

1-1-2022

Employment Law—Intersecting Identities & Ideologies, Nondiscrimination, and the First Amendment Ministerial Exception Defense—DeWeese-Boyd v. Gordon College, 163 N.E.3d 1000 (Mass. 2021)

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Recommended Citation

27 Suffolk J. Trial & App. Advoc. 181 (2021-2022)

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**EMPLOYMENT LAW—INTERSECTING
IDENTITIES & IDEOLOGIES,
NONDISCRIMINATION, AND THE FIRST
AMENDMENT MINISTERIAL EXCEPTION
DEFENSE—*DEWEESE-BOYD V. GORDON
COLLEGE*, 163 N.E.3D 1000 (MASS. 2021)¹**

When fundamental legal principles such as religious freedom and discrimination intersect, a great tension emerges.² The ministerial exemption—an affirmative defense under the First Amendment—sits at this intersection, barring employment discrimination claims against religious institutions by their ministerial employees.³ In *DeWeese-Boyd v. Gordon College*,⁴ the Supreme Judicial Court of Massachusetts (“SJC”) applied recent Supreme Court precedent to clarify which employees are considered ministers under the exemption.⁵ The SJC ultimately found that the plaintiff, Professor Margie DeWeese-Boyd, was not a minister, and, therefore, her employment discrimination claims against defendant, Gordon College, were not barred by the exemption.⁶

Gordon College is a Christian liberal arts college located in Wenham, MA, a suburb about twenty-five miles north of Boston.⁷ In 2011, the

¹ This case comment was initially written for Suffolk University Law School’s Race, Women’s Rights, Gender Identity and the Law course, under the supervision of Justice Elspeth Cypher and Dean Robert Ward.

² *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1009 (Mass. 2021) (“The potential for conflict between these fundamental legal principles is therefore obvious and of great concern, not only to the individual plaintiffs, but also for our civil society and religious institutions.”)

³ See *DeWeese-Boyd*, 163 N.E.3d at 1003 (explaining ministerial exception and evaluating plaintiff’s responsibility to integrate religious faith into instruction); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n* (“E.E.O.C (*Hosanna-Tabor*)”), 565 U.S. 171, 188-89 (2012) (barring woman’s claims, holding she was commissioned minister teaching daily religion classes at religious school).

⁴ 163 N.E.3d 1000 (Mass. 2021).

⁵ See *id.* at 1002 (stating “this case requires us to assess, in light of the recent United States Supreme Court decision in *Our Lady of Guadalupe Sch. v. Morrissey-Berru* . . . whether the ministerial exception applies to an associate professor of social work at a private Christian liberal arts college.”); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2062-66 (2020) (clarifying which employees fall under ministerial exemption).

⁶ See *DeWeese-Boyd v. Gordon*, 163 N.E.3d at 1018.

⁷ See *Id.* at 1004 (“Its mission is ‘to graduate men and women distinguished by intellectual maturity and Christian character, committed to lives of service and prepared for leadership worldwide.’”) *Gordon College*, distinct from *Gordon-Conwell Theological Seminary*, was founded in 1889 “for the purpose of carrying on the educational work begun . . . by the Reverend

late President R. Judson Carlberg resigned after serving nearly twenty years as Gordon's president and was succeeded by D. Michael Lindsay.⁸ With this leadership transition came many changes within the Gordon community, including the founding of OneGordon, a community of lesbian, gay, bisexual, transgender, queer (LGBTQ) and allied alumni, students, faculty, and staff, "committed to affirming and supporting people of all sexual orientations, gender identities, and gender expression."⁹ In 2014, following the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*,¹⁰ President Obama signed an Executive Order forbidding any federal contractor from discriminating on the basis of sexual orientation or gender identity.¹¹ In response, Gordon's President Lindsay, along with many other evangelical leaders, submitted a letter to President Obama requesting an exemption so religious institutions receiving federal funding can remain selective in their hiring.¹²

As a result of the letter to President Obama, community partners, including the cities of Salem and Lynn, formally cut ties with Gordon.¹³ In

Adoniram Judson Gordon." *Id.*; see also GORDON COLLEGE, <https://www.gordon.edu/> (last visited Nov. 21, 2021).

⁸ See *DeWeese-Boyd*, 163 N.E.3d at 1006 ("Lindsay, who became president of Gordon after DeWeese-Boyd was hired . . ."); see also John R. Ellement, *R. Judson Carlberg, 74; former president of Gordon College*, THE BOSTON GLOBE (Nov. 25, 2014), <https://www.bostonglobe.com/metro/2014/11/25/judson-carlberg-former-president-gordon-college/FMpzw5LEZlvpvmolMrbjpL/story.html> (noting Carlberg's tenure as president of Gordon College).

⁹ See OneGordon, *About*, FACEBOOK, https://www.facebook.com/OneGordonLGBTQ/about/?ref=page_internal (last visited May 5, 2021) (stating OneGordon's mission); see also Philip Francis & Mark Longhurst, *How LGBT Students Are Changing Christian Colleges*, THE ATLANTIC (July 23, 2014), <https://www.theatlantic.com/education/archive/2014/07/gordon-college-the-new-frontier-of-gay-rights/374861/> (describing emergence of LGBTQ+ activism on Christian college campuses).

