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No. 2020AP002007

In the Supreme Court of Wisconsin

CATHOLIC CHARITIES BUREAU, INC., BARRON COUNTY
DEVELOPMENTAL SERVICES, INC., DIVERSIFIED SERVICES, INC.,
BLACK RIVER INDUSTRIES, INC., AND HEADWATERS, INC.,
Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,
Respondent-Co-Appellant,

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE
DEVELOPMENT,
Respondent-Appellant.

On Remand from the Supreme Court of the United States
Case No. 24-154

SUPPLEMENTAL BRIEF OF PETITIONERS-RESPONDENTS-PETITIONERS

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INTRODUCTION

This case brings with it a long history. It has gone through every layer of review possible for a tax exemption request first made to the Department of Workforce Development, going all the way from that body to the United States Supreme Court and then back again.

Although the issues raised by the parties were fully aired at each level of review and have now all been resolved, Wisconsin suggests for the first time on remand from the United States Supreme Court that it can substitute its own preferred “remedy” for the remedy Catholic Charities has been seeking over 8 years of litigation. In response to the constitutional violation unanimously recognized by the United States Supreme Court, Wisconsin asks this Court to take tax exemptions away from a broad array of *other* religious and nonreligious third parties not before the Court rather than grant the exemption requested by Catholic Charities 8 years ago.

The answer to Wisconsin’s question is unequivocally no. Wisconsin’s immodest proposal is wrong for at least ten reasons, each of which separately requires the Court to extend the religious exemption to Catholic Charities.

First, Wisconsin is wrong when it says there’s room for remedial choice because this Court is not writing on a blank slate. The fact that this Court’s decision not to allow the religious exemption was expressly reversed by the United States Supreme Court obliges this Court to extend that exemption to Catholic Charities on remand. Wisconsin does not get a do-over.

Second, the Court is bound by *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), where the United States Supreme Court

rejected a state supreme court's attempt to deny a tax benefit to religious claimants by denying the tax benefit to a lot of other entities too.

Third, the First Amendment's guarantee of religious neutrality as set forth in *Walz v. Tax Commission*, 397 U.S. 664 (1970) and the Supreme Court's decision in this case demands more than mere parity—it also requires protection of the fundamental liberty interests at stake.

Fourth, the law of remedies requires that “[a]s a general rule, an injunction’ could not bind one who was not a ‘party to the cause.’” *Trump v. CASA, Inc.*, 606 U.S. 831, 842 (2025). Eliminating tax exemptions for a host of entities other than Catholic Charities would run afoul of that rule. Rather, in a constitutional case like this one, the remedy must be narrowly tailored to the injury complained of—here, the imposition of a tax on Catholic Charities.

Fifth, eliminating the religious exemption (or a broader set of exemptions) would be contrary to the Legislature's intent under the standard set out in *Welsh v. United States*, 398 U.S. 333 (1970). Indeed, the Legislature has expressly told both this Court and the United States Supreme Court that the Legislature's unequivocal intent is for Catholic Charities to receive the tax exemption.

Sixth, Wisconsin long ago forfeited any claim to request that Catholic Charities' remedy be anything other than receiving the exemption. Wisconsin should have raised that issue well before reversal and remand by the United States Supreme Court. It should have made those arguments in a timely fashion so that this Court and the United States Supreme Court had an opportunity to evaluate them.

Seventh, adopting Wisconsin's proposal would violate the church autonomy doctrine by penalizing the Catholic Church for how it organizes itself according to its religious principles.

Eighth, adopting Wisconsin's proposal would entangle church and state. Indeed, one of Wisconsin's main arguments to the United States Supreme Court was that the religious exemption is "an anti-entanglement statute." So, even by Wisconsin's own telling, eliminating the religious exemption would result in entanglement. Wisconsin's proposal is thus a bait-and-switch, telling the United States Supreme Court one thing, and this Court another.

Ninth, adopting Wisconsin's proposal would render Wisconsin law not generally applicable for purposes of the Free Exercise Clause, because its rule would privilege some religious groups over others, and privilege nonreligious entities over religious entities.

