

No. 21-145

IN THE
Supreme Court of the United States

GORDON COLLEGE, ET AL.,
Petitioners,

v.

MARGARET DEWEESE-BOYD,
Respondent.

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

**BRIEF OF THE JEWISH COALITION FOR
RELIGIOUS LIBERTY AND
AGUDATH ISRAEL OF AMERICA
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Whether professors at religious colleges perform ministerial functions when the college exists to spread its faith, and the college requires faculty, as a primary component of their position, to integrate religious doctrine into their work and academic disciplines, engage in teaching and scholarship from a decidedly religious perspective, and serve as advisors and mentors for student spiritual formation.

2. Whether the First Amendment requires courts to defer to the good-faith characterization of a ministerial position by a religious organization or church.

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INTEREST OF *AMICI CURIAE* *

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 this Court 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 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

* Pursuant to Rule 37.2(a), counsel for all parties received timely notice of *amici*’s intent to file this brief, and both parties have granted blanket consent to such briefs in writing. No counsel for any party authored this brief in any part; no person or entity other than *amici* or their counsel made a monetary contribution to fund its preparation or submission.

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 Supreme Judicial Court of Massachusetts, if not reviewed by this Court, would impair the missions of these and other religious groups for whom religious education is of central importance.

SUMMARY OF ARGUMENT

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. As this Court recently observed, many religions expect religious school teachers to instruct students “by word and deed” about their doctrines and beliefs. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020). Religious schools must be able to select teachers whose conduct aligns with the traditions of their faith.

These considerations are particularly important for protecting *minority* religions’ right to select their own ministers. Because minority religions’ “traditions may differ” from those of majority religions, the criteria by which they define and select their ministers may differ as well. *Id.* at 2064. “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.” *Id.* at 2066. This reality requires courts to remain flexible in deciding who qualifies as a minister or risk “impermissibl[y] discriminati[ng]” against minority religions. *See id.* at 2063–64.

The Supreme Judicial Court of Massachusetts limited the ministerial exception to instructors who perform traditional liturgical responsibilities, such as attending or leading worship services. As a result, it held that Respondent was not a minister, and that the ministerial exception did not apply—even though she was a professor at a religiously affiliated school, and was responsible for actually passing on the faith to her students. This approach is unfortunately of a piece with that of some lower courts across the country, which have muddled and narrowed the definition of a minister even in relatively clear-cut cases such as this one.

If the ministerial exception is applied in this way, many Jewish Rabbis and teachers would never qualify. Such a result is at odds with this Court’s instruction in *Our Lady of Guadalupe* that courts applying the ministerial exception should consider 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. The better approach is to defer to a religious organization’s good-faith identification of its ministerial employees, which would steer clear of Establishment Clause concerns and preserve the First Amendment’s guarantees for *all* religious organizations.

This Court should grant the petition and reverse.

ARGUMENT

I. SCHOOLS AFFILIATED WITH MINORITY RELIGIONS REQUIRE AUTONOMY IN EMPLOYING TEACHERS IN ORDER TO CONVEY THEIR RELIGIOUS MESSAGES.

This 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. Religious education 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.

A. 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 vital 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 Orthodox Jewish men during morning prayer.

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 “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 religious schools—especially those affiliated with minority religions—“convey[]” their faith’s message and “carry[] out [the school’s] mission” by modeling religious observance and religious perspectives throughout the day (*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).

The lower court recognized that Respondent's role required her to "teach[] students about connections between course material and the Christian faith" and that she was responsible for "help[ing] students make connections between course content, Christian thought and principles, and personal faith and practice." Pet. App. 24a–25a (second alteration in original). That should have been the end of the analysis, as the responsibility of passing down the faith is at the very core of the ministerial exception.

The lower court further stated, "It is undisputed that [Respondent's] integrative responsibility was part of her duty and function as a social work professor." *Id.* at 25a. This fact strengthens the case for the ministerial exception: Respondent's task to help her students navigate a pivotal early interaction between their faith and a secular discipline was extremely important to their religious development. One of the most perilous areas for a young person of faith is when their faith first intersects with other areas of knowledge. The teachers who guide a student through that process have a tremendous influence over their faith, and it is vital that schools be allowed to hire teachers who will do so in a manner consistent with their faith. Presumably, these students chose to attend a religious school so that their introduction to secular disciplines would take place with a faithful navigator who would show them how the two can coexist in harmony.

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

Having dismissed the significance of the integration of faith and education in Respondent's role, the lower court declined to apply the ministerial exception by relying on the absence of liturgical functions such as "leading students in prayer or religious ritual." Pet. App. 27a. But defining the ministerial exception in this way "impermissibl[y] discriminat[es]" against minority religions like Judaism that consider study and religious practice as important as worship. *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

"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). Yet official preference of majority religions is the natural consequence of the Supreme Judicial Court's heavy reliance on whether an employee "participate[s] in or lead[s] religious services" and "take[s] her students to chapel services." Pet. App. 33a.

This analysis is based on the assumption that central religious figures must be primarily involved in worship, which in turn springs from the majoritarian view that worship is the highest form of religiosity. Not so in Judaism. In Judaism, ordinary congregants often perform liturgical duties and conduct services; it is not a role reserved for, or even generally associated with, Rabbis or other teachers.

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, 15-105, 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.

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 Knesset* into a *Bet Medrash*, but not a *Bet*

Medrash into a *Bet Knesset*.” 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.

II. COURTS SHOULD DEFER TO RELIGIOUS ORGANIZATIONS IN IDENTIFYING THEIR “MINISTERS.”

Amici respectfully submit that the proper approach to the ministerial exception is 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 Judaism, 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.” *Our Lady of Guadalupe*, 140 S. Ct. 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 multi-factor 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 (2020) (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 significantly increases the risk of improper and problematic judicial entanglement in religion. *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

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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