

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
No. SJC-12988**

SUPERIOR COURT NO. 1777CV01367

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**MARGARET DEWEESE-BOYD,**

*Plaintiff-Appellee,*

v.

**GORDON COLLEGE, D. MICHAEL LINDSAY, AND JANEL CURRY,**

*Defendants-Appellants.*

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**BRIEF OF *AMICI CURIAE*  
JEWISH COALITION FOR RELIGIOUS LIBERTY AND  
AGUDATH ISRAEL OF AMERICA  
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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Blaine H. Evanson ( <i>pro hac vice pending</i> )	Joshua S. Lipshutz (BBO # 675305)
Paige Muhlestein ( <i>pro hac vice pending</i> )	GIBSON, DUNN & CRUTCHER LLP
GIBSON, DUNN & CRUTCHER LLP	1050 Connecticut Avenue, N.W.
3161 Michelson Drive	Washington, DC 20036-5306
Irvine, CA 92612-4412	Tel: (202) 955-8217
Tel: (949) 451-3805	Fax: (202) 530-9614
Tel: (949) 451-3940	JLipshutz@gibsondunn.com
Fax: (949) 475-4740	

BEvanson@gibsondunn.com	Vince Eisinger ( <i>pro hac vice pending</i> )
PMuhlestein@gibsondunn.com	GIBSON, DUNN & CRUTCHER LLP
	200 Park Avenue, 48th Floor
	New York, NY 10166-0193
	Tel: (212) 351-3993
	Fax: (212) 817-9593
	VEisinger@gibsondunn.com

*Counsel for Amici Curiae The Jewish Coalition for  
Religious Liberty and Agudath Israel of America*

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## TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT .....	2
TABLE OF CONTENTS .....	3
TABLE OF AUTHORITIES.....	5
INTEREST OF <i>AMICI CURIAE</i> .....	7
INTRODUCTION .....	8
ARGUMENT.....	10
I.    Schools Affiliated with Minority Religions Require Autonomy in Employing Teachers in Order to Convey Their Religious Messages Accurately. ....	10
A.    Religious Education Is an Important Component of Many Minority Religions. ....	11
B.    Teachers at Schools Affiliated with Minority Religions Convey the Messages of Their Faiths.....	11
II.   The <i>Kirby</i> Test Discriminates Against Judaism and Other Religious Minorities. ....	14
A.    Requiring Courts to Consider Whether Employees Proselytize Discriminates Against Judaism Because Jewish “Ministers” Do Not Proselytize.....	15
B.    Requiring Courts to Consider Whether Employees Speak on Church Doctrine Discriminates Against Judaism Because Few Jewish Teachers Have Such Authority.....	16
C.    Requiring Courts to Consider Whether Employees’ Functions Are Liturgical Discriminates Against Judaism. ....	17

**TABLE OF CONTENTS**  
(Continued)

	<u>Page</u>
III. Courts Should Defer to Religious Organizations in Identifying Their “Ministers.” .....	20
CONCLUSION.....	22

## TABLE OF AUTHORITIES

Page(s)

### Cases

<i>Ben-Levi v. Brown</i> , 136 S. Ct. 930 (2016) .....	21
<i>Grussgott v. Milwaukee Jewish Day Sch., Inc.</i> , 882 F.3d 655 (7th Cir. 2018) .....	13
<i>Hosanna-Tabor Evangelical Lutheran Church &amp; Sch. v. EEOC</i> , 565 U.S. 171 (2012) .....	<i>passim</i>
<i>Kirby v. Lexington Theological Seminary</i> , 426 S.W.3d 597 (Ky. 2014) .....	9
<i>Larson v. Valente</i> , 456 U.S. 228 (1982) .....	15
<i>LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n</i> , 503 F.3d 217 (3d Cir. 2007) .....	16
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020) .....	<i>passim</i>
<i>Shaliehsabou v. Hebrew Home of Greater Wash., Inc.</i> , 363 F.3d 299 (4th Cir. 2004) .....	13
<i>Zubik v. Burwell</i> , 136 S. Ct. 1557 (2016), 2016 WL 159297 .....	18, 19

