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 Massachusetts Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Margaret DeWeese-Boyd sued for employment discrimination when she was denied a full professorship at Gordon College, a Christian liberal-arts school, despite being unanimously recommended for the promotion. Gordon contended that she was a minister and therefore that her claims fail under the ministerial exception. The trial court disagreed but allowed Gordon to seek interlocutory review.

The Massachusetts Supreme Judicial Court determined that under the fact-based analysis in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), DeWeese-Boyd was not a minister. The court determined that although Gordon had a general requirement that professors integrate their Christian faith into their teaching and scholarship, DeWeese-Boyd's actual job responsibilities lacked the hallmarks of one who plays a significant role in preaching or teaching the faith. The court remanded so the parties could proceed with merits litigation.

The questions presented are:

1. Is the interlocutory ruling a final judgment under 28 U.S.C. § 1257(a)?

2. Did the Supreme Judicial Court err in determining that DeWeese-Boyd was not a minister because Gordon generally required that professors integrate their Christian faith into their work and teach from a "Christian perspective"?

3. Should the Court overturn *Hosanna-Tabor* and *Morrissey-Berru* to hold that an employee is a minister whenever the employer says so?

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INTRODUCTION

Just two terms ago, this Court clarified the fact-dependent test for who qualifies as a minister for legal purposes under the ministerial exception. On interlocutory appeal, the Massachusetts Supreme Judicial Court carefully weighed those considerations and concluded that Professor Margaret DeWeese-Boyd was not a minister.

Unhappy with that case-specific result, Gordon now demands that this Court revisit *Morrissey-Berru*, when few lower courts have even had a chance to apply it, and none have expressed any confusion.

But really, that is beside the point. For this Court doesn't have jurisdiction to hear the case. The decision below was interlocutory, and the case has been remanded for merits litigation—in which Gordon may raise its many remaining defenses, under the First Amendment and otherwise.

Beyond ignoring the fatal jurisdictional defect, the petition misconstrues both the facts and the holding of the Massachusetts court. Even so, Gordon still fails to find any split in authority, before or after *Hosanna-Tabor* and *Morrissey-Berru*. And it neglects to mention that a decision in its favor would not end this case, because there are issues yet to be litigated that the Supreme Judicial Court did not address and that the petition waives.

Failing to provide any reason why this Court should—or even can—review this case, Gordon nonetheless insists that the Court must intervene now, revisit its own recent, considered decisions, and adopt a per se rule that professors at religious colleges are ministers for First Amendment purposes. Going yet further, Gordon also asks the Court to scrap the legal

test of *Hosanna-Tabor* and *Morrissey-Berru* wholesale, and to hold instead that courts must afford absolute deference whenever a religious employer asserts a good-faith belief that an employee is a minister, regardless of the employee's actual job functions.

The issues that Gordon declines to acknowledge are reason enough to deny the petition. And the issues that it *does* raise only underscore why review is not warranted. The petition should be denied.

STATEMENT

A. Factual Background

1. DeWeese-Boyd's Employment at Gordon

For two decades, Margaret DeWeese-Boyd was a professor of social work at Gordon College, Pet. App. 11a, 14a n.15, where she taught courses on general social-work practice and sustainability and oversaw social-work practicums, Pet. App. 24a; R.A. 403.

She obtained her master's degree in general theological studies in 1993 and then pursued graduate studies in social work and political science. R.A. 368. In 1995, she completed her Master of Social Work, with a focus on social and economic development and a specialization in research methods. R.A. 368. She then enrolled in two Ph.D. programs, one in social work and one in political science. R.A. 368. She earned her Ph.D. in political science in 1999. R.A. 380.

In 1998, DeWeese-Boyd applied for a tenure-track position in Gordon College's Department of Sociology and Social Work. Pet. App. 49a; R.A. 342. Gordon is a private, nondenominational-Christian, liberal-arts college. Pet. App. 5a; R.A. 550.

In her cover letter, DeWeese-Boyd highlighted her interdisciplinary background in social work and political science as well as her seminary training and previous mission work. R.A. 342. Her application materials described her teaching and research experience, which was principally in the fields of statistics and data analysis. R.A. 369. Her teaching areas included "social policy; research methods; values and ethics; the policy process; political thought; [and] community development practice and theory." R.A. 369. And she described her plans for a research program addressing questions of "self-governance, direct democracy, and the importance of local—i.e., grassroots—institutions for community development." R.A. 374. She was hired and started as a social-work professor in 1999. R.A. 377.

Once she arrived at Gordon and began teaching in the "decidedly nonsectarian" field of social work, R.A. 391, DeWeese-Boyd used her interdisciplinary training to guide her research on "scholarly questions that have moral and ethical significance beyond their academic merits," R.A. 388. She later explained that she understood her role as a Christian scholar to govern how she would "guid[e] and mentor[] students," R.A. 395, by encouraging her to treat her students with respect and equality; to rely on seminars, because that classroom structure "best reflects the egalitarianism" central to Christianity; and to try to mitigate power differentials in the classroom. R.A. 396-97.

2. DeWeese-Boyd's First Promotion and Tenure

After three years, DeWeese-Boyd underwent her first performance review. As part of the process, she was required to submit a paper explaining her understanding of Gordon's "integration" requirement—

namely, the requirement that faculty teach and approach scholarship from a Christian perspective and integrate their faith into their work. *See* Pet. App. 125a. She submitted a scholarly book review. R.A. 382, 471. In an accompanying letter, she explained that the paper reflected her view that her work was "inherently integrated," R.A. 382—i.e., it reflected that her faith guided her selection of subjects on which to focus her scholarship, R.A. 385. She was promoted to associate professor in 2004. Pet. App. 13a.