¹⁰ 573 U.S. 682 (2014).

¹¹ See *id.* (allowing religious exemption to contraceptive mandate for privately held corporations); Exec. Order No. 13672, 3 C.F.R. 2014 Comp., pt. 1 (2015) (prohibiting discrimination based on sexual orientation and gender identity). Executive orders prohibiting employment discrimination precede even the 1964 Civil Rights Amendment. PATRICIA BELL-SCOTT, *THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE* 226-27 (Vintage Books 2017) (describing President Eisenhower's executive order protecting against discrimination).

¹² See Francis & Longhurst, *supra* note 9 (describing executive order and evangelical letter); Madeline Linnell, *The Four Years That Changed Gordon College*, THE TARTAN (March 29, 2017), <https://tartan.gordon.edu/the-four-years-that-changed-the-college/> (explaining letter to President Obama and subsequent impact).

¹³ See Liam Adams & Taylor Bradford, *Gordon in Lynn – An Enduring Relationship Severed*, THE TARTAN (March 29, 2017), <https://tartan.gordon.edu/gordon-in-lynn-an-enduring-relationship-severed/> (explaining history, legacy, and end of Gordon's programming in Lynn); Linnell, *supra* note 12 (describing community backlash to Lindsey's signature on letter to President Obama); Matt Rocheleau, *Salem ends Gordon College's use of town hall*, BOSTON GLOBE

response, Gordon's lawyers sent a memo to the Lynn Public School Committee defending President Lindsay's First Amendment rights, worsening tensions between the school and the surrounding communities.¹⁴ The following academic year, tenured Philosophy Professor Lauren Barthold penned a letter to the editor of *The Salem News* criticizing Gordon's approach to homosexuality; as a result, Barthold was threatened with termination and subject to discipline by the administration.¹⁵ Barthold filed and ultimately settled a civil rights lawsuit claiming employment discrimination.¹⁶ Shortly after Barthold's suit was filed, the word "minister" was added to the Gordon faculty handbook—an addition that garnered serious opposition from faculty.¹⁷

Prior to joining Gordon College as a professor, DeWeese-Boyd received a master's degree in General Theological Studies from Covenant Theological Seminary in St. Louis and performed mission work in the Phil-

(July 10, 2014, 12:00 AM), <https://www.bostonglobe.com/metro/2014/07/09/salem-cut-ties-with-gordon-college-over-school-request-for-religious-exemption-antigay-discrimination-rules/goy5ep3SGqAD0yqHWp77oO/story.html> (describing Salem's response to Lindsay's signature on letter to President Obama).

¹⁴ See Linnell, *supra* note 12 (describing Lindsay's "presumptuous" legal action and Lynn School Committee's response); Adams & Bradford, *supra* note 13 (describing Memo to Lynn School Committee); see also Letter from Kevin P. Martin, att'y for Gordon Coll., to John C. Mihos, att'y for Lynn Pub. Sch. Dist. (August 28, 2014) (on file with Tartan Newspaper) (threatening lawsuit for free speech retaliation).

¹⁵ See Linnell, *supra* note 12 (explaining circumstances leading up to Professor Barthold's civil rights suit); see also Lauren Barthold, *Letter: Hiring practices cause pain in Gordon community*, THE SALEM NEWS, https://www.salemnews.com/opinion/letter-hiring-practices-cause-pain-in-gordon-community/article_a890ec4f-d8d6-5c68-a001-5a8cd89ad042.html (Apr. 28, 2016) (opposing Gordon's hiring practices and criticizing Gordon's approach to homosexuality). Gordon's discipline of Barthold included removing her from faculty leadership positions, denying her the scheduled right to apply for a promotion, and removing her from serving as director of the Gender Studies Minor. Complaint and Jury Demand at 7, *Barthold v. Gordon Coll.*, No. 16-639 B, 2016 WL 4159201 (Essex Super. Ct. Apr. 28, 2016).

¹⁶ See Complaint and Jury Demand at 7, *Barthold v. Gordon Coll.*, No. 16-639 B, 2016 WL 4159201 (Essex Super. Ct. Apr. 28, 2016) (alleging employment discrimination based on her sex and association with LGBTQ community). Barthold's complaint highlights the non-ministerial nature of her role at Gordon. *Id.* at 2-3; see also Linnell, *supra* note 12 (explaining circumstances surrounding Professor Barthold's lawsuit).