Tenth, Wisconsin's proposed rule would result in unconstitutional religious targeting. "[T]he world is not made brand new every morning," and neither Wisconsin nor this Court have a free hand to design an exemption regime as if nothing had gone before. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866 (2005) (Souter, J., for the majority). Wisconsin has demonstrated a longstanding intention to exclude Catholic Charities and other entities like it. Having violated the Constitution, Wisconsin cannot now act as if its new proposal has nothing to do with that history or that it has not targeted Catholic Charities for exclusion from the very beginning. Indeed, if the "object of a law is to infringe upon or restrict practices because of their religious motivation," then it immediately triggers strict scrutiny under the Free Exercise Clause. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

Any one of these problems would be reason enough to reject Wisconsin's proposal; together, they mandate what the United States Supreme Court already decided—Catholic Charities is entitled to the exemption.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Federal Unemployment Tax Act, Wisconsin's complementary law, and the religious exemption

The Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311 “call[s] for a cooperative federal-state program of benefits to unemployed workers.” *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 (1981). As part of this cooperative system, employers pay the federal government a percentage of their employees' annual wages, but can claim a credit of up to 90% of this federal tax for “contributions” made to federally approved state unemployment compensation programs. *Id.* at 775 n.3; 26 U.S.C. § 3302(a)(1).

To allow their employers to take advantage of the federal tax credit, Wisconsin requires employers “to make regular contributions to [its] unemployment fund through payroll taxes.” *Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 242 (2025). The State, however, “exempts over 40 forms of ‘employment’ from its unemployment compensation program.” *Id.* at 253 (citing Wis. Stat. §§ 108.02(15)(f)-(kt)). Among these is “an exemption for religious employers.” *Catholic Charities*, 605 U.S. at 242. This exemption “applies to any ‘church or convention or association of churches,’ without further qualification, and to services provided ‘[b]y a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.’” *Id.* “[T]he exemption also covers nonprofit organizations ‘operated, supervised, controlled, or principally supported by a church or convention or

association of churches,’ but only if they are ‘operated primarily for religious purposes.’” *Id.* Wisconsin’s religious exemption is “textually parallel” to the “religious-employer exemption” Congress adopted in FUTA. *Id.*

B. Catholic Charities and its religious mission

Catholic Charities Bureau, Inc. “is a nonprofit organization that serves as the social ministry arm of the Roman Catholic Diocese of Superior, Wisconsin.” *Id.* at 243. Catholic Charities’ “mission is to ‘carry on the redeeming work of our Lord.’” *Id.* “In aid of that mission,” Catholic Charities “‘provides services to the poor and disadvantaged’ and seeks to ‘be an effective sign of the charity of Christ.’” *Id.* (cleaned up). “It does not distinguish on the basis of ‘race, sex, or religion in reference to clients served, staff employed and board members appointed.’” *Id.*

The Bishop of the Diocese of Superior has plenary control over Catholic Charities and its sub-entities, which are separately incorporated from the Diocese of Superior. *Id.* Like the Diocese, these entities all have 501(c)(3) status under the Roman Catholic Church’s group tax exemption. *Id.* And they “provide a range of charitable services to local communities across Wisconsin.” *Id.* Each sub-entity signs Catholic Charities’ *Guiding Principles of Corporate Affiliation*, which gives Catholic Charities ultimate responsibility for ensuring the sub-entities remain faithful to their Catholic mission. Pet.App.422a-425a.¹ And each sub-entity is directed to comply fully with Catholic social teaching in providing services. Pet.App.8a, 425a. All new key staff and director-level positions receive a manual entitled *The Social Ministry of Catholic Charities Bureau in the*

¹ Citations to “Pet.App.” refer to the Petitioners’ Appendix filed with Catholic Charities petition for certiorari in the United States Supreme Court. Citations to “Wis.App.” refer to the Appendix previously filed in this Court.

Diocese of Superior, which they must review during orientation. Pet.App.371a-385a. In addition, every new employee receives a welcome letter with Catholic Charities' mission statement, code of ethics, and statement of the ministry's philosophy toward service. Pet.App.131a, 207a, 380a-385a, 469a-475a. All employees are instructed to abide by these documents. Pet.App.130a-131a, 207a.

