COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
CASE NO. SJC-12988

MARGARET DEWEESE-BOYD,

Plaintiff – Appellee,

v.

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

Defendants – Appellants.

BRIEF OF THE AMICUS CURIAE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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INTEREST OF AMICUS CURIAE

The American Association of University Professors ("AAUP"), founded in 1915, is a non-profit organization of over 45,000 faculty, librarians, graduate students, and academic professionals, a significant number of whom are private sector employees. The mission of the AAUP is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. As discussed in greater detail below, AAUP has played a primary role in establishing academic freedom as an essential aspect of higher education. AAUP, both independently and in concert with other higher education organizations, issues statements and interpretations that have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See*, *e.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). In cases that implicate AAUP policies or otherwise raise legal issues important to higher education or faculty members, AAUP frequently submits *amicus* briefs in the Supreme Court, the federal and state appellate courts, and the National Labor Relations Board. *See,*

e.g., Grutter v. Bollinger, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *NLRB v. Yeshiva University,* 444 U.S. 672 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *McAdams v. Marquette University*, 2018 WI 88, 914 N.W.2d 708 (2018); *Columbia University*, 364 NLRB No. 90 (2016); *Pacific Lutheran University,* 361 NLRB 1404 (2014).

RULE 17(C)(5) DECLARATION

The AAUP declares that (a) no party or party's counsel authored the brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; (c) no person or entity – other than the amici, their members, or their counsel – contributed money that was intended to fund preparing or submitting the brief; and (d) neither amici nor their counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF ARGUMENT

Since its founding in 1915, AAUP has played a pivotal role in developing principles and standards of the academic profession in higher education, which includes religiously-affiliated colleges and universities. Together with national organizations representing higher education institutions, AAUP co-authored the

1940 *Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 13-16 (11th ed. 2015) (hereinafter "1940 *Statement*"), which is considered the seminal statement on academic freedom and other standards of the academic profession. The U.S. Supreme Court has found the AAUP's 1940 *Statement* to be indicative of an institution's inclusion in the broader higher education community. *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). The 1940 *Statement* has been endorsed by the Association of American Colleges and Universities and over subsequent decades, by more than 250 higher education institutions and disciplinary societies, including the Association of Theological Schools, the American Academy of Religion, the American Catholic Philosophical Association, and the College Theology Society and adopted by hundreds of American colleges and universities. Moreover, many religiously-affiliated universities have joined the broader higher education community and adopted the principles and standards of academic freedom.

AAUP files this *amicus* brief to provide assistance to this Court in applying the "ministerial exception" in the context of higher education.[1] In *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 565 U.S. 171, 188 (2012), the

[1] This *amicus* brief addresses only the second prong of the ministerial exception, interpreting the scope of the exception.

U.S. Supreme Court held that there is "a 'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." As the Court explained in *Hosanna-Tabor* and *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. ___ , 140 S.Ct. 2049 (2020), the ministerial exception requires a multi-factored analysis, including close analysis of the employee's job functions. In *Our Lady of Guadalupe,* the Court emphasized "our admonition [in *Hosanna-Tabor*] that we were not imposing any 'rigid formula'" and that courts should "take all relevant circumstances into account and…determine whether each particular position implicated the fundamental purpose of the [ministerial] exception." 140 S.Ct. at 2067. In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Supreme Court applied its multi-factored analysis in the context of religious elementary schools, where teachers' duties are often strictly circumscribed by the school administration. *Amicus* AAUP urges this Court to consider the distinctive nature of higher education as a relevant factor in interpreting the scope of the ministerial exception in religiously-affiliated institutions. In contrast to the parochial or religious elementary or secondary school context, faculty in colleges and universities – including most religiously-affiliated institutions – are provided with the academic freedom that is fundamental to higher education norms and practices. This context of higher education should

be considered as an important factor to ensure that the ministerial exception is applied only to faculty who are required to perform specific religious functions that would meet the definition of a "minister."