¹⁷ See *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1006 (Mass. 2021) (explaining addition of minister to Gordon's faculty handbook). Since Barthold and DeWeese-Boyd's initial filings, Gordon hired a professional facilitator to mediate conversations on campus between the administration and members of the LGBTQ+ community, and President Lindsay has formally submitted his resignation. Shalom Maleachi, *Colegrove Hired to Facilitate Talk on Sexuality*, THE TARTAN (Feb. 2, 2017), <https://tartan.gordon.edu/colegrove-hired-to-facilitate-talk-on-sexuality/> (describing professional facilitator's role on campus); Paul Leighton, *Lindsay to step down as Gordon College president*, THE SALEM NEWS (Oct. 22, 2020), https://www.salemnews.com/lindsay-to-step-down-as-gordon-college-president/article_86d1add3-5488-502a-9437-98f838b086a5.html (explaining President Lindsay's resignation).

ippines.¹⁸ DeWeese-Boyd first contacted Gordon about a tenure track faculty position in the Social Work department in February 1998, submitting an application for employment in March.¹⁹ In her application, DeWeese-Boyd acknowledged her personal agreement with Gordon's Statement of Faith, agreed to comply with the Statement of Life and Conduct, and affirmed her understanding of the basic responsibilities of a faculty member.²⁰ In June 1998, Gordon offered DeWeese-Boyd a "tenure track faculty position," hiring her as an Assistant Professor of Social Work.²¹ While at Gordon, DeWeese-Boyd participated in religious services, convocations, and religious gatherings on campus with students and attended a local church alongside Gordon students.²²

DeWeese-Boyd was promoted to Associate Professor in 2004 and approved for tenure in September 2009.²³ In 2016, DeWeese-Boyd applied for promotion to Full Professor and the Faculty Senate unanimously rec-

¹⁸ See *DeWeese-Boyd*, 163 N.E.3d at 1006-07 (explaining DeWeese-Boyd's educational background); *DeWeese-Boyd v. Gordon Coll.*, No. 1777CV01367, 2020 WL 1672714, at *6 (Essex Super. Ct. Apr. 2, 2020) (discussing DeWeese-Boyd's previous missionary work in the Philippines).

¹⁹ See *DeWeese-Boyd*, 163 N.E.3d at 1006 (describing initial hiring process); *DeWeese-Boyd*, 2020 WL 1672714, at *5 (discussing DeWeese-Boyd's personal motivations for applying to work at Gordon College). "[DeWeese-Boyd] sent a cover letter to Gordon's then-Provost in which she stated, '[a]s a product of a Christian liberal arts college . . . I very much want to participate in, and contribute to, Christian liberal arts education.'" *DeWeese-Boyd*, 2020 WL 1672714, at *5. In her cover letter, DeWeese-Boyd "further stated that her seminary training and mission work in the Philippines 'could be of particular benefit to Gordon College Students.'" *DeWeese-Boyd*, 2020 WL 1672714, at *5.

²⁰ See *DeWeese-Boyd*, 2020 WL 1672714, at *6 (describing DeWeese-Boyd's personal understanding of Gordon's Statement of Faith and Life and Conduct Statement). DeWeese-Boyd described her understanding of her role as a faculty member as "to provide a critical, and distinctly Christian, perspective[,] . . . to guide and mentor each student in such a way as to help her discern how Christianity impacts upon her particular discipline[,] . . . [and] to teach her students how to do 'Christian scholarship.'" *Id.* Gordon's Statement of Faith described the institution's beliefs, and each member, including faculty and students, were required to sign a "Memorandum of Understanding" agreeing to these beliefs. *Id.* at *4. The faculty Life and Conduct Statement differed slightly from the student Life and Conduct Statement, specifically regarding expectations to abstain from "homosexual practice." *Id.* at *4-*5.

²¹ See *id.* (providing Gordon's reasons for DeWeese-Boyd's appointment to faculty). "Your achievements, academic pedigree, commitment to the Triune God, and expressed desire to benevolently serve in this Christian liberal arts setting have led to your appointment to the faculty." *Id.* In closing, the offer letter stated, "Welcome to Gordon College faculty. May the Lord always bless your work here as you join us in the 'precious trust' of developing young Christian hearts, hands, and minds." *Id.*

²² See *DeWeese-Boyd*, 2020 WL 1672714, at *8 (describing religious activities in which DeWeese-Boyd partook).

²³ See *DeWeese-Boyd*, 163 N.E.3d at 1007 (describing DeWeese-Boyd's promotion and tenure sequence); see also *DeWeese-Boyd*, 2020 WL 1672714, at *6 (noting approval for tenure in 2009).

ommended her to Provost Janel Curry.²⁴ In February 2017, after Provost Curry declined to recommend DeWeese-Boyd for promotion to President Lindsay and the Board of Trustees, DeWeese-Boyd filed her employment discrimination suit.²⁵ Gordon raised the ministerial exception as a defense, but the Essex County Superior Court ruled that the ministerial exception did not apply, denied Gordon's motion for summary judgment, and granted DeWeese-Boyd's cross-motion.²⁶ Affirming the lower court's judgement, the SJC held that DeWeese-Boyd's responsibility to integrate her Christian faith into her teaching and scholarship was not sufficient to make her a minister, rendering the ministerial exception inapplicable.²⁷

The First Amendment to the U.S. Constitution includes the Establishment Clause, which prohibits Congress from making any law "respecting an establishment of religion," and the Free Exercise Clause, which prohibits Congress from interfering with "the free exercise thereof."²⁸ The "ministerial exception," which prohibits most employment-related lawsuits against religious organizations, was created by courts under the First Amendment's Establishment and Free Exercise Clauses to prevent state in-

²⁴ See *DeWeese-Boyd*, 163 N.E.3d at 1007 (describing Faculty Senate unanimous recommendation for DeWeese-Boyd's tenure); see also *DeWeese-Boyd*, 2020 WL 1672714, at *7-8 (describing process for faculty evaluation).

