and out of the classroom.” *Franciscan Mission & Vision, supra*. Benedictine, likewise, directly incorporates its Catholic beliefs throughout its many fields of academic study (and into its campus life more broadly), with an aim to be the “flagship college of the New Evangelization.”

*Catholic Identity at Benedictine, supra*, at 1, 6. At the heart of both schools' commitment to imbue their educational programs with their Catholic faith is their underlying belief that that "what is at stake" in higher education is not only the "meaning of scientific and technological research, of social life and of culture, but [also], on an even more profound level, . . . the very meaning of the human person." *Ex Corde Ecclesiae, supra*, ¶ 7 (emphasis omitted).

As in any institution of higher learning, the faculty of Benedictine and Franciscan are indispensable to the success of their educational missions. And given the unique Christ-centered missions that these schools have been called to serve, their faculty are likewise "called to be witnesses and educators of authentic Christian life, which evidences attained integration between faith and life, and between professional competence and Christian wisdom." *Id.* ¶ 22. The identities of Benedictine and Franciscan are "essentially linked to the quality of [their] teachers and to respect for Catholic doctrine." *Id.* at Pt. II, art. 4, § 1.

Both schools therefore appoint only professors in whom they can entrust their distinctly Catholic missions. Benedictine, for example, hires faculty who hold "a personal commitment to the ideals and principles of the Catholic tradition and expression of these in action." *Benedictine 2020 – Faculty*, Benedictine College, <https://bit.ly/38qdGOE> (last visited Aug. 31, 2021). The president and dean of the college conduct "mission interviews" with all prospective faculty and senior staff members—a

“crucial step in the hiring process” during which they “explain the nature and significance of the mission in the life of the college” and ask the prospective employees “how they envision themselves contributing to this mission.” *Catholic Identity at Benedictine, supra*, at 6. Once hired, new faculty are provided an orientation on the mission of the school, including a “specific exploration of *Ex Corde Ecclesiae*.” *Id.* Franciscan likewise requires that prospective faculty candidates submit statements detailing how they will integrate the “vision of Catholic education expressed in *Ex corde Ecclesiae*” into their courses and scholarly work. *See, e.g., Faculty Openings: Full-Time Faculty Position Department of Political Science*, Franciscan University of Steubenville, <https://bit.ly/3mKzjRP> (last visited Aug. 31, 2021). Franciscan stresses that “[a]s brothers and sisters in Christ, faculty, staff, and students” work together to build Franciscan’s “dynamic, evangelistic, Catholic culture that encourages students . . . to grow in mind, body, and spirit, following Jesus Christ.” Franciscan Univ. of Steubenville, *Staff Employee Handbook* at A-1 (Rev. Mar. 29, 2021). Similarly, the university informs prospective faculty that their “work should never just be work” and that, at Franciscan, they will “have the opportunity to be a part of a visionary organization in service of the Catholic Church, society, and culture.” *Human Resources*, Franciscan University of Steubenville, *supra*.

The demand to incorporate the school’s Catholic faith into the faculty’s work applies across all

disciplines at Benedictine and Franciscan.<sup>3</sup> This is because, to each of these schools, education is in service of the truth—and the truth, according to these schools’ sincerely held religious beliefs, is known only through God. See, e.g., *Ex Corde Ecclesiae*, *supra*, at ¶ 4 (“[A] Catholic University is completely dedicated to the research of all aspects of truth in their essential connection with the supreme Truth, who is God.”). For Benedictine and Franciscan, to pursue truth in and through God, one must look to the teachings contained in sacred Scripture or tradition as taught by the Catholic Church. See, e.g., *Franciscan Mission & Vision*, *supra* (“The University . . . reject[s] all propositions contrary to those truths [taught by the Catholic Church], and promot[es] thereby all the truths of revelation whether found in Scripture or Tradition as taught by the Catholic Church.”). Accordingly, to these schools, a curriculum that delimits itself to exclude such sources of truth in certain disciplines would be no education at all.