When DeWeese-Boyd applied for tenure in 2008, she was required to include a paper reflecting her "development of a Christian perspective" within her discipline. R.A. 268. The requirement was "not intended to be a test of theological orthodoxy." R.A. 268. She initially submitted a paper on land use and development, because it "showed by * * * example [her] understanding of integration." R.A. 355. She was later asked to submit work that more straightforwardly explained her understanding of integration. R.A. 355. She then submitted a paper detailing that, for her, integration was "fundamentally about * * * pursuing scholarship that is faithful to the mandates of Scripture, the vocational call of Christ, and the dictates of conscience." R.A. 388. She was awarded tenure in 2009. Pet. App. 13a.

3. DeWeese-Boyd's Job Functions

DeWeese-Boyd taught in Gordon's social-work program, which is designed to educate students "for entry level, generalist practice in social work within the context of a Christian liberal arts institution." R.A. 418. The social-work handbook describes the program as being "informed by a Christian worldview" in that it recognizes "the value and dignity of every person." R.A. 418. Under that rubric, the program's goals

include "alleviat[ing] poverty [and] oppression" and promoting "social and economic justice." R.A. 418.

Over time, DeWeese-Boyd's administrative duties largely supplanted her teaching responsibilities, meaning that she spent less time with students in the classroom. *See* Pet. App. 105a. She completed several stints as Social Work Program Director. That role required coordinating course schedules and teaching loads, overseeing faculty hiring, maintaining the program's secular accreditation, compiling and reporting program statistics, updating the program's website, and fostering partnerships with the surrounding community. R.A. 410, 610. She also took on the role of Social Work Practicum Director, in which she administered the placement of social-work students as interns with outside organizations. R.A. 410, 610.

Never was DeWeese-Boyd required to teach religion, and she never did. Pet. App. 15a, 24a. Nor did she perform other religious duties. Faculty are not required to lead prayers, and DeWeese-Boyd did not do so; nor did she pray in the classroom. Pet. App. 15a, 24a. Faculty are not required to attend chapel services with students, and again, DeWeese-Boyd didn't. Pet. App. 24a.

Gordon also did not require religious training or confer special titles on faculty who had it. Pet. App. 9a-10a. And though DeWeese-Boyd had studied theology years before beginning at Gordon, R.A. 368, she was not ordained or commissioned by any church or denomination, Pet. App. 14a. Nor did she ever hold herself out as a minister. Pet. App. 14a-15a. In 2016 she removed from her curriculum vitae her seminary training because it was not relevant to her actual job responsibilities at Gordon. R.A. 180-81.

Eighteen years into DeWeese-Boyd's employment, Gordon added language to its employee handbook that for the first time described faculty as "both educators and ministers to its students." Pet. App. 119a. This new language stated that faculty are "expected to participate actively in the spiritual formation" of students and "seek to engage [the] students in meaningful ways to strengthen them in their faith walks with Christ." Pet. App. 118a; R.A. 282.

That language was added without following the standard process for amending the faculty handbook, which included conferring with faculty. *See* R.A. 227. A lawyer for Gordon explained at the time that the changes were made to "shore up" Gordon's governing documents for "legal reasons" and to "trigger judicial deference." R.A. 670.

Though Gordon's president has now said in a deposition that the college "memorialized the word 'minister'" in the handbook in 2016 but already had "ministerial expectations" for its faculty, R.A. 486, that was not the faculty's understanding. Many faculty members strongly objected to the new addition, calling it "disingenuous," R.A. 626, and "legally dubious," R.A. 670, and stating forthrightly that "[w]e are not real ministers," R.A. 670. A formal letter from the Gordon chapter of the American Association of University Professors, which included DeWeese-Boyd as a signatory, explained that the title change "wrongly describ[es] the faculty role within the College." R.A. 655-56.

Gordon now also points to its "Vision Day," during which it "commissions" faculty. Pet. 10. But that practice was adopted well after DeWeese-Boyd began her employment, and she never participated in it. Pet. App. 14a n.17; R.A. 468. Likewise, although Gordon's

president now says that he tells new professors that joining the faculty is like "joining a religious order," Pet. 7, he arrived at Gordon a decade *after* DeWeese-Boyd was hired, R.A. 481. There is nothing in the record to reflect that anything similar was ever communicated to or required of DeWeese-Boyd.

4. Gordon's Denial of DeWeese-Boyd's Promotion

In 2016, DeWeese-Boyd applied for a promotion to full professor. Pet. App. 128a. Her application explained in detail her role in the Department of Sociology and Social Work, her teaching, her scholarship, and her institutional service. R.A. 399-413. The descriptions were overwhelmingly secular. *See* R.A. 399-413.

Her application did not say anything about teaching or transmitting the faith to Gordon students. It did, however, reiterate that her faith had guided her "personal and professional endeavors," R.A. 399, explaining that, to her, Christian scholarship and integration means pursuing scholarship that has "moral and ethical significance" beyond what is of merely academic interest, R.A. 407. Put another way, DeWeese-Boyd understood her work as aligning with her faith but not as promoting it to others. *See* R.A. 407.

Her application went to the Faculty Senate, which unanimously recommended her for the promotion. Pet. App. 104a. The Faculty Senate reported that "the only regret we have with respect to Margie's teaching is that her current social work program responsibilities mean that students have limited opportunities to encounter her in the classroom." Pet. App. 105a. And it praised her scholarship and her institutional leadership of the social-work practicum. Pet. App. 105a-

106a. The Faculty Senate's recommendation was devoid of references to religious or spiritual criteria. Pet. App. 104a-107a.

Despite unanimous Faculty Senate support, Gordon's president and provost declined to forward the recommendation to the board of trustees—i.e., they denied DeWeese-Boyd the promotion. Pet. App. 108a. In a letter explaining why, the provost discussed her teaching, scholarly output, institutional service, and professionalism. Pet. App. 108a-111a. The letter made no mention of the integration requirement and cited no religious criteria weighing either in support of or against her. Pet. App. 108a-111a. And though Gordon now frames the dispute as being about a professor's rejecting a college's core religious beliefs, Pet. 18, the provost did not even hint at any such thing.