Catholic Charities' ministry is also guided by the principles of its Catholic faith. Specifically, Catholic teaching “demand[s] that Catholics respond in charity to those in need.” Pet.App.128a; see also Pope Benedict XVI, *Deus Caritas Est* ¶ 32 (2005) (“[Charity] has been an essential part of [the Church’s] mission from the very beginning.”); *James* 1:27 (RSV-CE) (“Religion that is pure and undefiled before God and the Father is this: to visit orphans and widows in their affliction[.]). Indeed, the Catholic Church “claims works of charity as its own inalienable duty and right.” Pope Saint Paul VI, *Apostolicam Actuositatem* ¶ 8 (1965); Catechism of the Catholic Church ¶ 1826 (charity “is the first of the theological virtues”); *Deus Caritas Est* ¶ 25(a) (“For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being.”). To Catholic Charities, the purpose, form, and outworking of charity are fundamentally and inescapably religious.

C. Catholic Charities seeks to participate in the Wisconsin bishops’ unemployment assistance program

For the Catholic Church, “[t]he obligation to provide unemployment benefits ... spring[s] from the fundamental principle of the moral order in this sphere.” Pet.App.433a (quoting Pope Saint John Paul II, *Laborem Exercens* (1981)). Prompted by and in accordance with this teaching, the Wisconsin bishops created the Church Unemployment Pay Program

(CUPP) “to assist parishes, schools, and other church employers in meeting their social justice responsibilities by providing church funded unemployment coverage.” Pet.App.433a.

CUPP has long served the needs of employees throughout Wisconsin without issue. CUPP provides the same maximum weekly benefit rate as the State’s system. Pet.App.438a. And, in some instances, an employee may receive a higher percentage of his salary than in the State’s system, while often receiving benefits more quickly. Compare *id.* (“50% of the employee’s average weekly gross wages”) with Wis. Stat. § 108.06(1) (“[N]o claimant may receive total benefits based on employment in a base period greater than 26 times the claimant’s weekly benefit rate ... or 40 percent of the claimant’s base period wages, whichever is lower.”). And, unlike participants in the State’s program, CUPP participants need not reapply for benefits on a weekly basis. Pet.App.441a.

Catholic Charities has long sought to join CUPP. Participating in the Catholic Church’s unemployment program would bring Catholic Charities into alignment with the Diocese of Superior (which participates in CUPP) and allow Catholic Charities to direct additional resources toward serving those in need. Currently, Catholic Charities and its sub-entities are reimbursable employers, meaning they pay only for the benefits that their employees receive, they don’t pay a risk-adjusted quarterly fee. This option is available to all non-profits. Wisconsin Br. at 4, 6 n.1, 9, *Catholic Charities*, 605 U.S. 238 (No. 24-154).

D. Prior proceedings

In 2004, Catholic Charities requested a religious exemption from the State’s system. This request was denied. Pet.App.450a-463a. Then in 2016—after one of Catholic Charities’ sub-entities (not a Petitioner here)

was held to qualify for the religious exemption under Section 108.02(15)(h)(2), Pet.App.497a-504a—Catholic Charities again sought an exemption from the Department of Workforce Development. The Department, however, held that Catholic Charities was not “operated primarily for religious purposes,” Pet.App.351a-370a, and thus did not qualify for an exemption. Catholic Charities appealed. After a two-day hearing, an administrative law judge reversed, ruling for Catholic Charities. Pet.App.291a-350a. The Department then petitioned the Labor and Industry Review Commission for review. The Commission reversed. Pet.App.226a, 241a, 257a, 272a, 289a.

Catholic Charities then sought review in Douglas County Circuit Court. The Circuit Court ruled for Catholic Charities. Pet.App.209a-210a. The Department and the Commission appealed. The Court of Appeals reversed the Circuit Court’s order and reinstated the Commission’s decision denying Catholic Charities an exemption. Pet.App.127a.

Catholic Charities next petitioned this Court for review. After granting review, this Court first recognized that Catholic Charities was “operated, supervised, controlled, or principally supported by a church,” satisfying the first requirement of Section 108.02(15)(h)(2). Pet.App.5a & n.3. But it then held that determining whether Catholic Charities is “operated primarily for religious purposes” under Section 108.02(15)(h)(2) requires not just an inquiry into the ministry’s religious “motivations,” but also a separate “objective inquiry” into its “activities” to determine whether those activities are “‘primarily’ religious in nature.” Pet.App.21a-22a, 26a-27a, 29a. This Court then concluded that Catholic Charities’ activities are not primarily religious “in nature” and therefore

denied it the Section 108.02(15)(h) religious exemption. Pet.App.32a-33a.