According to the Faculty Handbook, "[t]he Faculty Senate and the provost are responsible for coordinating faculty evaluation efforts." The Faculty Senate is responsible for making recommendations on professors' applications for tenure and promotions . . . The Faculty Senate "found [her] to be meritorious in teaching and institutional service and [her] scholarship was assessed at the expected level."

Id. at *8 (citations omitted).

²⁵ See *DeWeese-Boyd*, 163 N.E. 3d at 1007 (explaining Provost Curry's and President Lindsay's reasoning behind rejection of tenure application and recommendation). Curry and Lindsay cited "a lack of scholarly productivity, professionalism, responsiveness, and engagement." *Id.*; see also *DeWeese-Boyd*, 2020 WL 1672714, at *8.

Lindsay "concurred with [Curry's] assessment." According to Curry, DeWeese-Boyd was a "strong teacher" with "very high" teaching evaluations. However, DeWeese-Boyd's scholarly productivity "did not reach acceptable levels" for a Gordon faculty member, and her professionalism and follow through on institutional projects about which she may not feel passionate was lacking.

Id. (citations omitted); see also Linnell, *supra* note 12 (noting DeWeese-Boyd's tenure denial and lawsuit).

²⁶ See *DeWeese-Boyd*, 2020 WL 1672714, at *1 (summarizing parties' motions and stating trial court ruling).

²⁷ See *DeWeese-Boyd*, 163 N.E.3d at 1018 ("In sum, we conclude that DeWeese-Boyd was expected and required to be a Christian teacher and scholar, but not a minister. Therefore, the ministerial exception cannot apply as a defense to her claims against Gordon.")

²⁸ See U.S. CONST. amend. I (establishing constitutionally protected freedom of religion, speech, and expression).

terference with the governance of churches.²⁹ The Supreme Court recognized the ministerial exception for the first time in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission* (“*Hosanna-Tabor*”),³⁰ when it considered whether—the defendant employer—church violated the Americans with Disabilities Act by firing the plaintiff employee after becoming sick.³¹ The Supreme Court concluded that the ministerial exception was not limited to hiring and firing decisions made for religious reasons, that the plaintiff employee functioned as a minister, and that the ministerial exception, therefore, applied.³² Building on *Hosanna-Tabor*, the Court in *Our Lady of Guadalupe School*

²⁹ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 188-90 (2012) (establishing ministerial exception). “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.” *Id.* at 184. “Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” *Id.* at 181; see also *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 604 (Ky. 2014) (“The ministerial exception is best understood as a narrow, more focused subsidiary of the ecclesiastical abstention doctrine”)

It would be difficult for the ecclesiastical abstention doctrine to be more clearly expressed than ‘[i]n such matters relating to the faith and practice of the church and its members, the decision of the church court is not only supreme, but is wholly without the sphere of legal or secular judicial inquiry.’

Kirby, 426 S.W.3d 597 at 618 (quoting *Marsh v. Johnson*, 82 S.W.2d 345, 346 (Ky. 1935)); *Doe v. First Presbyterian Church U.S.A.*, 421 P.3d 284, 289 (Okla. 2017) (affirming ministerial exception—termed “church autonomy doctrine”—to prohibit courts from interfering “in matters of church government, faith and doctrine.”)

³⁰ 565 U.S. 171 (2012).

³¹ See *id.* at 177-78 (outlining facts); *id.* at 188 (raising ministerial exception as issue of first impression); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (prohibiting employers from discriminating against qualified individuals based on disability).

³² See *Hosanna-Tabor*, 565 U.S. at 188-92 (establishing ministerial exception and applying to facts); *id.* at 194 (finding purpose of ministerial exception “is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason.”); see also *DeWeese-Boyd*, 2020 WL 1672714, at *9 (discussing Court’s rationale in *Hosanna-Tabor*). The exception is, however, intended to “ensure[] that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’—is the church’s alone.” *Hosanna-Tabor*, 565 U.S. at 194-95 (citations omitted) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952)). This broad reading of the exception appears to provide too much protection to religious institutions; if the Supreme Court requires employment decisions to be rooted in ideological judgments, defendants like Gordon would merely need to be more precise about the religious basis for their discriminatory practices. See Amy Howe, *Argument analysis: Justices divided In debate over “Ministerial Exception”*, SCOTUS BLOG (May 11, 2020, 6:41 PM), <https://www.scotusblog.com/2020/05/argument-analysis-argument-analysis-justices-divided-in-debate-over-ministerial-exception/> (explaining Justices Ginsburg, Breyer, and Sotomayor’s concerns around broadening exception); *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2080 (2020) (Sotomayor, J., dissenting) (noting ministerial exception should not apply based on teaching religious themes alone).

v. Morrissey-Berru (“*Our Lady of Guadalupe*”)³³ expressly declined “to adopt a rigid formula for deciding when an employee qualifies as a minister,” but emphasized that the key inquiry is what the employee does.³⁴

Before applying the ministerial exception, a court must determine: (1) whether the defendant organization is a religious institution; and (2) whether the plaintiff employee qualifies as a “minister.”³⁵ While the Supreme Court has not established a rigid formula for this inquiry, lower courts provide helpful precedent.³⁶ The classification of a defendant organization as a “religious institution” does not merely depend on whether it is a church or sect, but rather whether it is a religiously affiliated entity.³⁷ This means that institutions such as schools, hospitals, corporations, and retirement homes may avail themselves of the ministerial exception.³⁸

³³ 140 S. Ct. 2049 (2020).