B. Procedural Background

In 2017, DeWeese-Boyd sued Gordon, its president, and its provost, asserting state-law claims for retaliation and discrimination on the basis of sex; violation of the Massachusetts Civil Rights Act; breach of contract; breach of the implied covenant of good faith and fair dealing; and tortious interference with contractual relations. Pet. App. 38a. She also filed claims before the Massachusetts Commission Against Discrimination and the EEOC. *See* R.A. 28.

The superior court bifurcated discovery to first address cross-motions for summary judgment on Gordon's ministerial-exception defense. Pet. App. 37a, 39a. Gordon argued that DeWeese-Boyd's claims failed because the school labeled her a minister, expected her to integrate its religious message into her teaching, and relied on her religious background when hiring her. R.A. 74-75. DeWeese-Boyd argued that

Gordon's affirmative defense failed because the evidence unequivocally demonstrated that she was "a professor who studies and teaches social work-related topics and has no religious or ministerial functions for Gordon College." R.A. 100. She also argued that even if the ministerial exception applied to her, it did not bar her contract claims. Pet. App. 57a.

The trial court determined that the ministerial exception did not apply. Pet. App. 77a. Although "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." Pet. App. 98a.

At Gordon's request, the superior court reported the summary-judgment order for interlocutory review by the state's Appeals Court. *See* Mass. R. Civ. P. 64(a).[1] The question reported asked whether the superior court erred "in dismissing on summary judgment the affirmative defense of the ministerial exception." Pet. App. 4a n.3. The Supreme Judicial Court then accepted the appeal for direct review. Pet. App. 4a.

After Gordon filed its interlocutory appeal but before briefing, this Court issued its opinion in *Morrissey-Berru*. Gordon then argued that, under that decision, the expectation that DeWeese-Boyd would "integrate" faith into her teaching sufficed to bring her within the ministerial exception. Defs. Br. 43-45. In

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[1] Like 28 U.S.C. § 1292(b) for federal courts, Massachusetts Rule of Civil Procedure 64(a) gives the state's trial courts discretion to allow parties to seek appellate review of an interlocutory decision when it would lead to more efficient resolution of the litigation.

response, DeWeese-Boyd argued that integration at Gordon means only that professors must teach from a religious perspective, not that they must include religious content in their lessons, so it is insufficient to turn a social-work professor with no religious functions or responsibilities into a minister. Pl. Resp. Br. 22-23.

The Supreme Judicial Court unanimously concluded that the ministerial exception did not extend to DeWeese-Boyd. Applying *Hosanna-Tabor* and *Morrissey-Berru*, the court observed that each factor of this Court's ministerial-exception analysis is important but no individual factor is dispositive. Pet. App. 2a. "What matters, at bottom, is what an employee does." Pet. App. 23a (quoting *Morrissey-Berru*, 140 S. Ct. at 2064). So the court focused on DeWeese-Boyd's functions within the college. Pet. App. 24a-31a. "She was, first and foremost, a professor of social work. She taught classes on sustainability and general social work practice and oversaw practicums." Pet. App. 24a. She did not "teach classes on religion, pray with her students, or attend chapel with her students," nor did she "lead students in devotional exercises or lead chapel services." Pet. App. 24. The court treated those differences from the plaintiffs in *Hosanna-Tabor* and *Morrissey-Berru* as "significant" but not determinative. *See* Pet. App. 24.

In light of DeWeese-Boyd's responsibility to teach social work from a Christian perspective, the court then considered the role of "integration" in its ministerial-exception analysis. "[S]ensitive to the judiciary's necessarily limited understanding of any religious underpinnings of the concept of integration," the court looked to the school's "handbook to illuminate DeWeese-Boyd's duties in this respect." Pet. App. 24a

n.20. It accepted at face value the school's new handbook language and determined based on it that the provision was limited to requiring faculty to be "fully prepared in all facets of their tasks as Christian teachers and advisors." Pet. App. 26a. The "integrative function" was "not tied to a sectarian curriculum." Pet. App. 27a. And though Gordon argued that being a spiritual advisor was central to "what it means to be faculty at a Christian college," and "Christians have an undeniable call to minister to others," the court determined that for those features alone to render DeWeese-Boyd a minister would "oversimplify the Supreme Court test, suggesting that all Christians teaching at all Christian schools and colleges are necessarily ministers." Pet. App. 26a.

After examining DeWeese-Boyd's job duties and her responsibility to teach from a Christian perspective, the court then turned to the remaining considerations identified in *Hosanna-Tabor* and *Morrissey-Berru*. It held that her title (Associate Professor of Social Work) and how she held herself out to the public (she consistently rejected the ministerial label Gordon later applied to all faculty) weighed against classifying her as a ministerial employee. Pet. App. 28a-29a, 31a. And while she did have some religious training, she had not been required to receive the training for her initial or continued employment, was not ordained, and was never formally commissioned by Gordon (or at all). Pet. App. 29a. The court also observed that this Court has "cautioned against placing too much weight on formal training." Pet. App. 29a (citing *Morrissey-Berru*, 140 S. Ct. at 2067-68). The court specifically acknowledged that "a case need not mirror" *Hosanna-Tabor* and *Morrissey-Berru* for the ministerial exception to apply. Pet. App. 35a. "Here, however, the facts are materially different." Pet. App. 35a.

Because it concluded that DeWeese-Boyd was not a ministerial employee, the court did not reach the question whether the exception bars her contract claims. Pet. App. 36a n.27. And because the court answered only the one reported question presented on interlocutory appeal, it remanded for merits litigation, Pet. App. 36a, which is ongoing.