Catholic Charities then sought review from the U.S. Supreme Court, which was granted. *Catholic Charities*, 605 U.S. at 241. At the U.S. Supreme Court, Catholic Charities argued that this Court's interpretation of the religious exemption violated the First Amendment in (at least) three ways: "First, government cannot interfere with the inner workings of religious institutions." Catholic Charities Br. at 21, *Catholic Charities*, 605 U.S. 238 (No. 24-154). "Second, the Religion Clauses also protect religious institutions' sphere of internal control by ensuring that government cannot get entangled in religious affairs." *Id.* at 21-22. "Third, Religion Clauses cases consistently prevent discrimination by government against religious institutions—whether in the form of discrimination between religious and nonreligious institutions or discrimination among different religious institutions." *Id.* at 22.

By contrast, Wisconsin argued that the religious-purposes exemption "is an anti-entanglement statute," Transcript of Oral Argument at 110:8-9, *Catholic Charities*, 605 U.S. 238 (No. 24-154), available at <https://perma.cc/58RB-KKGN>, and aims at "avoid[ing] excessive entanglement and preserv[ing] the autonomy and freedom of certain religious organizations." Wisconsin Br. at 21, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (cleaned up); see, e.g., *id.* at 1, 2, 12-13, 15, 22-23, 31-32 (similar). But in Wisconsin's view, application of the exemption should have been limited to organizations that "primarily engage[] in distinctively religious activity." *Id.* at 24 (cleaned up).

The Supreme Court unanimously agreed with Catholic Charities. In an opinion authored by Justice Sotomayor, the Supreme Court held that

“Wisconsin’s exemption, as interpreted by its Supreme Court, ... grants a denominational preference by explicitly differentiating between religions based on theological practices. Indeed, petitioners’ eligibility for the exemption ultimately turns on inherently religious choices (namely, whether to proselytize or serve only co-religionists).” *Catholic Charities*, 605 U.S. at 250. In fact, this was a “paradigmatic form of denominational discrimination.” *Id.* at 249.

The Court thus applied strict scrutiny and held that the law easily failed narrow tailoring. *Id.* at 252-54. As the Court explained, the “distinctions drawn by Wisconsin’s regime ... are vastly underinclusive” because they exempt “over 40 forms of ‘employment’” and, worse, exempt “religious entities that provide charitable services in a similar manner to” Catholic Charities solely because “the work is done directly by the church itself or its ministers.” *Id.* at 253. This vast “underinclusiveness” “belie[d] the State’s claim of narrow tailoring.” *Id.* Thus, the Supreme Court “reversed” and “remanded for further proceedings not inconsistent with this opinion.” *Id.* at 254. Justices Thomas and Jackson wrote concurring opinions, though they also joined the Court’s opinion in full. *Id.* at 255, 270.

After losing at the U.S. Supreme Court, Wisconsin asked on remand for supplemental briefing in this Court on a “critical issue” that (it believed) remains “undecided: the appropriate remedy for [Wisconsin’s] First Amendment violation.” Wisconsin Letter at 1-2 (July 9, 2025). Catholic Charities responded that the United States Supreme Court’s opinion “cannot be read to allow anything other than extension of the tax exemption to Petitioners.” Catholic Charities Letter at 1 (July 10, 2025). On September 18, 2025, this Court ordered supplemental briefing on the

“appropriate remedial measures to be taken in light of the Supreme Court’s opinion.” Order at 1. Justices Bradley and Ziegler dissented. *Id.* at 2.

ARGUMENT

I. Catholic Charities must be granted the tax exemption.

Wisconsin, and this Court, are bound to extend the unemployment tax exemption to Catholic Charities. The United States Supreme Court’s holding and reasoning did not leave any other choice. To do otherwise would be to contradict the Supreme Court’s decision in *Espinoza* on the same remedial question. It would also contradict Supreme Court precedent guaranteeing religious neutrality, the law of remedies, and the demonstrated intent of the Legislature. Finally, it would bless an argument Wisconsin forfeited. This Court must therefore recognize the exemption for Catholic Charities and affirm the judgment of the Circuit Court.

A. The U.S. Supreme Court’s decision in this case requires extending the religious exemption to Catholic Charities.

The U.S. Supreme Court did not leave Wisconsin free to deny Catholic Charities an exemption by other means. Instead, the Supreme Court’s judgment—which unanimously *reversed* that of this Court—makes clear that the only option is to recognize the exemption for Catholic Charities. There is no remedial choice.