³⁴ *See id.* at 2062 (noting Court’s ruling in *Hosanna-Tabor*); *id.* at 2067-68 (stating that, in applying exception, courts should “take all relevant circumstances into account and [] determine whether each particular position implicated the fundamental purpose of the exception.”) The factors the Court referenced under *Hosanna-Tabor* were specific to that case, and courts may consider other factors when determining whether an employee is a “minister” in a different context. *Id.* at 2063. The Court noted that educating young people in their faith—the responsibility of the plaintiffs in *Our Lady of Guadalupe*—is at the very core of a private religious school’s mission. *Id.* at 2055. *But see id.* at 2072 (Sotomayor, J., dissenting) (arguing plaintiff-employees not ministers, given that “the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic.”)

³⁵ *See* Lishu Yin v. Columbia Int’l Univ., 335 F. Supp. 3d 803, 812 (D.S.C. 2018) (“In order for the ministerial exception to apply, an employer must be a religious institution, and an employee must be a minister.”); *see also* Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 581 (6th Cir. 2018) (outlining history and use of ministerial exception); *Kirby*, 426 S.W.3d at 609 (“The application of the ministerial exception requires two main inquiries: 1) is the employer a religious institution, and 2) is the employee a minister.”); Note, *Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries*, 133 HARV. L. REV. 599, 602 (2019) (describing two-prong ministerial exception test applied by courts).

³⁶ *See supra* note 35 and accompanying text (describing two-prong ministerial exception test applied by courts); *Of Priests, Pupils, and Procedure, supra* note 35, at 602 (noting *Hosanna-Tabor*’s preference for fact-specific-inquiry).

³⁷ *See* Shaliehsabou v. Hebrew Home of Greater Wash., 363 F.3d 299, 310 (4th Cir. 2004) (“Numerous courts have held that the term ‘religious institution,’ in this context, can include religiously affiliated schools, hospitals, and corporations.”); *Of Priests, Pupils, and Procedure, supra* note 35, at 602 (noting “the ministerial exception has never applied exclusively to established churches.”)

³⁸ *See* Scharon v. St. Luke’s Episcopal Presbyterian Hosp., 929 F.2d 360, 362 (8th Cir. 1991) (holding hospital “act[ed] as a religious institution as Scharon’s employer”). The court was persuaded by plaintiff’s occupation as the hospital’s chaplain, even though the hospital “provides many secular services (and arguably may primarily be a secular institution).” *Id.*; *Hosanna-Tabor*, 565 U.S. at 177 (finding “member congregation” of Missouri Synod both church and school); *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 418 (2nd Cir. 2018) (holding hospital “only historically connected to the United Methodist Church” religious institution).

When determining whether a plaintiff-employee is a minister for purposes of the ministerial exception, the primary question is “what the employee does” at the institution.³⁹ Courts, therefore, utilize a functional test, focusing on the function of the position rather than ordination status of the employee.⁴⁰ Courts will consider the employee’s title, trainings received, whether they were ordained or commissioned, and whether the institution or the employee considered the employee a minister within the institution.⁴¹ Despite this flexibility, courts have emphasized the serious consequences of the exemption and have demonstrated their willingness to engage with the tension between religious freedom and employment discrimination.⁴²

In *DeWeese-Boyd v. Gordon College*, the SJC applied the Supreme Court’s findings from *Our Lady of Guadalupe* and took seriously the consequences of an overly broad analysis.⁴³ The SJC’s decision also emphasized that the existence and role of the ministerial exception is to prohibit “government interference with employment relationships between religious institutions and their ministerial employees[.]”⁴⁴ Applying the Supreme

³⁹ See *Our Lady of Guadalupe*, 140 S. Ct. at 2064 (finding employee’s role in relation to nature of institution important in determining whether a minister); see also *Temple Emanuel of Newton v. Mass. Comm’n Against Discrim.*, 975 N.E.2d 433, 443, 472 (Mass. 2012) (“the ministerial exception applies . . . regardless of whether [the employee] is called a minister or holds any title of clergy” because “a minister is defined by her function, rather than her title”).

⁴⁰ See *Hosanna-Tabor*, 565 U.S. at 190 (emphasizing functional analysis). The Court acknowledged the “functional consensus” among lower courts, noting that “[t]he ministerial exception has not been limited to members of the clergy.” *Id.* at 203 (quoting *Equal Emp. Opportunity Comm’n v. Catholic Univ.*, 83 F.3d 455, 461 (D.C. Cir. 1996)).

⁴¹ See *Hosanna-Tabor*, 565 U.S. at 191-92 (noting employee’s commission or ordinance); *id.* at 191-92 (emphasizing plaintiff-employee “[holding themselves] out as” minister); *Our Lady of Guadalupe*, 140 S. Ct. at 2067-68 (noting employee training); see also *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (limiting exception to “individuals who play certain key roles” in religious institution).