### Other Authorities

ASMA T. UDDIN, WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA’S FIGHT FOR RELIGIOUS FREEDOM (2019) .....	22
Asma Uddin, <i>Muslim Views on Education: Parameters, Purview, and Possibilities</i> 44 J. Cath. Legal Stud. 143 (2005) .....	11
Maimonides, <i>Mishneh Torah</i> , Hilchot Tefilah (Moznaim Publishing Corp. 1989) .....	18, 19

# TABLE OF AUTHORITIES

(Continued)

	<u>Page(s)</u>
Meir Katz, <i>The Economics of Section 170: A Case for the Charitable Deduction of Parochial School Tuition</i> , 12 Rutgers J.L. & Religion 224 (2011) .....	13
Michael J. Broyde, <i>Proselytism and Jewish Law: Inreach, Outreach, and Jewish Tradition</i> , in SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM (John Witte & Richard C. Martin eds., Wipf & Stock 2008) (1999), <a href="https://www.broydeblog.net/uploads/8/0/4/0/80408218/proselytism_and_jewish_law.pdf">https://www.broydeblog.net/uploads/8/0/4/0/80408218/proselytism_and_jewish_law.pdf</a> .....	16
R. Jack Bieler, <i>Vision of a Modern Orthodox Jewish Education</i> , <a href="https://www.lookstein.org/resource/vision.pdf">https://www.lookstein.org/resource/vision.pdf</a> .....	14
Rabbi Jonathan Sacks, <i>Orthodox Judaism &amp; Halakhah</i> , My Jewish Learning, <a href="https://www.myjewishlearning.com/article/orthodox-judaism-halakhah/">https://www.myjewishlearning.com/article/orthodox-judaism-halakhah/</a> (last visited Dec. 9, 2020) .....	17
<b>Rules</b>	
Mass. R. App. P. 17(c)(5) .....	7

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

*Amicus Curiae* The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence. The Coalition aims to protect the ability of all Americans to practice their faith freely and to foster cooperation between Jews and other faith communities. It has filed *amicus* briefs in the Supreme Court of the United States and federal courts of appeals, published op-eds in prominent news outlets, and established an extensive volunteer network to promote support for religious liberty within the Jewish community.

*Amicus Curiae* Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

*Amici* have an acute interest in ensuring that religious schools remain free to select those teachers and other employees who will “teach their faith” and “carry out

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<sup>1</sup> No party or counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, their members, or their counsel contributed money to fund this brief’s preparation or submission. Neither *amici curiae* nor their counsel represent or have represented one of the parties to the present appeal in another proceeding involving similar issues, nor were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal. See Mass. R. App. P. 17(c)(5).

their mission.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012). The autonomy of religious organizations to govern themselves is a fundamental religious liberty, and it is particularly important for religious traditions practiced by a minority of the U.S. population, such as Judaism. For these minority religions, religious education is a critical means of propagating the faith, instructing the rising generation, and instilling a sense of religious identity. The rule applied by the Superior Court, if approved by this Court, would impair the missions of these and other religious groups for whom religious education is of central importance.

### **INTRODUCTION**

The autonomy of religious schools to choose teachers who will convey the messages of their faith is fundamental to the First Amendment and its ministerial exception. In its most recent decision on the scope of the ministerial exception, the Supreme Court warned against rigid tests for determining whether a teacher at a religious school qualifies as a minister. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2067 (2020). Among the reasons the Court gave for a more flexible approach is that “religious traditions may differ” in the importance they ascribe to certain factors, and rigid adherence to a limited set of factors may result in “impermissible discrimination.” *Id.* at 2063–64.

The Superior Court here (without the benefit of *Our Lady of Guadalupe*) adopted the rigid test set forth by the Kentucky Supreme Court in *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014). *Kirby* requires courts to consider the following three factors (among others), regardless of their relevance to the employer's religion: (1) "whether the position ... required proselytizing," (2) whether "the employee use[d] [his] title in a manner that would indicate ... that he was ... authorized to speak on church doctrine," and (3) whether the employee's functions were "essentially liturgical." Addendum to Aplt's. Br. at 95–96.