REASONS FOR DENYING THE PETITION

The Court should not and indeed cannot grant review here. As an initial matter, the Court does not have jurisdiction to hear this case because the decision below is not a final judgment as required by 28 U.S.C. § 1257. But even if there were jurisdiction, there would still be no reason for this Court to intervene. The Court should not review the first question presented by the petition—whether general integration requirements make all professors ministerial employees. The Supreme Judicial Court followed this Court's guidance; there is no split of authority among the lower courts; and this case is a bad vehicle to address the question. And the petition's second question asks this Court to overrule *Hosanna-Tabor* and *Morrissey-Berru*, yet Gordon fails to provide any good reason to do so.

I. There is no jurisdiction to hear this case.

The party seeking review "has the burden of affirmatively establishing this Court's jurisdiction." *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948). Under 28 U.S.C. § 1257(a), this Court's jurisdiction is limited to final judgments or decrees of state courts. Gordon generally asserts (at 1) that the Supreme Judicial Court's decision was final under 1257(a), not even bothering to mention that it was in-

terlocutory. Nor could Gordon have shown that the decision satisfies any of the narrow exceptions to finality, had it seen fit to try. That alone is reason to deny the petition.[2]

A. The decision is not a final judgment.

"From the earliest days of our judiciary," Congress has defined and limited this Court's authority to review judgments of state courts of last resort "to cases in which the State's judgment is final." *Jefferson v. City of Tarrant*, 522 U.S. 75, 80 (1997) (citing Judiciary Act of 1789, § 25, 1 Stat. 85). Section 1257(a)'s "firm final judgment rule," *id.* at 81, requires a judgment to be final in two senses. First, it must not be subject to further correction or review by the state courts. *Id.* Second, it must end the litigation. "It must be the final word of a final court." *Id.* (quoting *Market St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). When a state court remands a case for merits litigation, its decision is not final. *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam).

The first requirement is not satisfied. Merits discovery has only just begun. If, during that discovery,

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[2] "If review of a state-court judgment is sought," the petitioners' statement of the case must specify both when and how "the federal questions sought to be reviewed were raised * * * so as to show that * * * this Court has jurisdiction." Sup. Ct. R. 14.1(g)(i). Aside from its boilerplate jurisdictional statement, the petition says (at 16) that "The Massachusetts Supreme Judicial Court allowed Gordon a direct appeal, then affirmed," making it appear that Gordon bypassed the intermediate appellate court after the trial court issued a final judgment. The petition acknowledges only in passing (at 39) that there are "other issues remain[ing] for trial." Because Gordon failed to provide the requisite information under Rule 14 to enable this Court to determine its jurisdiction, the petition should be denied.

Gordon develops additional evidence relevant to DeWeese-Boyd's status, it may offer the evidence and ask the trial court for a new determination on the ministerial exception. *See generally Peterson v. Hopson*, 29 N.E.2d 140, 144 (Mass. 1940).

But even if the decision were to satisfy the first requirement, it would still fail the second: The decision was rendered in a discretionary interlocutory appeal, making it quintessentially nonfinal. *See Jefferson*, 522 U.S. at 80 n.2, 81. The Supreme Judicial Court decided only whether one affirmative defense applied, and then remanded for further proceedings on the merits, which will include litigation of the many other affirmative defenses that Gordon has asserted. Pet. App. 36a. What is more, DeWeese-Boyd also has other, related claims pending before the EEOC (No. 16C-2020-00237) and the Massachusetts Commission Against Discrimination (No. 19-BEM-03145), some of which cannot yet be brought to court because of administrative-exhaustion requirements but may later be added to the case in an amended complaint.

B. The decision does not satisfy any exception to the finality requirement.

Under narrow circumstances this Court has "treated state-court judgments as final for jurisdictional purposes although there were further proceedings to take place in the state court." *Florida v. Thomas*, 532 U.S. 774, 777 (2001) (quoting *Flynt v. Ohio*, 451 U.S. 619, 620-21 (1981) (per curiam)). Four categories of cases potentially merit that treatment. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). None apply here.

1. A case may be deemed final when the federal issue is conclusively determined and the outcome of the case is therefore preordained or a mere formality. In *Mills v. Alabama*, 384 U.S. 214 (1966), for example, the state court rejected a defendant's only defense—a challenge to the constitutionality of a criminal statute. *Id.* at 217. Because the defendant had no other defenses, the final disposition of the case on remand was set, and the case could be treated as effectively final. *Id.* at 217-18.

Here, by contrast, the Supreme Judicial Court considered and rejected just one of Gordon's *seventeen* affirmative defenses. *See* R.A. 45-48. The rest remain to be litigated in full. And Gordon may also, of course, argue that DeWeese-Boyd cannot make out a *prima facie* case; it can try to rebut that showing if she succeeds; and if that rebuttal is successful, it can then argue that DeWeese-Boyd fails to meet her ultimate burden of persuasion.

2. A case may be treated as final when the federal issue is separate from the other issues and "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. This element is satisfied only if "the state proceedings to take place on remand 'could not remotely give rise to a federal question that may later come'" to this Court. *Thomas*, 532 U.S. at 779 (quoting *Cox*, 420 U.S. at 480) (cleaned up). In *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), for example, the state court conclusively held that a federal radio license must be transferred in a property dispute, remanding solely for an accounting of the value of the property to be transferred. *Id.* at 124. Although the proceedings on remand technically continued the case, they could not present or address any federal issue and were in

effect wholly separate, so the judgment on the only federal question was final. *See id.* at 127.

Whether DeWeese-Boyd was a minister would *not* "require decision regardless of the outcome of future state-court proceedings," *Cox*, 420 U.S. at 480. Most obviously, Gordon could prevail on another ground, be it legal or factual. And on remand Gordon may seek to raise its other constitutional defenses, *see* R.A. 47, regardless of this interlocutory ruling. Because the merits litigation will therefore present additional federal questions, the second *Cox* category cannot be satisfied.