ARGUMENT

I. Academic Freedom is an Essential Element of Higher Education and the 1940 *Statement on Academic Freedom and Tenure* is Recognized as its Bedrock.

The 1915 formation of AAUP, and its strong commitment to academic freedom from its inception, have been pivotal in the development of academic freedom as one of the foundations of higher education in the United States. *See generally,* Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure,* 53 LAW & CONTEMP. PROBS. 3 (1990); William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 706-07 (5th ed. 2013). The first authoritative statement on academic freedom in America was the 1915 Declaration of Principles, written by a committee of American scholars to mark the founding of the AAUP. *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 3-12 (11th ed. 2015); Kaplin & Lee, *supra*, at 706-07.

Within a decade from the founding of the AAUP, national organizations representing higher education institutions began to recognize the need for national statements affirming academic freedom, particularly the American Association of

Colleges ("AAC") (now the Association of Colleges and Universities). Over a period of over 15 years, the AAUP and AAC worked on reports and statements that culminated in their co-authoring the foundational document on academic freedom in higher education: The 1940 *Statement,* which begins:

> The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research.

1940 *Statement, supra* at 14 *(footnote omitted)*. The 1940 *Statement* further articulates and defines the scope of academic freedom as covering teaching, research, and extramural speech (including public speech outside the faculty member's disciplinary expertise) and prescribes procedural guidelines to protect the exercise of academic freedom.

The concept of academic freedom, and the 1940 *Statement* in particular, has been recognized as one of the defining standards of an institution's inclusion in the broader higher education community. Kaplin & Lee, *supra*, at 704 ("Academic Freedom traditionally has been considered to be an essential aspect of higher education in the United States.").[2] The 1940 *Statement* has been adopted by over

[2] *See also*, Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher*

250 educational and disciplinary societies and incorporated into hundreds of university and college faculty handbooks. Such incorporation is not hortatory, but generally creates a binding obligation on the institution and the faculty. *See McAdams v. Marquette University*, 383 Wis. 2d 358, 404-05, 914 N.W.2d 708, 730 (2018); Kaplin & Lee, *supra*, at 705.

With the exception of institutions whose purpose is to train the clergy or to explicitly indoctrinate all of its students,[3] religiously-affiliated universities have generally joined this broader higher education community and recognized that

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Education, 22 HOFSTRA LAB. & EMP. L.J. 1, 57-58 (2004) ("…the 1940 Statement has been the authoritative document shaping the understanding of, and prescribing the procedures necessary to protect, academic freedom."); Charles J. Russo, *Can Academic Freedom in Faith-Based Colleges and Universities Survive During the Era of Obergefell?,* 14 AVE MARIA L. REV. 71, 82-83 (2016) (In describing the 1940 *Statement,* "It almost goes without saying that any examination of academic freedom in American higher education must begin with the bedrock document in this area.")

[3] Such institutions are not considered by AAUP to be institutions that are part of the broader higher education community to which the 1940 *Statement* would apply in any respect. These are primarily institutions "dedicated to the propagation of particular beliefs or schools of thought," religious or otherwise, and unaccredited institutions. AAUP, *Academic Freedom at Religiously Affiliated Institutions: The "Limitations" Clause in the 1940 Statement of Principles on Academic Freedom and Tenure,* AAUP POLICY DOCUMENTS AND REPORTS 64 (11the ed. 2015). These include "[v]arious sectarian institutions [that] have been founded and are supported by sponsoring religious denominations for the training of their laity and clergy in the faith." *Id.* Such institutions generally do not claim to be part of the broader higher education community, nor do they typically recognize academic freedom. Therefore, AAUP principles and standards overall, including the limitations clause (discussed *infra*, pp.19-20), would not apply to these institutions. However, such institutions should not then represent themselves as institutions freely engaged in higher education.