⁴² See *Hosanna-Tabor*, 565 U.S. at 196 (“[T]he interest of society in the enforcement of employment discrimination statutes is . . . important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”); *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1145-46 (D. Or. 2017) (“Courts have properly rejected such a broad reading . . . which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws.”); see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (“In our time, few pieces of federal legislation rank in significance” with legislation outlawing “discrimination in the workplace on the basis of race, color, religion, sex, or national origin.”); *Flagg v. AliMed*, 992 N.E.2d 354, 359 (Mass. 2013) (“Legislature determined that workplace discrimination harmed not only the targeted individuals but the entire social fabric.”)

⁴³ See *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1002, 1009, 1011-12 (Mass. 2021) (introducing issue of ministerial exception).

⁴⁴ See *id.* at 1002 (expressing difficulty surrounding minister title determination). The court further concedes that “the difficult issue is not at this point whether the ministerial exception should be created – it is well established, . . . [n]or whether it should eclipse and thereby eliminate

Court's precedent, the SJC first, for the purposes of the exception, found Gordon a religious institution due to its "obvious religious character."⁴⁵ While Gordon is not a traditional church nor organized sect, the SJC found that Gordon's "clear commitment to Christian principles, as well as its historical religious roots" satisfied the religious institution prong of the exemption.⁴⁶ Therefore, the SJC was not persuaded by DeWeese-Boyd's argument that Gordon's "'primary commitment' is to provide a liberal arts education" and thus is not a religious institution.⁴⁷

In the second prong of its analysis, the SJC found DeWeese-Boyd not a minister and therefore held the ministerial exception does not bar her claims.⁴⁸ The SJC reasoned that DeWeese-Boyd's role was not that of a minister because she did not "lead students in devotional exercises or chapel services" and she did not "teach classes on religion, pray with her students, or attend chapel with her students[.]"⁴⁹ Additionally, based on DeWeese-Boyd's title and training alongside Gordon's Faculty Handbook, the SJC found that DeWeese-Boyd was not held out as a minister by the school or herself.⁵⁰ The SJC compared DeWeese-Boyd's role as a profes-

civil law protection against discrimination – it clearly does. Rather, the difficult issue is who is a minister." *Id.* at 1009; *see also Hosanna-Tabor*, 565 U.S. at 188-89 (defining ministerial exception); *see also Williams v. Episc. Diocese of Mass.*, 766 N.E.2d 820, 824 (Mass. 2002) (demonstrating SJC's prior recognition of exception implications). "It is our understanding that the ministerial exception has been carefully circumscribed to avoid any unnecessary conflict with civil law." *See DeWeese-Boyd*, 163 N.E.3d at 1017.

⁴⁵ *See DeWeese-Boyd*, 163 N.E.3d at 1009-11 ("All of Gordon's governing documents reference religious purposes, and all members of the Gordon community, including its faculty, are expected to articulate and affirm their faith and abide by faith-based behavioral standards. Upon review of the abundant record concerning Gordon's obvious religious character, we conclude that it is a religious institution.") The SJC was particularly concerned itself with Gordon's non-denominational nature, drawing a comparison to *Conlon v. InterVarsity Christian Fellowship*. *See id.* at 1010 (finding both Gordon and InterVarsity religious institutions regardless of their "lack of denominational affiliation" because of their principles and history).

⁴⁶ *See DeWeese-Boyd*, 163 N.E.3d at 1010 (noting Gordon's institutional status).

⁴⁷ *See id.* (rejecting argument that under exception religious institutions cannot have primary purpose of providing liberal arts education).

Gordon identifies as both a Christian college and a liberal arts college, as the portion of the handbook the plaintiff quotes makes clear: Gordon is "a Christian community, distinguished from other Christian communities by its primary commitment to provide a liberal arts education."

Id.

⁴⁸ *See id.* at 1017-18 ("In sum, we conclude that DeWeese-Boyd was expected and required to be a Christian teacher and scholar, but not a minister. Therefore, the ministerial exception cannot apply as a defense to her claims against Gordon.")

⁴⁹ *See id.* at 1012.

⁵⁰ *See id.* at 1013-15 (analyzing whether DeWeese-Boyd was held out as or held herself as a minister). The SJC relied on the fact that "she [DeWeese-Boyd] was part of the group of professors opposed to the addition of 'minister' to the handbook because they viewed it as 'wrongly

sor with the specific and sectarian religious instructions in *Hosanna-Tabor* and *Our Lady of Guadalupe*, and thus remained unconvinced by Gordon's argument that DeWeese-Boyd's responsibility to integrate her Christian faith into her teaching and scholarship asserted that she was a minister.⁵¹ The SJC, engaging in a subjective analysis comparing the particular facts of the present case with available precedent, held that although Gordon is a religious institution, DeWeese-Boyd was not a minister and that the ministerial exception did not bar her claims.⁵²