The rigidity of the *Kirby* test uniquely disadvantages minority religions in precisely the way *Our Lady of Guadalupe* warned because the three *Kirby* factors have little to no relevance to Judaism and many other non-Christian faiths. The risks of such a test are especially grave "[i]n a country with the religious diversity of the United States, [where] 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." *Our Lady of Guadalupe*, 140 S. Ct. at 2066. In the face of such diversity, courts should not attempt to identify a single set of factors that applies equally to every religion because such an approach inadvertently skews the outcome in favor of majority religions.

The Supreme Court's decision in *Our Lady of Guadalupe* mandates a more flexible approach. Courts should consider only those factors that are "relevant" in

the context of the particular religion, while recognizing the “importan[ce]” of “[a] religious institution’s explanation of the role of [its] employees in the life of the religion.” *Id.* at 2066–67. By deferring to the religious organization’s good-faith identification of its ministerial employees, courts can avoid entanglement and preserve the First Amendment’s guarantees for *all* religious organizations.

The Superior Court’s summary judgment decision was premised on an incorrect application of the First Amendment’s ministerial exception that will disadvantage minority religions if not corrected. This Court should reverse.

### **ARGUMENT**

#### **I. Schools Affiliated with Minority Religions Require Autonomy in Employing Teachers in Order to Convey Their Religious Messages Accurately.**

The Supreme Court recognized in *Our Lady of Guadalupe* and *Hosanna-Tabor* “the close connection that religious institutions draw between their central purpose and educating the young in the faith.” *Our Lady of Guadalupe*, 140 S. Ct. at 2066; *see also Hosanna-Tabor*, 565 U.S. at 192. Indeed, for many religious groups, including Judaism, religious education is a vital component of faith. The ability to hire and retain teachers who will accurately teach the faith and model religious observance is thus of paramount importance for religiously affiliated schools and their associated faith traditions.

**A. Religious Education Is an Important Component of Many Minority Religions.**

Religious education is critical to the missions of many faith traditions. Certainly it is inextricable from the Jewish faith, as Jewish parents have a biblical obligation to teach their children God’s commandments. *See Deuteronomy 6:6–7* (“And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up.”). Teachers at Jewish day-schools step into parents’ shoes in fulfilling this commandment, making religious instruction in the Jewish tradition “an obligation of the highest order.” *Our Lady of Guadalupe*, 140 S. Ct. at 2065.<sup>2</sup>

**B. Teachers at Schools Affiliated with Minority Religions Convey the Messages of Their Faiths.**

The individuals who teach at religiously affiliated schools are critical to the missions of these organizations and their associated faith traditions. It is thus

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<sup>2</sup> Religious education is also imperative in Islam. This duty is traced to the Prophet Muhammad, who taught that “‘the pursuit of knowledge is incumbent on every Muslim.’” *Our Lady of Guadalupe*, 140 S. Ct. at 2065 (brackets omitted) (quoting Asma Uddin, *Muslim Views on Education: Parameters, Purview, and Possibilities*, 44 J. Cath. Legal Stud. 143, 143–44 (2005)). For this reason, “[t]he acquisition of at least rudimentary knowledge of religion and its duties is mandatory for the Muslim individual.” *Id.* (brackets and quotation marks omitted).

important that these schools be permitted to choose teachers who reflect their religious beliefs and those of the parents who send their children to the schools.

Many teachers at religiously affiliated schools are expected to instruct students explicitly on religious doctrines. But religious education is not always confined to a “religion class” or a particular time of day. Instead, teachers are frequently “expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.” *Our Lady of Guadalupe*, 140 S. Ct. at 2066. Teachers may be expected to model religious observance or perspectives throughout the day, even when they are teaching nominally “secular subjects.” *Id.* at 2058–59 (noting that teachers’ employment agreements required “personal modeling of the faith”).