It is significant that the Supreme Court *reversed* this Court’s judgment, which had held Catholic Charities ineligible for the exemption. The Supreme Court ordinarily “reverse[s]”—not just “vacate[s]”—when it “deems the judgment below to be *absolutely wrong*.” The Supreme Court’s Style Guide § 10.5 (Jack Metzler ed., 2016) (emphasis added). And “[i]t has long been well established that the reversal of a lower

court's decision sets aside that decision ... and requires that it be treated thereafter as though it never existed.” *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). In other words, “[t]o ‘reverse’ a judgment means to ‘overthrow, vacate, set aside, make void, annul, repeal, or revoke it.’ A judgment reversed by a higher court is ‘without any validity, force or effect, and ought never to have existed.’” *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991) (citation omitted); *see also Pottgen v. Mo. State High Sch. Activities Ass’n*, 103 F.3d 720, 724 (8th Cir. 1997) (“A judgment that has been reversed on appeal is a nullity.”); *Kaplan v. Joseph*, 125 F.2d 602, 606 (7th Cir. 1942) (“After reversal [a] decree [is] no longer of any force or effect. The parties [a]re in precisely the same situation as though no decree had been entered.”). Thus, by *reversing* this Court’s judgment, the U.S. Supreme Court “reinstate[d] the judgment ... entered by the [Douglas County Circuit] Court,” *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983), which had recognized the exemption for Catholic Charities.

Nor can there be any doubt that the Supreme Court thought it was resolving Catholic Charities’ entitlement to the exemption, not deciding whether *any* religious entity in Wisconsin could claim the exemption. As the Court’s 9-0 opinion repeatedly stressed, the dispute between Catholic Charities and Wisconsin was and is about Catholic Charities’ eligibility for the exemption.

The very first paragraph described Catholic Charities’ “claim[] that they qualify for the exemption as religious organizations controlled by the Roman Catholic Diocese of Superior.” *Catholic Charities*, 605 U.S. at 241. In reviewing the procedural history, the Court observed that “[a]fter petitioners sought judicial review in state court, the state trial court

overrode the commission, holding that petitioners are entitled to the exemption.” *Id.* at 245. The Court even described “[t]he *dispositive question*” before this State’s courts as being “whether petitioners are ‘operated primarily for religious purposes.’” *Id.* (emphasis added). And it faulted this Court’s analysis by noting that although “the court recognized that petitioners’ charitable works are religiously motivated[,]” “[t]he court nevertheless deemed petitioners ineligible for the exemption.” *Id.* at 249.

The concurrences similarly show that the Court intended to resolve Catholic Charities’ eligibility. Justice Thomas stressed that the Court had held that “the Wisconsin Supreme Court unconstitutionally discriminate[d] against Catholic Charities” by “h[olding] that the purposes of Catholic Charities ... are primarily secular, not religious.” *Id.* at 255 (Thomas, J., concurring). Addressing Catholic Charities’ eligibility for the exemption, Justice Thomas also stressed that “[i]t is ... dispositive that, as the State concedes, the Diocese qualifies for the religious employer exemption.” *Id.* at 268. “As an arm of the Diocese from the Bishop’s perspective, Catholic Charities and its subentities must qualify as well,” he concluded. *Id.* at 268-69. And Justice Jackson’s concurrence also described “[t]he fight” before the Court as being “over whether church-affiliated charitable organizations ... that primarily provide job training, mental health, and other services to those with developmental disabilities ... satisfy the first requirement; that is, whether they ‘operat[e] primarily for religious purposes’ within the meaning of this provision.” *Id.* at 273-74 (Jackson, J., concurring).

Thus, the Supreme Court resolved the question of Catholic Charities’ eligibility for the exemption—the question that has been the focus of this

litigation from its inception. By *reversing* this Court's prior decision, the Supreme Court left no ambiguity about the necessary remedy here.

B. *Espinoza* requires extending the religious exemption to Catholic Charities.

Eliminating the religious exemption would also contradict the Supreme Court's decision in *Espinoza*.