DeWeese-Boyd v. Gordon poignantly demonstrates the tensions and consequences courts encounter when faced with the ministerial exception.⁵³ Though the SJC cannot ignore the existence of the ministerial exemption, it is evident that the Justices desire to avoid it so that employees of religious institutions can utilize civil law protections against discrimination.⁵⁴ In its introductory paragraph, the SJC laments that the "parameters of the exception . . . remain somewhat unclear," but it is this lack of clarity that allowed the SJC to reject a broad analysis of who qualifies as a minister under the exemption.⁵⁵ Given the Supreme Court's use of the ministeri-

describing the faculty role within the College." *Id.* at 1015. The court continued, "[u]nlike Perich, she never held herself out as a minister or referred to herself as such, and never claimed a ministerial housing allowance." *Id.*

⁵¹ See *DeWeese-Boyd*, 163 N.E.3d at 1014 ("Here, the integrative function is not tied to a sectarian curriculum: it does not involve teaching any prescribed religious doctrine, or leading students in prayer or religious ritual.") The SJC compared DeWeese-Boyd to the plaintiffs in *Hosanna-Tabor* and *Our Lady of Guadalupe*, where "the religious instructions were specific and sectarian, and the teachers led prayers and religious rituals." *Id.*

⁵² See *DeWeese-Boyd*, 163 N.E.3d at 1000 (holding Gordon was 'religious institution' under ministerial exception, but exception did not ultimately apply).

⁵³ See sources cited *supra* notes 2 & 42 and accompanying text (articulating the concern of balancing religious rights and employment rights). The court immediately introduces this tension. See *DeWeese-Boyd*, 163 N.E.3d at 1002.

We are thus presented with a potential conflict between two fundamental American legal principles. The application of the ministerial exception could eclipse, and thereby eliminate, civil law protection against discrimination within a religious institution; in contrast, the decision not to apply the exception could allow civil authorities to interfere with who is chosen to propagate religious doctrine, a violation of our country's historic understanding of the separation of church and State set out in the First Amendment to the United States Constitution.

Id.

⁵⁴ See sources cited *supra* note 44 and accompanying text (providing examples and restrictions of minister classification).

⁵⁵ See *DeWeese-Boyd*, 163 N.E.3d at 1002-03 ("Unfortunately, the parameters of the exception—that is to say, who is covered by the ministerial exception—remain somewhat unclear. We conclude that Gordon College (Gordon) is a religious institution, but that the plaintiff, Margaret DeWeese-Boyd, is not a ministerial employee. Her duties as an associate professor of social work differ significantly from cases where the ministerial exception has been applied."); see also

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al exception to bar claims based on disability and age, it is no surprise that the exception is leveraged here to bar claims of discrimination based on gender and sexual orientation.⁵⁶ The SJC's findings do not, however, eliminate future uses of the exemption to bar employment discrimination claims based on age, disability, gender (including gender identity and gender expression), sexual orientation, race, or national origin.⁵⁷ Because such claims already face high pleading standards and challenges of intersectionality, limiting the ministerial exception provides *some* redress for plaintiffs regularly marginalized in society and disempowered by the justice system.⁵⁸

The SJC was unwilling to expand the scope of people who are considered ministers under the exception based on an employee's responsibility to integrate their faith with their role, because an expansion would increase the number of plaintiff employees left vulnerable to discrimination.⁵⁹ Not only does the SJC seem wary of expanding the reach of the exception, but it is compelled, in deference to Supreme Court precedent, to apply a more narrow reading of "integrate religious faith" to the facts of the instant case.⁶⁰ If mere integration of faith into her teaching and scholarship makes

sources cited *supra* note 51 and accompanying text (distinguishing professor's curriculum determining minister exemption).

⁵⁶ See *DeWeese-Boyd*, 163 N.E.3d at 1003 ("She alleged in her complaint that the defendants unlawfully retaliated against her for her vocal opposition to Gordon's policies and practices regarding individuals who identify as lesbian, gay, bisexual, transgender, or queer (or questioning), and others (LGBTQ+ persons), by denying her application for promotion to full professor, despite the fact that the faculty senate unanimously recommended her for the promotion. Specifically, she alleged unlawful retaliation in violation of G. L. c. 151B, § 9; unlawful discrimination on the basis of her association with LGBTQ+ persons or on the basis of her gender in violation of G. L. c. 151B, § 9.")

⁵⁷ See sources cited *supra* note 54 and accompanying text (exemplifying application of narrow religious and minister exemptions).

⁵⁸ See sources cited *supra* note 53 and accompanying text (identifying the need to balance religious interests and employment interests).

⁵⁹ See *DeWeese-Boyd*, 487 N.E.3d at 1002 (addressing parameters of the ministerial exception regarding how to evaluate the responsibility to integrate faith).

The Supreme Court has not specifically addressed the significance of the responsibility to integrate religious faith into instruction and scholarship that would otherwise not be considered ministerial. If this integration responsibility is sufficient to render a teacher a minister within the meaning of the exception, the ministerial exception would be significantly expanded beyond those employees currently identified as ministerial by the Supreme Court. The number of employees playing key ministerial roles in religious institutions would be greatly increased.

Id.