For instance, teachers at Jewish day schools not only teach their students specific Jewish prayers, but also model the discipline of following *halacha* (Jewish law) throughout the day. Teachers may say blessings over food or invoke divine guidance before classes. Some teachers may follow the practice of making a notation that means “with the help of God” on the top of every document they give

to students. Male teachers may demonstrate the proper way to lay phylacteries, small leather boxes containing Hebrew texts, worn by Jewish men during morning prayer.<sup>3</sup>

Teachers also model the observation of important religious holidays. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018) (“[S]ome might believe that learning the history behind Jewish holidays is an important part of the religion.” (emphasis omitted)). For example, on the Holiday of Sukkot, a teacher at a Jewish day school may demonstrate the ritual use of a palm branch and citron. They may also model compliance with religious dietary rules. *Cf. Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309 (4th Cir. 2004) (“Jews view their dietary laws as divine commandments...”).

Finally, teachers show students how to view the world through a faith-based lens. *See, e.g.,* Meir Katz, *The Economics of Section 170: A Case for the Charitable Deduction of Parochial School Tuition*, 12 Rutgers J.L. & Religion 224, 264 (2011) (“Religious schools provide a lot more than an education in religious and secular subjects; they provide a religious socialization and worldview as well.”). “By modeling ... integrated thinking,” teachers at Jewish schools may help students

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<sup>3</sup> Likewise, teachers at Islamic schools may model the proper use and orientation of prayer rugs, the timing of the five obligatory daily prayers, and the proper form for prayers, which involves precise physical movements. Teachers may model proper religious attire by, for example, wearing traditional head coverings.

“recognize that intellectual excitement and deep understanding can be achieved by bringing together ostensibly diverse points of view.” R. Jack Bieler, *Vision of a Modern Orthodox Jewish Education* 16, <https://www.lookstein.org/resource/vision.pdf>.

Because teachers at Jewish and other schools affiliated with minority religions “conve[y]” their faith’s message and “carry[] out [the school’s] mission” by modeling religious observance and religious perspectives throughout the day (*see Hosanna-Tabor*, 565 U.S. at 192), religiously affiliated schools must have the “autonomy” to employ teachers who they believe can fulfill the mission of rightly conveying the messages of their faith, in word and deed (*Our Lady of Guadalupe*, 140 S. Ct. at 2060). This essential mission would be threatened if religiously affiliated schools were restrained in their ability to decide who will speak for them. The medium is often the message, and if a school cannot make important decisions about hiring and retaining teachers, it will lose control of its distinctive message. This result would be particularly harmful for minority faiths like Judaism because their messages may sometimes be contrary to, or different from, the cultural norms of the American majority.

## **II. The *Kirby* Test Discriminates Against Judaism and Other Religious Minorities.**

As set forth below, *Kirby* adopts several factors that *no* Jewish employee could meet, no matter how central that employee is to his employer’s religious

mission. “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). But the Superior Court’s one-size-fits-all approach risks “impermissibl[y] discriminati[ng]” against religious organizations whose “ministers” do not check the same boxes as the Christian plaintiff in *Kirby*, thereby denying them the protections of the ministerial exception. *Our Lady of Guadalupe*, 140 S. Ct. at 2064; *cf. id.* at 2063–64 (an employee’s title is “not ... necessarily important” because “many religious traditions do not use the title ‘minister’”); *id.* at 2064 (noting that overreliance on an employee’s religious training or lack thereof “could have a distorting effect” because “religious traditions may differ in the degree of formal religious training thought to be needed in order to teach”).

**A. Requiring Courts to Consider Whether Employees Proselytize Discriminates Against Judaism Because Jewish “Ministers” Do Not Proselytize.**

Under the *Kirby* framework, courts are required to consider “whether the [employee’s] position involved, expected, or required proselytizing.” Addendum to Aplt.’ Br. at 95–96. This factor reflects the majoritarian assumption that those who hold central religious positions tend to have a duty to proselytize, which is not true of Judaism. If this Court adopts a proselytization requirement, no teacher—or even Rabbi—will qualify as a minister.