3. This Court may have jurisdiction if "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. In those situations, "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.* The prime example is when a state court of last resort decides a suppression motion in favor of a criminal defendant and state law limits the right of the state to appeal. *See, e.g.*, *New York v. Quarles*, 467 U.S. 649, 653 (1984). In that instance, if the state prevails on remand, the federal question is moot; if the state loses on remand, it is barred from appealing. In other words, further review is categorically unavailable.

If DeWeese-Boyd prevails in the trial court, there is nothing that would preclude Gordon from appealing at that time, including seeking review in this Court when the decision is actually final.

4. A decision may also be deemed final if the federal issue has been finally decided in the state court, the party seeking review could prevail on nonfederal grounds, reversal of the state court would be preclusive of any further litigation on the relevant cause of action, *and* failure to review the case immediately would seriously erode federal policy. *See Thomas*, 532 U.S. at 780.

Only truly exceptional issues have satisfied this standard. For example, a Florida statute threatened the existence of a free press when it forced any newspaper to print a political candidate's reply to the newspaper's criticism. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). Matters of national security have also risen to this level. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988). As have statutory guarantees that litigants need not have their cases heard in certain venues or state courts. *See Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548 (1963); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

Although a constitutional issue may present the potential for serious erosion of federal policy, the existence of a constitutional question alone is not enough to create jurisdiction in this Court. *Cf. Thomas*, 532 U.S. at 776, 780 (challenge to search of a passenger compartment under the Fourth Amendment did not satisfy *Cox*); *Flynt*, 451 U.S. at 620, 622 (same for state court's rejection of Fourteenth Amendment defense against discriminatory prosecution).

The fourth *Cox* category is not satisfied if "[t]he question presented for review is whether *on this record*" the state court came to the wrong answer on how to apply a legal standard. *See Flynt*, 451 U.S. at 622

(emphasis added). For if every case-specific application of a constitutional claim or defense were deemed final, the exception would "swallow the rule." *Id.* Any constitutional "issue finally decided on an interlocutory appeal in the state courts would qualify for immediate review." *Id.*

This case fails to satisfy the fourth *Cox* factor for at least three reasons.

First, as explained above (at 13-14), the decision of the Supreme Judicial Court did not conclusively resolve whether DeWeese-Boyd was a minister. Merits discovery may turn up new information that may allow Gordon to seek to relitigate that affirmative defense.

Second, reversal of the Supreme Judicial Court would not be dispositive of the issues on which Gordon seeks review. As explained below, *infra* 27-28, the Massachusetts courts did not decide the question, explicitly left open by *Hosanna-Tabor*, whether the ministerial exception precludes state-law contract claims. And Gordon has waived that issue before this Court by not raising it in the petition.

Finally, there is no federal policy at risk of being seriously eroded by continuing litigation in this case. The ministerial exception is a case-specific affirmative defense. *Hosanna-Tabor*, 565 U.S. at 195 n.4. And the question in this case is "whether on this record," *Flynt*, 451 U.S. at 622, the Supreme Judicial Court correctly applied *Hosanna-Tabor* and *Morrissey-Berru*. Even if the court applied that standard incorrectly, Gordon could always seek review at the end of the case—as with any other affirmative defense. *See, e.g.*, *Flynt*, 451 U.S. at 622. That Gordon might have to wait to present all its federal defenses at once—if that even

becomes necessary—could not seriously erode any federal policy. Parties may wish to have this Court weigh in early and often, but that is not how Section 1257 operates.

If all of that weren't enough, "in most, if not all, of the cases falling within the four [*Cox*] exceptions * * * there were no other federal issues to be resolved" and therefore "no probability of piecemeal review with respect to federal issues." *Flynt*, 451 U.S. at 621. But as just explained, there are a host of other federal issues yet to be resolved in this case, including four additional constitutional defenses. *See* R.A. 45-48.

In sum, Gordon not only failed to meet its burden to establish this Court's jurisdiction under *Cox*, but it failed to mention the issue at all. Because the decision here is not final, this Court does not have jurisdiction. That should end the matter—for now, anyway.

II. Whether an "integration" policy automatically renders all professors ministers does not warrant this Court's review.

Even if there were jurisdiction to hear this case, the Court should not consider the first question presented—whether a professor at a religious college is a minister solely because the college requires all professors to generally integrate their faith into their work. The Supreme Judicial Court's decision does not conflict with the decisions of this Court. There is no split in authority among the circuit courts or the state courts of last resort. And this case is a bad vehicle to address Gordon's question.

A. The decision of the Supreme Judicial Court does not conflict with this Court's decisions.

Gordon's contention that there is a conflict between this Court's jurisprudence and the Supreme Judicial Court's decision rests on a misunderstanding of what both courts have said. Ultimately, Gordon's gripe is not that the Supreme Judicial Court departed from this Court's instructions, but that Gordon just doesn't like the ruling.

Gordon insists that the Supreme Judicial Court applied a "rigid checklist" in rejecting the school's affirmative defense. Pet. 24. But it did nothing of the sort. Instead, it recognized that it must "take all relevant circumstances into account." Pet. App. 23a (quoting *Morrissey-Berru*, 140 S. Ct. at 2067). Using this Court's precedents as its guidepost, the Supreme Judicial Court correctly recognized that "a case need not mirror" *Hosanna-Tabor* and *Morrissey-Berru* "for the ministerial exception to apply." Pet. App. 35a. So rather than a side-by-side comparison of the cases, the court reviewed the record—including the "handbook's detailed expectations of faculty"—to "understand the nature and extent of DeWeese-Boyd's duties," Pet. App. 27a, as this Court directed, *see Morrissey-Berru*, 140 S. Ct. at 2067.