At bottom, what Benedictine and Franciscan provide—what is their very *purpose* to provide—is a Christ-centered education that integrates faith and reason throughout their educational programs and that will form students and prepare them to serve as

---

<sup>3</sup> See, e.g., *Chemical Engineer Assistant or Associate Professor*, Benedictine College, <https://bit.ly/3DAFUo8> (last visited Aug. 31, 2021); *Faculty Openings: Full-Time Professor of Fine Arts*, Franciscan University of Steubenville, <https://bit.ly/2WBdJov> (last visited Aug. 31, 2021); *Faculty Openings: Full-Time Faculty Position in the Department of Political Science*, Franciscan University of Steubenville, <https://bit.ly/3DAFZIs> (last visited Aug. 31, 2021).

leaders and living witnesses to the Gospel. This is a mission and a ministry that cannot be fulfilled by simply hiring a few individuals to teach a religious education class or to escort the students to weekly Mass. By failing to understand the full scope and nuance of such a pervasively religious higher education, the Massachusetts ruling discriminates against schools like *amici* and prevents them from being truly religious in the way they sincerely believe they must.

### **III. The Supreme Judicial Court's Test Would Destroy the Ability of Schools like *Amici* to Define Their Educational Missions and Threatens Their Very Existence.**

Despite the vital religious functions performed by the faculty at schools like Benedictine and Franciscan, the Supreme Judicial Court's circumscribed test all but eliminates the ministerial exception in higher education for the simple reason that a college is not an elementary school. The narrow checklist applied by the Supreme Judicial Court simply does not map onto college education. And an insistence upon such a rigid set of criteria means that the critical protections of the ministerial exception may not safeguard the freedom of even the most manifestly and comprehensively religious colleges to choose the faculty who will teach and transmit their unique religious messages—leaving the schools' very existence vulnerable to the control of the state.

At the most basic level, the court's tailoring of the ministerial exception to grade-school teachers forecloses its application to college professors because

their job duties can hardly be compared. For starters, college professors teach mature and independent adults, not young children entrusted to their custody during the school day. College professors are not typically tasked with supervising and chaperoning their students throughout the day, leaving them with substantially less opportunity and less reason to escort students to religious services or to lead them in religious rituals, Pet. App. 26. Relatedly, grade-school teachers are generalists by nature, often required to teach their students nearly all subjects, including, at religious schools, religion. This was the case for Cheryl Perich, see *Hosanna-Tabor*, 565 U.S. at 178, for Agnes Morrissey-Berru, *Our Lady of Guadalupe*, 140 S. Ct. at 2056, and for Kristen Biel, *id.* at 2058. College professors are, of course, more specialized than that. Most are experts in a single field and teach classes and produce scholarship in only that discipline. For this reason alone, there is rarely occasion for many college professors to “directly” teach their students religious “doctrine,” Pet. App. 26.

These simple distinctions betray a more fundamental reality, illustrated above: the educational ministry of *amici*’s thoroughly religious colleges looks radically different from the elementary religious education described by the Supreme Judicial Court. And for good reason. The religious formation needed to prepare young men and women to become faith-filled leaders in the professional world is a far cry from that needed to inculcate young children in the foundations of a religion. Where a religious grade school must teach the basics in a broad spectrum of subjects, including the basic “tenets of the faith,” *Our Lady of*

*Guadalupe*, 140 S. Ct. at 2064, Benedictine and Franciscan must promote a deep “dialogue between faith and reason” and “be engaged in a constant effort to determine the relative place and meaning of each of the various disciplines within the context of a vision of the human person and the world that is enlightened by the Gospel.” *Ex Corde Ecclesiae*, *supra*, ¶¶ 16, 17 (emphasis omitted). Thus, Benedictine and Franciscan do not simply aim to teach their students the foundations of the Catholic faith but rather strive to build educational communities in which students will study, deepen, and mature in all applications of that faith so they may become leaders who will transform the world and glorify God. See *Benedictine College’s Vision*, *supra*. (“We dedicate ourselves to educating students to become leaders in the Benedictine tradition, who will transform the world through their commitment to intellectual, personal, and spiritual greatness. . . . Our distinctively Benedictine approach to education culminates in graduates who are committed to living their lives ‘so that in all things God may be glorified.’”); *About Us*, Franciscan University of Steubenville, <https://bit.ly/3kB6fK2> (last visited Aug. 31, 2021) (“Here, your exceptional education is grounded in a passionately Catholic faith tradition that takes you beyond yourself and into the community where you can evangelize and transform the culture.”). For *amici*, this can be accomplished only by building a school where “Catholic ideals, attitudes and principles penetrate and inform [the] university” at every level. *Ex Corde Ecclesiae*, *supra*, ¶ 14.