Judaism is a non-proselytizing religion. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226–27 (3d Cir. 2007). As one scholar and Rabbi put it, “[t]he Jewish legal tradition desires not to participate in proselytizing and conversion, either as proselytizer or proselytizee. It desires to be left alone, and to focus on inreach, the process by which Jews make Jews into better Jews.” Michael J. Broyde, *Proselytism and Jewish Law: Inreach, Outreach, and Jewish Tradition*, in *SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM* 45, 45 (John Witte & Richard C. Martin eds., Wipf & Stock 2008) (1999) (footnotes omitted), [https://www.broydeblog.net/uploads/8/0/4/0/80408218/proselytism\\_and\\_jewish\\_law.pdf](https://www.broydeblog.net/uploads/8/0/4/0/80408218/proselytism_and_jewish_law.pdf). This is because Judaism teaches that “Jewish law binds [only] Jews.” *Id.* at 46. In fact, “Jewish law obligates its adherents *not* to solicit converts.” *Id.* at 45 (emphasis added).

**B. Requiring Courts to Consider Whether Employees Speak on Church Doctrine Discriminates Against Judaism Because Few Jewish Teachers Have Such Authority.**

Under the *Kirby* framework, courts are also required to consider whether “the employee use[d] [his] title in a manner that would indicate to the members of the particular faith community or to the public that he was a representative of the religious institution *authorized to speak on church doctrine*.” Addendum to Aplt’s.’ Br. at 95–96 (emphasis added). Once again, this factor is based on a Christo-centric

assumption that central religious figures must be authorized to give binding interpretations of doctrinal issues.

But this is not the case in Judaism, where most teachers at Jewish schools, and a good number of Rabbis as well, do not offer precedential interpretations of Jewish law. Those Rabbis who do issue such opinions are called *Poskim*. The typical synagogue Rabbi's rulings on Jewish law, however, are usually only considered binding on his local community or just the individual who sought out his opinion. See Rabbi Jonathan Sacks, *Orthodox Judaism & Halakhah*, My Jewish Learning, <https://www.myjewishlearning.com/article/orthodox-judaism-halakhah/> (last visited Dec. 9, 2020) (“According to Maimonides, after the closure of the Babylonian Talmud no one had the power to legislate for all Israel. At most, a court was able to issue rulings for its own immediate locality, although some post-talmudic rulings gained widespread acceptance. The power to create new law had lapsed.”). Restricting the ministerial exception to individuals who are authorized to speak on church doctrine would exclude many teachers at Jewish schools and also a good number of Rabbis.

**C. Requiring Courts to Consider Whether Employees' Functions Are Liturgical Discriminates Against Judaism.**

The *Kirby* framework requires courts to consider whether the employee's “functions were essentially liturgical.” Addendum to Aplt's.' Br. at 95–96. Like the others, this factor is based on the assumption that central religious figures must be

primarily involved in worship. This assumption, in turn, springs from the majoritarian view that worship is the highest form of religiosity. Not so in Judaism.<sup>4</sup>

For Jews, the study of the Torah is a profound act of devotion, at least on par with worship. For example, “in Jewish Law and traditional doctrine, ... the Yeshiva—a *Bet Medrash* or Torah study hall—is more sacred than a Synagogue—a *Bet Knesset*.” Brief *Amicus Curiae* of the National Jewish Commission on Law and Public Affairs (“COLPA”) in Support of Petitioners (“COLPA Brief”), *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-119, 15-191), 2016 WL 159297, at \*8.

This prioritization of law over liturgy is reflected in the Jewish rule that, whereas a synagogue may be converted into a yeshiva, a yeshiva may not be converted into a synagogue. As Maimonides, medieval Torah scholar and author of the *Mishneh Torah*, explained:

It is permitted to transform a synagogue into a house of study. However, it is forbidden to transform a house of study into a synagogue because the sanctity of a house of study exceeds that of a synagogue and one must proceed to a higher rung of holiness, but not descend to a lower rung.

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<sup>4</sup> In Judaism, there are cantors who perform liturgical duties and conduct services and other religious rites, but most Rabbis and teachers do not.