These duties were "different in kind" from the sorts that made the teachers ministers in *Hosanna-Tabor* and *Morrissey-Berru*. Pet. App. 33a. Whereas those teachers taught religion and led prayers, performing the important religious functions of teaching and preaching the faith, DeWeese-Boyd "was, first and foremost, a professor of social work." Pet. App. 24a. Her scholarship and teaching focused on sustainability, general social-work practice, and the social-

work practicum. Pet. App. 24a. She did not "teach classes on religion, pray with her students, or attend chapel with her students," "nor did she lead students in devotional exercises or lead chapel services, like the plaintiff in *Hosanna-Tabor*." Pet. App. 24a; *cf. Morrissey-Berru*, 140 S. Ct. at 2066. She "was not ordained or commissioned; she was not held out as a minister and did not view herself as a minister; and she was not required to undergo formal religious training." Pet. App. 33a.

None of that minimizes DeWeese-Boyd's Christian faith. She has never shied away from describing how her religion has informed her professional life: It drove her to study and teach social work as a means to pursue equality and justice and to care for others, as her faith teaches. *See, e.g.*, R.A. 395-96. That is akin to a physician's being drawn to medicine by a faith-based call to heal. DeWeese-Boyd treated her teaching and scholarship at Gordon as a way to pursue religiously inspired ends, not as an opportunity to teach or preach the faith.

Gordon overstates the religious nature of her role by emphasizing DeWeese-Boyd's 1998 application to the college, where she wrote that she considered social work well suited to a Christian college because "Christians have an undeniable call to minister to others," and that the role of a Christian academic includes "guid[ing] and mentor[ing] each student in such a way as to help her discern how Christianity impacts upon her particular discipline." Pet. 11. These statements were from over 20 years ago, *before she began teaching at Gordon*. They do not reflect the job she actually performed.

Gordon also leans on a handful of statements from formal documents to argue that the Supreme Judicial

Court "disregarded" the duty of professors to integrate the Christian faith into their teaching and scholarship. Pet. 24-27. That is incorrect. The court recognized the "undisputed" fact that the "integrative responsibility was part of [DeWeese-Boyd's] duty and function." Pet. App. 25a. The court then looked to what DeWeese-Boyd actually did—and did not do—to determine whether that responsibility sufficed to transform her into a minister. Pet. App. 26a-27a. The court recognized that she did not "meet with students for spiritual guidance, pray with students, directly teach them doctrine, or participate in religious rituals or services with them." Pet. App. 26a. And unlike in *Morrissey-Berru* and *Hosanna-Tabor*, the court determined, "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." Pet. App. 27a. Thus, the court concluded, the responsibility to integrate religion into DeWeese-Boyd's teaching was "different in kind" from the responsibilities that made the employees in *Hosanna-Tabor* and *Morrissey-Berru* ministers. Pet. App. 33a.

Gordon further insists that at "*any* religious college" a professor is a minister if formal documents like "mission statements, faculty handbooks, and codes of conduct" say that faculty are responsible for furthering the institution's religious mission. Pet. 23 (emphasis added). But *Hosanna-Tabor* and *Morrissey-Berru* straightforwardly *rejected* that sort of formalism: "What matters, at bottom, is what an employee does." *Morrissey-Berru*, 140 S. Ct. at 2064. The Supreme Judicial Court followed those precedents in rejecting Gordon's attempt to "oversimplify" this Court's legal test. *See* Pet. App. 26a.

B. There is no split in authority among the lower courts.

Gordon also imagines splits among the decisions of three circuits and one other state court of last resort. Yet after trawling 40 years of federal and state reporters—going back three decades before this Court even recognized the ministerial exception—Gordon points to only seven cases from appellate courts (federal *or* state). And only five considered whether to apply the ministerial exception to professors at religious colleges. It then cherry-picks bits from those cases to contend that the courts are divided, supposedly making dispositive either "integration" of a professor's faith, or else the types of classes the professor teaches.

But no federal court of appeals and no state court of last resort (including in this case) has determined whether the ministerial exception applies based exclusively, or even primarily, on whether a professor integrates religion into teaching or on what courses the professor teaches. In other words, Gordon purports to identify a split between two legal standards that *no* courts have actually applied.

1. Gordon argues that the Fifth Circuit and the Kentucky Supreme Court have made the courses that a professor teaches determinative, and that they have distinguished between "professors who integrate their faith into disciplines they teach and those who teach their faith as a discipline." Pet. 32. But neither adopted the rule that Gordon contends.

The Fifth Circuit cases to which Gordon points were decided thirty years before *Hosanna-Tabor*. Yet even without this Court's guidance, the Fifth Circuit's ministerial-exception analysis looked to employees'

specific job responsibilities. Thus, the court determined that the exception did not apply to a psychology professor at a religious college because she did not "attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine." *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980). It was not enough that the professor was expected to act as an "exemplar[] of practicing Christians" because she was not an "intermediar[y]" between the church and the faithful. *Id.* One year later, the court applied the same analytical framework to hold that seminary faculty who taught religious doctrine to students training for ecclesiastical roles *were* ministers. *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283-84 (5th Cir. 1981). Again, the court weighed multiple factors, including that students attended the seminary to receive training for leadership roles within the church, *id.* at 279, and that most faculty members were ordained, were expected to "model[] the ministerial role for the students," and served as "intermediaries between the Convention and the future ministers of many local Baptist churches." *Id.* at 283-84.[3] In other words, the court in both cases performed the functional analysis that this Court would eventually specify.