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 colleges like *amici* the indispensable “authority to select, supervise, and if necessary, remove” the individuals who are at the heart of this calling. *Our Lady of Guadalupe*, 140 S. Ct. at 2060. And, as this Court has warned, without such protections these schools would see “the core of their mission” hollowed out, and “the very reason for [their] existence” “undermine[d].” *Id.* at 2055. Indeed, if *amici* were to lose their ability to select those who will personify and profess their faith, they would lose their very ability to *accomplish* their missions. Requiring *amici* instead to employ even professors that they believe might lead students *away* from the faith is not merely inconsistent with their missions but is in fact antithetical to them. And without a reason to exist, many pervasively religious colleges might simply cease to do so.

This does not mean that all religiously affiliated—or even all Catholic—colleges and universities define their educational missions in the same way as *amici*. Nor does it mean that those schools which do pursue similar missions to *amici* all define the roles of their faculty in the same way or place the same demands on their teaching and scholarship. Many do not. Thus, contrary to the dramatic warnings of the Supreme Judicial Court, Pet. App. 34–35, a ruling in favor of Gordon College in this case need not mean that *all* faculty appointments at *all* religiously affiliated colleges are necessarily protected by the ministerial exception. But surely *some* are. And surely the question of which ones qualify does not turn on how closely the professor resembles a grade-school religion teacher.

Moreover, the fact that some deeply religious colleges may require their faculty to integrate a particular faith tradition into their work is not a looming threat to academic freedom, as was suggested to the state court, *see* Brief of the Amicus Curiae American Ass'n of University Professors, *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000 (Mass. 2021) (SJC-12988). Rather, the protections demanded by the First Amendment simply enable schools like Benedictine and Franciscan *to exist* in the first place. The elimination of such protections would not *foster* academic freedom and diversity but rather *endanger* it by threatening to eliminate the unique and vibrant educational environments that some schools have chosen to cultivate. This “diversity of institutions and educational missions is one of the key strengths of American higher education,” not a hazard to it. 20 U.S.C. § 1011a(a)(2)(A); *see also* *Zelman v. Simmons-Harris*, 536 U.S. 639, 680–83 (2002) (Thomas, J., concurring); *United States v. Virginia*, 518 U.S. 515, 533 n.7, 535 (1996); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

The rich diversity among and complexity within religious ministries are precisely what the holistic, flexible, and functional analysis established in *Hosanna-Tabor* and *Our Lady of Guadalupe* was meant to embrace. But this nuanced understanding of the First Amendment and of the ministerial protections it demands is exactly what the Supreme Judicial Court’s blinkered analysis has foreclosed. Review is needed by this Court to correct this drastic error and to make clear that many faculty members at schools like *amici* perform critical religious work, even if that work

might not include leading students in prayer or lecturing them in the content of the Catechism.

**CONCLUSION**

For the foregoing reasons, *amici curiae* urge the Court to grant certiorari and reverse.

Respectfully submitted,

RICHARD W. GARNETT IV

*Counsel of Record*

NICOLE STELLE GARNETT

JOHN A. MEISER

NOTRE DAME LAW SCHOOL

RELIGIOUS LIBERTY INITIATIVE

Eck Hall of Law

Notre Dame, Indiana 46556

(574) 631-6981

rgarnett@nd.edu

*Counsel for Amici Curiae*

SEPTEMBER 2, 2021