⁶⁰ See *id.* at 1014 ("[I]ntegrating the Christian faith generally into teaching and writing about social work. Whether this more general religious reflection was meant to be included in the Supreme Court's statement about 'educating young people in their faith,' and is enough to render

DeWeese-Boyd a minister, regardless of the sectarian or religious nature of that teaching and scholarship, then the inherently integrative roles of teachers, mentors, coaches, and other pedagogical professions are essentially ministerial.⁶¹ By finding that DeWeese-Boyd's claims are not barred by merely integrating her faith and her employment responsibilities, the SJC applies the Supreme Court's functional analysis without creating a bright line rule that could easily be used in the future to perpetuate discrimination against already marginalized plaintiff employees.⁶²

While the SJC acknowledges the tension between Gordon's rights under the First Amendment and DeWeese-Boyd's employment discrimination claims, the opinion does not address the broader applications of this affirmative defense.⁶³ In addressing this tension, the SJC does, however, take an intersectional approach, recognizing the impact of these intersecting legal principles on DeWeese-Boyd—a professional, Christian, woman—who affirms the dignity and rights of her LGBTQ+ associates.⁶⁴ By

her a minister, is not directly answered by precedent.”); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2064 (exemplifying minister exemption requirement); sources cited *supra* notes 50 & 51 and accompanying text (discussing minister exemptions requirement and considerations).

⁶¹ *See DeWeese-Boyd*, 163 N.E.3d at 1013 (“While it may be true that Gordon employs Christians, and ‘Christians have an undeniable call to minister to others,’ this line of argument appears to oversimplify the Supreme Court test, suggesting that all Christians teaching at all Christian schools and colleges are necessarily ministers.”) If the SJC expanded the exception in this way, in line with Gordon's arguments, the only employees in America who would not be considered ministers would be those explicitly barred from integrating their faith with their work, a dynamic further at odds with the First Amendment. *See id.* at 1017.

We recognize that some of the language employed in *Our Lady of Guadalupe* may be read more broadly, in a way that would include every educator at a religious institution. As Gordon has stated, the integrative function applies to all teachers at the college, whether they teach computer science, calculus, or comparative religion.

Id.; *see also Richardson v. Northwest Christian Univ.*, 242 F. Supp. 3d 1132, 1138-39 (D. Or. 2017).

If plaintiff was a minister, it is hard to see how any teacher at a religious school would fall outside the exception. Courts have properly rejected such a broad reading . . . , which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws.

Id.

⁶² *See supra* notes 51, 55, 59, & 60, and accompanying text (highlighting court's reasoning regarding integration of faith and teachings).

⁶³ *See DeWeese-Boyd*, 163 N.E.3d at 1009 (addressing “high stakes” surrounding ministerial exception but declining to further comment on its necessity).

⁶⁴ *See id.* (“The potential for conflict between these fundamental legal principles is therefore obvious and of great concern, not only to the individual plaintiffs, but also for our civil society and religious institutions. While ‘the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission’ is an undoubtedly important First

acknowledging these divergent principles and interests, while limited by available precedent, the SJC lays out a subjective and fact dependent analysis that lower courts can use as a model for future decisions.⁶⁵ While the merits of DeWeese-Boyd's discrimination claims are not examined in the scope of this SJC opinion, the court's unwillingness to apply the ministerial exemption to a Christian liberal arts college professor will protect similarly situated professors from discrimination on the basis of age, disability, gender (including gender identity and gender expression), sexual orientation, race, or national origin.⁶⁶

DeWeese-Boyd v. Gordon wrestles with the tension between two fundamental American legal principles: civil law protection against discrimination and "our country's historic understanding of the separation of church and State set out in the First Amendment to the United States Constitution."⁶⁷ In our increasingly polarized society, where the historically white, male, able-bodied, heterosexual, and Christian majority's power is consistently challenged, courts are faced with claims, like the instant case, that stretch our understanding of religious freedom today.⁶⁸ In its opinion, the SJC effectively applies the Supreme Court's functional analysis as developed in *Hosanna-Tabor* and *Our Lady of Guadalupe*, holding that while Gordon College is a religious institution, DeWeese-Boyd is not a minister and her employment discrimination claims are, therefore, not barred by the ministerial exemption. The precedent established by *DeWeese-Boyd v. Gordon* leaves the ministerial exception available as an affirmative defense to employment discrimination, while not expanding the exception to bar discrimination claims by employees who are required to integrate their religious faith into their professional responsibilities. Although DeWeese-Boyd's intersectional discrimination claim is not addressed in this holding, the SJC's decision balances their clear concern for the communities left unprotected by the ministerial exception and deference to Supreme Court precedent. The Justice's ultimately take an intersectional approach by upholding civil law protections against discrimination for similarly situated plaintiff employees.

Amendment right, so, too, is "[t]he interest of society in the enforcement of employment discrimination statutes.")

⁶⁵ See *supra* note 60 and accompanying text (noting lack of precedent addressing if faith is generally integrated into academics at religious institutions).

⁶⁶ See *supra* notes 55 & 61 and accompanying text (explaining court's reasoning in declining to expand scope of ministerial exception).

⁶⁷ See *DeWeese-Boyd*, 163 N.E.3d at 1002 (noting crux of opinion).

⁶⁸ See *id.* at 1002 (introducing intersection and tension between civil law protection against discrimination and separation of church and State).

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