The Kentucky Supreme Court has likewise performed functional analyses—based expressly on *Hosanna-Tabor*—and similarly refused to create a categorical rule for who is or isn't a minister. In a pair of decisions issued on the same day, the court concluded that one seminary professor fell within the ministerial

[3] The court also held that categorically designating all seminary employees as ministers would be inappropriate: Their different functions might merit different classifications. *Id.* at 284-85.

exception while another did not. *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 602 (Ky. 2014); *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587, 592 (Ky. 2014). That was because one "gave sermons on multiple occasions, served communion, taught classes on Christian doctrine, opened class with prayer each day, affirmatively promoted students' development in the ministry, and served as a representative—a literal embodiment—of the Seminary at events on multiple occasions." *Kirby*, 426 S.W.3d at 614. The other, a professor of the history of religion, taught students to "interpret historical and modern cultures and contexts." *Kant*, 426 S.W.3d at 592. Though the latter was sometimes a "source of religious instruction," *id.* at 595 (quoting *Hosanna-Tabor*, 565 U.S. at 192), he never "espouse[d] the tenets of the Christian Church * * * or Christianity," *id.* at 593. Teaching about religion was, on its own, insufficient to make him a minister. *Id.*

Far from adopting the categorical test that Gordon describes, the Kentucky court considered the "totality of the circumstances," *Kirby*, 426 S.W.3d at 614. It evaluated the "important functions performed for the religious institution," considering whether those functions "were essentially liturgical, closely related to the doctrine of the religious institution, * * * performed in the presence of the faith community," and whether they "resulted in a personification of the religious institution's beliefs." *Id.*

In short, both the Kentucky Supreme Court and the Fifth Circuit looked at what the professors *did*, which is precisely what this Court has directed. And that is the approach the Supreme Judicial Court employed.

2. Gordon then insists that the D.C. and Seventh Circuits have adopted a different categorical rule, in which a professor's integration of faith into teaching is determinative. That, too, is incorrect.

Like the Kentucky Supreme Court and the Fifth Circuit—and well before *Hosanna-Tabor*—the D.C. Circuit applied the ministerial exception to a professor at a seminary who trained her students for ordained roles within the church. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463-64 (D.C. Cir. 1996). Looking to the job functions of a nun in the Canon Law Department at Catholic University—"the sole entity in the United States empowered by the Vatican to confer ecclesiastical degrees in canon law," *id.* at 464—the court determined that she "perform[ed] the vital function of instructing those who will in turn interpret, implement, and teach the law governing the Roman Catholic Church and the administration of its sacraments," *id.* The nun thus did far more than "integrate" her faith into her teaching: She taught the next generation of Church leaders how to perform their ecclesiastical duties in line with church doctrine.

Gordon's reliance on *Grussgott v. Milwaukee Jewish Day School*, 882 F.3d 655 (7th Cir. 2018), as support for its invented "integration" test, is yet more perplexing. There, a Hebrew teacher at a Jewish elementary school was a minister because, among other reasons, she followed a curriculum designed to "develop Jewish knowledge and identity," had extensive previous experience as a religious teacher, and prayed with her students. *Id.* at 660. The court considered all of that and did not stop at "integration." Nor does *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003), have anything to do with integration. There, the court held, with little explanation,

that a press secretary hired to shape a church's message fell within the ministerial exception. *Id.* at 704.

Bereft of any genuine split, Gordon points to a smattering of district-court opinions. *But see* Sup. Ct. R. 10. If the question of integration caused the disarray that Gordon contends, surely more than five courts of appeals would have weighed in over the last 40 years, and at least one would have parted company with the others.

C. This case is a poor vehicle to address the question of integration that the petition poses.

1. If Gordon were to prevail in this Court, it would not resolve the case.

Beyond the jurisdictional defect and lack of split in authority, review at this juncture makes no sense because it could not end the case.

In *Hosanna-Tabor*, the Court expressly reserved the question whether the ministerial exception is a defense against contract claims. 565 U.S. at 196 ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."). *Morrissey-Berru* did not broach that question either.

DeWeese-Boyd has state common-law contract claims. Pet. App. 3a-4a. She has maintained that even if Gordon were to prevail on the ministerial-exception defense, those claims would not be barred. *See* Pet. App. 57a. Although the parties briefed the issue in the state courts, neither the superior court nor the Supreme Judicial Court passed on it. *See* Pet. App. 36a n.27, 77a. Because DeWeese-Boyd was not a minister,

there was no need to address the question. Pet. App. 36a n.27.

Gordon did not raise or even mention this issue in the petition, so it is waived. And even if it had, this Court is "a court of final review and not first view." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)). It generally "do[es] not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999). The Court should not depart from that sound principle in this case by deciding an issue that the Supreme Judicial Court left open and Gordon failed to raise in its petition.

2. Gordon's petition omits key facts.

Gordon asks the Court to decide whether professors are automatically ministers when they are required "to integrate Christian 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." Pet. i. That question, which depends on misrepresentations of the factual record, is not genuinely presented here.

a. Gordon's entire argument for why DeWeese-Boyd is a minister hangs on the institution's integration requirement. *See* Pet. 9. But Gordon offers a selective picture of what the requirement entailed and how it was implemented.

Gordon does not show how DeWeese-Boyd integrated Christian faith into her classes. For good reason: She understood "integration" to be about aligning her scholarship and other professional endeavors with her faith, not about imparting her beliefs (or Gordon's)

to her students. *See* Pet. App. 126a-127a. And nowhere in the record does Gordon show that she was wrong about that or was somehow failing to perform her job duties.

In fact, Gordon twice accepted her explanation of integration. When asked to submit a paper "on the development of a Christian perspective within [her] academic discipline" for her third-year review, R.A. 265, DeWeese-Boyd selected a secular book review, explaining that her work is "inherently integrated" because her faith guides her selection of subjects to explore through her scholarship, R.A. 382-86. And in her application for tenure, she explained that integration was "fundamentally about * * * pursuing scholarship" that was true to her faith. R.A. 388. Gordon apparently accepted her interpretation, for it awarded her tenure.[4]

b. Gordon also asks this Court to grant review to declare that professors are automatically ministers if they are required generally to teach from a Christian perspective and to direct the spiritual formation of

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[4] That Gordon required faculty to explain their understanding of integration is not the same as evaluating whether they successfully integrated "faith and learning," Pet. 10, much less does it show the integration requirement to entail the sorts of job functions that might categorically make one a minister. Gordon ignores these critical distinctions.