academic freedom is one of its guiding principles. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities,* 53 LAW & CONTEMP. PROBS. 303, 307-09 (1990); Marjorie Reiley Maguire, *Comment: Having One's Cake and Eating It Too: Government Funding and Religious Exemptions For Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1103 (1989). Thus, the 1940 *Statement* has been adopted by many religiously-affiliated universities. McConnell, *supra*, at 309; Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1, 60-61 (2004). Indeed, the Supreme Court has relied upon the adoption of the 1940 *Statement* by certain religiously-affiliated universities to support the conclusion that "the schools were characterized by an atmosphere of academic freedom." *Tilton*, 403 U.S. at 681-682; *see also Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976) ("Nontheology courses are taught in an 'atmosphere of intellectual freedom' and without 'religious pressures.' Each college subscribes to, and abides by, the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors.")

The U.S. Supreme Court and other courts have recognized AAUP's standards and principles. *See, e.g.*, *Roth*, 408 U.S. at 579 n.17; *Tilton*, 403 U.S. at 681–82 (1971). In *McAdams v. Marquette University*, 914 N.W.2d 708 (Wis.

2018), a faculty member brought a breach of contract claim against Marquette University, a religiously-affiliated university, which had adopted the 1940 *Statement.* In ruling in favor of the plaintiff faculty member, the Wisconsin Supreme Court majority stated, "[W]e will refer to [the AAUP *1940 Statement of Principles*] . . . to understand the scope of the academic freedom doctrine." *Id.* at 730. The concurring opinion noted, "As the first organization to develop codes of academic freedom, AAUP's statements remain the model." *Id.* at 746, n.10 (Bradley, J., concurring); *see also* 29 C.F.R. § 1625.11(e)(2) ("[T]he minimum standards [of tenure] set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly developed by the Association of American Colleges and the American Association of University Professors, have enjoyed widespread adoption or endorsement.")[4]

The U.S. Supreme Court and lower federal courts have recognized the special role of academic freedom in defining faculty rights in higher education. As the Supreme Court famously stated, "academic freedom is a special concern of the First Amendment," which is "of transcendent value to us all and not merely the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

[4] *See also*, *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975), where the federal Ninth Circuit Court of Appeals stated, "We take notice…that section 2.3 [of the code of the university] was adopted almost verbatim from the 1940 Statement of Principles of the American Association of University Professors…"

More recently, in *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006), the Court explicitly reserved the question of whether academic scholarship or teaching may warrant First Amendment protection denied to other public employee speech pursuant to job duties. Subsequently, several federal courts held that the First Amendment protects such faculty speech. *Wetherbe v. Tex. Tech Univ. Sys*., 669 F. Appx 297 (5th Cir. 2017); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

II. The Context of Higher Education and AAUP Standards of Academic Freedom Are Relevant to this Court's Application of the "Ministerial Exception."

In *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 565 U.S. 171, 188 (2012), the U.S. Supreme Court held that there is "a 'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." As Court explained in *Hosanna-Tabor* and *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. ___ , 140 S.Ct. 2049 (2020), interpreting the ministerial exception is a multi-factored analysis, including close analysis of the employee's job functions. In *Our Lady of Guadalupe,* the Court emphasized "our admonition [in *Hosanna-Tabor*] that we were not imposing any 'rigid formula,'" 140 S.Ct. at 2067, and that courts should "take all relevant circumstances into account and…determine whether each

particular position implicated the fundamental purpose of the [ministerial] exception." *Id.* In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Supreme Court applied its multi-factored analysis in the context of parochial or religious elementary schools, where teachers' duties are often strictly circumscribed by the school administration. In evaluating all the relevant circumstances in determining the ministerial exception, *Amicus* AAUP urges this Court to consider the significant distinctions between primary or secondary education and higher education.