Chapter 11 of Hilchot Tefilah (Laws of Prayer), Halachah 14 (Moznaim Publishing Corp. 1989). Over the centuries, other Torah scholars have reached the same conclusion:

The authoritative Sixteenth Century compendium of Jewish Law, the *Shulchan Aruch* authored by Rabbi Joseph Caro, expressed the same rule in *Orach Chaim*, Chapter 153(1): “It is permitted to convert a *Bet Kneset* into a *Bet Medrash*, but not a *Bet Medrash* into a *Bet Kneset*.” Rabbi Yisrael Meir Kagan of Radin, also known as the *Chofetz Chaim* (1839-1933), explained in his *Mishnah Berurah* commentary to *Orach Chaim* that a *Bet Medrash* “is a place set aside for Torah study” and that it “has more holiness even if it is not usual to pray there at all.”

COLPA Brief, 2016 WL 159297, at \*10.

Any rule that prioritizes liturgical leaders over teachers of Torah would impose an alien hierarchy on Judaism and deny the ministerial exception to Jewish leaders who “perform[] vital religious duties.” *Our Lady of Guadalupe*, 140 S. Ct. at 2066.

\* \* \*

No employee of a Jewish school, regardless of the centrality of his or her role, would ever satisfy these three factors, which, taken together, make up a significant portion of the “ministerial exception” test the Superior Court adopted. The *Kirby* test sets up Jewish employers for failure, effectively excluding all Jews from the ministerial exception. No test that discriminates in this way can adequately protect the First Amendment rights of religious believers. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064.

### **III. Courts Should Defer to Religious Organizations in Identifying Their “Ministers.”**

The Superior Court’s decision here should be reversed for the same reasons the Supreme Court reversed the Ninth Circuit’s decision in *Our Lady of Guadalupe*—namely, the court treated the ministerial exception as a “checklist” of “items to be assessed and weighed against each other in every case.” *Our Lady of Guadalupe*, 140 S. Ct. at 2066–67. The proper approach under the First Amendment is instead to defer to religious organizations’ good-faith determinations that their employees’ duties are “ministerial.” This approach ensures that all religious organizations, including minority faiths like those represented by *Amici*, have the same First Amendment protections.

Minority religious organizations are especially vulnerable to misunderstandings about which of their members or employees perform “ministerial” roles. The “religious diversity of the United States” means that “judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.” *Id.* at 2066. This (understandable) lack of knowledge means that “[j]udicial attempts to fashion a civil definition of ‘minister’ through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some.” *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Judicially created tests

often focus on certain factors that may be relevant to majoritarian religions familiar to judges but inapplicable to minority religions that may be less familiar.

As Professor and former Circuit Judge Michael W. McConnell has explained, courts may of course determine whether the organization claiming the ministerial exception is sincere and acting in good faith. Brief for InterVarsity Christian Fellowship/USA et al. as *Amici Curiae* in Support of Petitioners, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2010) (Nos. 19-267, 19-348), 2020 WL 635296, at \*29. “But insofar as there are disputes about which duties are religious, and how important those duties are to the exercise of the faith, courts should accord substantial deference to the employer’s assessment.” *Id.*

Failure to grant this deference substantially increases the risk of entanglement. *See Our Lady of Guadalupe*, 140 S. Ct. at 2069 (determining whether the employee and employer share the same religion “would risk judicial entanglement in religious issues”). For example, assessments of which practices a teacher should model in order to pass on the faith to the next generation may vary substantially between different Jewish traditions. Wading into those debates could result in courts telling a minority religious practitioner that “he misunderstands his own religion.” *Ben-Levi v. Brown*, 136 S. Ct. 930, 933 (2016) (Alito, J., dissenting from denial of certiorari). “Defer[ring] to the individual’s interpretation of her religion” enables

courts to steer clear of this problem. *See* ASMA T. UDDIN, WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA’S FIGHT FOR RELIGIOUS FREEDOM 126 (2019).