Gordon also contends that a professor's track record of integration weighs heavily in performance evaluations and applications for promotions and tenure. Pet. 10. But that's not reflected in the record. *See* Pet. App. 120a. And nowhere does Gordon point to any evidence that integration played a role in DeWeese-Boyd's (or anyone else's) promotions or reviews.

students. Pet. 9-10, 25-26. Again, Gordon relies on broad statements and ignores the facts in the record.

There is nothing in the record that shows how DeWeese-Boyd directed (or was expected to direct) the spiritual formation of students. After all, she did not teach religion or theology courses; she taught courses on general social-work practice and sustainability and oversaw social-work practicums. Pet. App. 24a. As director of the social-work program and social-work practicums, her responsibilities were substantially managerial and administrative. *See* Pet. App. 105a-106a. And as Practicum Director she devoted significant time to entities *outside* the college, again spending less time in the classroom with students. Pet. App. 105a-106a; R.A. 409-10, 610.

c. Nor, contrary to Gordon's assertion, did DeWeese-Boyd "carr[y] the title 'minister,'" Pet. 24. It is true that Gordon's handbook now refers to faculty as "ministers." But that language was added in 2016, almost two decades into DeWeese-Boyd's employment at Gordon, Pet. App. 10a, as part of a legal strategy to "trigger judicial deference," R.A. 670. And the categorization was "a significant departure from the faculty's own sense of their responsibilities and calling at Gordon." *See* R.A. 623, 631.

3. The Supreme Judicial Court's decision will not trigger the catastrophe that Gordon imagines.

Undeterred, Gordon insists that denying review of a decision as to one professor (who is no longer employed by Gordon and does not seek reinstatement) means that it will be required to hire and retain faculty who do not share its religious ideals and will not

carry out its religious mission. Pet. 19. And as a result, religious colleges across the country will be forced to shut down and put their assets in hock.

But the sky won't fall. The Supreme Judicial Court's ruling means only that Gordon could not take adverse action against DeWeese-Boyd without regard to the federal and state laws governing employment relationships. Gordon can still prevail on the merits. And it is still entitled to the protections of the ministerial exception with respect to its employees who *do* perform ministerial functions and fulfill ministerial roles. So are other religious colleges.

Moreover, nothing in the Supreme Judicial Court's opinion prohibits Gordon from enforcing the employment requirements, whether religious or otherwise, set out in its employee contracts, handbook, and statements of faith and conduct. So, for example, the Supreme Judicial Court's opinion simply has no bearing on Gordon's ability to require all faculty to subscribe to its Statement of Faith, "through which they affirm the fundamental tenets of their faith." *See* Pet. 7. Nor does the opinion impinge on Gordon's ability to require faculty to abide by its Statement on Life and Conduct. *See* Pet. 7.[5]

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[5] Gordon supports its fearmongering by explaining that DeWeese-Boyd was engaged in "public advocacy *against* the College's" beliefs. *See* Pet. 18. Again, that's not what the record shows: DeWeese-Boyd affirmed Gordon's Statement of Faith, and there is nothing in the record to show that she did not live fully in accordance with the "behavioral expectations" in Gordon's Life and Conduct Statement. *See* R.A. 247, 308; Pet. App. 14a. Her advocacy for the "rights and safety" of LGBTQ students at Gordon was an attempt to "engage conversations" among people who had different views yet remained committed to Gordon and its mission. *See* R.A. 411.

Indeed, it is Gordon's position that would have enormous consequences if adopted. If Gordon had its way, every professor at every religious college would automatically be deemed a minister, no matter the discipline, job duties, or actual functions, and any potential contract claims they might have would fail. The upshot is that tenure would be a dead letter at those schools. *See, e.g.*, William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* 186, 213 (4th ed. 2006). Gordon offers no justification for completely upending academic freedom at religious colleges.

III. The Court should reject Gordon's request to overturn *Hosanna-Tabor* and *Morrissey-Berru*.

Gordon's second question—whether the First Amendment requires courts to defer to an employer's good-faith categorization of who is a minister, Pet. i—is even more unfit for review. Dedicating barely a page and a half to the issue, Gordon asks the Court to grant review so that it can scrap altogether the functional analysis at the heart of *Hosanna-Tabor* and *Morrissey-Berru* and make a single question determinative.[6]

But Gordon gives no good reason for the Court to revisit those decisions. It raises the potential threat of entanglement. Pet. 37-38. Yet it points to nothing in the Supreme Judicial Court's decision that failed to follow this Court's admonition that, in "any given

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[6] Gordon insists that "the Court reserved" this question in *Hosanna-Tabor* and *Morrissey-Berru*. Pet. 37. That is wrong. The Court has twice made clear that it was "not imposing any 'rigid formula,'" *Morrissey-Berru*, 140 S. Ct. at 2067 (quoting *Hosanna-Tabor*, 565 U.S. at 190), because courts must instead "take all relevant circumstances into account," *id.* "Simply giving an employee the title of 'minister' is not enough to justify the exception." *Id.* at 2063.

case, courts must take care to avoid 'resolving underlying controversies over religious doctrine.'" *Morrissey-Berru*, 140 S. Ct. at 2063 n.10 (quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969)). Nor does Gordon point to any other court that has struggled to heed this warning or offered even the slightest anxiety about its administrability. Nor are we aware of any.

What is more, Gordon's question assumes that its ministerial designation for all faculty in 2016 was in "good-faith." *See* Pet. i. DeWeese-Boyd does not concede that point. And to the extent that the record speaks to the issue, it arguably supports the opposite conclusion: The record suggests that the designation of faculty as ministers was not for religious reasons but for "legal reasons" to "trigger judicial deference." R.A. 670.

A mere thirteen months after *Morrissey-Berru*, Gordon asked this Court to revisit its decision, before most courts have had any opportunity to apply it. The Court should not revisit *Hosanna-Tabor* and *Morrissey-Berru*. And it certainly should decline Gordon's invitation to overrule them.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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NOVEMBER 2021