AAUP was founded in 1915 in recognition of the distinctive public mission of higher education in the U.S. and the need for college and university faculty to exercise independence and broad academic freedom in their teaching, research, and extramural speech. As discussed above, many religiously-affiliated universities have joined the broader community of secular higher education institutions in adopting broad academic freedom standards for faculty. Thus, the institutional character and function of religiously-affiliated universities are different from primary or secondary parochial schools. "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an

early age.'" *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971), *quoting*, *Walz v. Tax Comm'n,* 397 U.S. 664, 671 (1970).

The academic norms and expectations of college and university faculty are different from those of primary and secondary religious school faculty. Religious schoolteachers often teach multiple subjects, including math, literature, and religion. They have significant constraints imposed on their choices in teaching, including textbooks and curriculum. As the Court stated in *Our Lady of Guadalupe,* "Like most elementary school teachers, [Morrissey-Berru] taught all subjects, and since OLG is a Catholic school, the curriculum included religion. As a result, she was her students' religion teacher," 140 S.Ct. at 2056, who was expected to follow "a prescribed curriculum" of religious teaching. *Id.* The Court also noted that "[t]eaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training." *Id*. at 2064. The Court relied on these circumstances in determining the teachers' role in transmitting religious education to the students.

In contrast, in higher education, the widely accepted professional standards of academic freedom have institutionalized the expectation that college and university faculty have control over the content of their course, the course materials, and the pedagogical methods. "[B]y their very nature, college and

postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students." *Tilton,* 403 U.S. at 686 (*footnote omitted*). Higher education faculty are experts in their particular academic discipline, such as Professor DeWeese-Boyd's expertise in the academic discipline of social work, or other professors' expertise in academic disciplines in the social sciences, humanities, and natural sciences. As the Superior Court found in the instant case, "[A]lthough DeWeese-Boyd was expected to integrate the principles and concepts that underlie the Christian evangelical tradition with her teaching, she had no religious duties and did not actively promote the tenets of evangelical Christianity." *DeWeese-Boyd v. Gordon College*, 2020 WL 1672714, at *24 (Apr. 2, 2020). "At bottom, '[i]f [DeWeese-Boyd] was a minister, it is hard to see how any teacher at a religious school would fall outside the exception.'" *Id.* at *26 *quoting*, *Richardson v. Northwest Christian Univ*., 242 F. Supp. 3d 1132, 1145 (D. Or. 2017) (holding that an assistant professor of exercise science did not fall within the ministerial exception).

Even the question of whether a professor of theology fits within the "ministerial exception" will depend on a multi-factor analysis of all the relevant circumstances. The evidence may well show that a theology professor has the

academic freedom to teach the discipline of theology without the specific job requirement to inculcate students in religious doctrine. In *Kant v. Lexington Theol. Seminary*, 426 S.W.3d 587 (Ky. 2014), the Kentucky Supreme Court held that a theological seminary professor of the history of religion did not fall within the ministerial exception, as he "did not participate in significant religious functions, proselytize, or espouse the tenets of the faith on behalf of his religious institutional employer." *Id.* at 589.

Thus, the application of the ministerial exception should take into account the differences between the role of faculty in religious primary and secondary schools and religiously-affiliated colleges/universities. The ministerial exception requires evidence that the college or university has adequately specified a faculty member's religious job functions as a minister, to justify excluding the faculty member from exercising full employment rights. Where a college or university recognizes faculty academic freedom and independence in teaching or research, this will counter an assertion by that college or university that all its faculty members fall within the ministerial exception. In the instant case, Gordon College's Administrative/Faculty Handbook (2017) includes "academic freedom" as part of the "Foundations for Gordon's Philosophy of Education" (section 1.5). The Handbook defines academic freedom as including "integrity of scholarship and loyalty to intellectual honesty" as "basic commitments in the search for truth."