In short, “[a] religious institution’s explanation of the role of [its] employees in the life of the religion in question is important,” *Our Lady of Guadalupe*, 140 S. Ct. at 2066, and “judges have no warrant to second-guess [the employer’s] judgment” of who should hold such a position “or to impose their own credentialing requirements,” *id.* at 2068. By deferring to the religious organization’s good-faith identification of its ministerial employees, courts can avoid entanglement and preserve the First Amendment’s guarantees for all religious organizations—minority and majority alike.

## **CONCLUSION**

This Court should reject the *Kirby* framework in favor of a more flexible, less majoritarian test that recognizes the “importanc[e]” of—and defers to—the “religious institution’s explanation of the role of [its] employees in the life of the religion.” *Our Lady of Guadalupe*, 140 S. Ct. at 2066. Such a ruling would help ensure that the Constitution protects the rights of all “religious organization[s] ... to select [their] own ministers.” *Hosanna-Tabor*, 565 U.S. at 189.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: Blaine H. Evanson

Blaine H. Evanson (*pro hac vice pending*)

Paige Muhlestein (*pro hac vice pending*)

3161 Michelson Drive

Irvine, CA 92612-4412

Tel: (949) 451-3805

Tel: (949) 451-3940

Fax: (949) 475-4740

BEvanson@gibsondunn.com

PMuhlestein@gibsondunn.com

Joshua S. Lipshutz (BBO # 675305)

1050 Connecticut Avenue, N.W.

Washington, DC 20036-5306

Tel: (202) 955-8217

Fax: (202) 530-9614

JLipshutz@gibsondunn.com

Vince Eisinger (*pro hac vice pending*)

200 Park Avenue, 48th Floor

New York, NY 10166-0193

Tel: (212) 351-3993

Fax: (212) 817-9593

VEisinger@gibsondunn.com

*Counsel for Amici Curiae The Jewish Coalition for  
Religious Liberty and Agudath Israel of America*

Dated: December 14, 2020

### Certificate of Compliance

I, Vince Eisinger, certify that the foregoing Brief of *Amici Curiae* Jewish Coalition for Religious Liberty and Agudath Israel of America in Support of Defendants-Appellants complies with the requirements of Massachusetts Rules of Appellate Procedure 17 and 20. The Brief is in 14-point Times New Roman Font and consists of 3,633 non-excluded words. The Brief was created using Microsoft Word 2016.



Vince Eisinger (*pro hac vice pending*)  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue, 48th Floor  
New York, NY 10166-0193  
Tel: (212) 351-3993  
Fax: (212) 817-9593  
VEisinger@gibsondunn.com

*Counsel for Amici Curiae The Jewish  
Coalition for Religious Liberty and  
Agudath Israel of America*

Dated: December 14, 2020

### Certificate of Service

I, Vince Eisinger, certify that on December 14, 2020, a true and correct copy of the foregoing Brief of *Amici Curiae* Jewish Coalition for Religious Liberty and Agudath Israel of America in Support of Defendants-Appellants was electronically filed in *DeWeese-Boyd v. Gordon College, et al.*, No. SJC-12988, with the Clerk of Court for the Massachusetts Supreme Judicial Court, and electronically served on the following counsel of record:

For Appellants: Andrew C. Pickett  
Jeffrey S. McAllister  
JACKSON LEWIS P.C.  
75 Park Plaza, 4th Floor  
Boston, MA 02116  
andrew.pickett@jacksonlewis.com  
jeffrey.mcallister@jacksonlewis.com

For Appellee: Hillary Schwab  
Rachel Smit  
FAIR WORK, P.C.  
192 South Street, Suite 450  
Boston, MA 02111  
hillary@fairworklaw.com  
rachel@fairworklaw.com



Vince Eisinger (*pro hac vice pending*)  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue, 48th Floor  
New York, NY 10166-0193  
Tel: (212) 351-3993  
Fax: (212) 817-9593  
VEisinger@gibsondunn.com

*Counsel for Amici Curiae The Jewish  
Coalition for Religious Liberty and  
Agudath Israel of America*