The academic freedom section of the Handbook also states, "If scholarship is to proceed without coercion, there must be freedom within our commitment [to the Bible] to raise questions and explore diverse viewpoints." This is consistent with Professor DeWeese-Boyd's understanding that "integration [of a Christian perspective within a faculty member's discipline] is fundamentally about taking up scholarly questions that have moral and ethical significance beyond their academic merits," but "is not any sort of requirement that professors teach religion or the Bible, incorporate Scripture into their lessons, pray with their students, or perform any religious functions." Plaintiff/Appellee's Response Brief (Nov. 4, 2020), at 41. Thus, Gordon College has not shown that it has clearly specified that Professor DeWeese-Boyd is required to perform religious job functions that make her a minister "conveying the Church's message and carrying out its mission." *Our Lady of Guadalupe,* 140 S.Ct. at 2063.

While religiously-affiliated universities are generally integrated into the higher education community, the 1940 *Statement* recognizes that some religiously-affiliated institutions may need to restrict the scope of academic freedom to accommodate their particular needs: "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." 1940 *Statement, supra,* at 14. Any such limitations must be stated with specificity at the time of the faculty appointment, such as specific

religious-based functions required for the faculty position. This notice and specificity is necessary to narrow the scope of the exemption and to protect faculty academic freedom to the greatest extent possible. Further, given the long-established integration of religiously-affiliated universities into the broader higher education community, in 1970, AAUP added to the 1940 *Statement* an interpretive comment that had been adopted as AAUP policy, stating, "Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 'Statement,' and we do not now endorse such a departure." 1940 *Statement, supra,* at 14 n.5[5]

CONCLUSION

Amicus AAUP urges this Court to consider the distinctive context of higher education in implementing the ministerial exception, including in the instant case. Consideration of the higher education context is essential to apply the ministerial exception in a way that protects faculty rights even as it seeks to avoid judicial intervention into religiously-affiliated institutions. Issues of academic freedom are relevant to multiple aspects of these concerns. As discussed above, most religiously-affiliated colleges and universities have adopted principles and

[5] *See also* Prenkert *supra*, at 61 ("…the AAUP was correct when it asserted that many religious and church-related schools no longer need or desire to invoke the limitations clause.")

standards of academic freedom, which are fundamental to membership in the community of higher education institutions. Well-established norms of academic freedom in higher education, including in most religiously-affiliated institutions, provide faculty with a significant degree of freedom in their teaching, research, and extramural speech. Therefore, to prove that a faculty member is a "minister," colleges and universities must demonstrate more than general requirements that faculty "integrate the principles and concepts that underlie the Christian evangelical tradition" with their teaching. *See*, *DeWeese-Boyd v. Gordon College*, 2020 WL 1672714 at *24. Without requiring evidence of a faculty member's specific religious job functions, religiously-affiliated colleges and universities may be able to use the ministerial exception to exclude virtually all faculty from protective labor legislation, including protections from discrimination on the basis of race, sex, religion, national origin, age, and disabilities. Such exclusions would also harm faculty academic freedom, as in the instant case where Professor DeWeese-Boyd alleges that Gordon College engaged in sex discrimination by denying her promotion to full professor because of her advocacy on behalf of LGBTQ+ individuals at Gordon College and her opposition to the college's anti-LGBTQ+ policies.

For the foregoing reasons and those in the brief of Plaintiff/Appellee, this Court should affirm the Superior Court's conclusion that Gordon College may not invoke the ministerial exception to bar any of Plaintiff/Appellee's claims.

Respectfully Submitted,

American Association of
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By its attorneys

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Dated: December 14, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure. This Brief is in 14-point Times New Roman font and is 3,941 non-excluded words. It was prepared in Microsoft Word for Microsoft 365.

/s/ Jasper Groner
Jasper Groner

CERTIFICATE OF SERVICE

Pursuant to Rule 13(e) of the Massachusetts Rules of Appellate Procedure, I hereby certify that this document was served on counsel for Plaintiff-Appellees and Defendant-Appellants via the Massachusetts Tyler Host electronic filing system.

/s/ Jasper Groner
Jasper Groner