In that case, the U.S. Supreme Court rejected the Montana Supreme Court's decision to invalidate a tax benefit altogether rather than extend that benefit to religious schools. *Id.* at 472. At issue in *Espinoza* was a tax credit scholarship program that "provide[d] tuition assistance to parents who send their children to private schools." *Id.* at 467-68. When religious parents "sought to use the scholarships at a religious school," the Montana Supreme Court chose to invalidate the entire program, invoking a "no-aid provision of the State Constitution, which prohibit[ed] any aid to a school controlled by a church, sect, or denomination." *Id.* at 468 (cleaned up).

The U.S. Supreme Court rejected this gambit. The Court first concluded that the religious parents could not be excluded from the "otherwise available" scholarship program without offending the Free Exercise Clause. *Id.* at 475-77, 486. Echoing arguments Wisconsin raises here, Montana nonetheless asserted that there could be "no free exercise violation ... because the Montana Supreme Court ultimately eliminated the [tax credit] program altogether." *Id.* at 487; *compare* Wisconsin Letter at 2 ("eliminat[e] the exemption altogether"). Because, the state said, "there [was] no program" to begin with, "religious schools and adherents [could not] complain that they [were] excluded from any generally available benefit." *Espinoza*, 591 U.S. at 487.

This too the Court rejected. “The Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law.” *Id.* at 487. Instead, the court had “invalidated the program pursuant to a state law provision that expressly discriminate[d] on the basis of religious status.” *Id.* And because the state court saw “no other ‘mechanism’ to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program.” *Id.* Even though “[t]he final step in this line of reasoning eliminated the program, to the detriment of religious and non-religious schools alike,” that did not fix the constitutional infirmity. *Id.* Instead, the state court’s “error of federal law occurred at the beginning.” *Id.* at 487-88. “Because the elimination of the program flowed directly from the Montana Supreme Court’s failure to follow the dictates of federal law, it [could not] be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.” *Id.* at 488.

Espinoza is dispositive here. There is no “innocuous principle of state law” available to nullify the § 108.02(15)(h)(2) exemption. *Id.* at 487. Instead, any such nullification would ultimately “flow[] directly from” this Court’s “failure to follow the dictates of federal law”—namely, the prior construction of the religious exemption in a way that discriminated along denominational lines and thus violated the First Amendment. *See Catholic Charities*, 605 U.S. at 249. And having lost in the U.S. Supreme Court, Wisconsin cannot now turn to leveling down as its next “‘mechanism’ to make absolutely sure” that Catholic Charities and other “religious” groups like it will be “exclude[d].” *Espinoza*, 591 U.S. at 487-88; *see also Walz*, 397 U.S. at 666-67 (rejecting request to invalidate a tax

exemption designed for religious groups). That sort of targeting of a religious organization itself violates the First Amendment. *See Espinoza*, 591 U.S. at 487-88; *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (where “proposals for state intervention stem from animosity to religion[,]” they violate the First Amendment); *cf. Washington v. Davis*, 426 U.S. 229, 241 (1976) (facially neutral state actions violate equal protection where they are done for a discriminatory reason).²

In fact, Wisconsin’s arguments here are even *more* discriminatory toward religion than Montana’s were. Wisconsin asks this Court to eliminate an exemption designed for religious groups while (presumably) leaving the law’s wide swath of *secular* exemptions in place. In *Espinoza*, by contrast, the program had been eliminated for *everyone*, secular and religious schools alike, yet the U.S. Supreme Court still held that it violated the Free Exercise Clause. 591 U.S. at 487-88. This is an *a fortiori* case. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017) (“[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified ... is odious to our Constitution[.]”).³

² To be sure, the Legislature could itself attempt to prospectively revoke all the statutory unemployment tax exemptions, though to do so it would need to definitively demonstrate that it did not do so simply as a means of excluding Catholic Charities or similar religious bodies.

³ Of course, if Wisconsin argues that all exemptions must be eliminated, that would also run afoul of *Espinoza*.

C. The First Amendment’s guarantee of religious neutrality requires extending the religious exemption to Catholic Charities.

Instead of grappling with *Espinoza*, Wisconsin relies on a series of cases in which the U.S. Supreme Court confronted *equal protection* claims and concluded that constitutionally mandated “equality” could be achieved either by extending the benefit to the unconstitutionally excluded group or denying the benefit to everyone. *See* Wisconsin Letter 1-2 (citing, *inter alia*, *Levin v. Com. Energy, Inc.*, 560 U.S. 413 (2010)). The problem for Wisconsin is that this is not an equal protection case, it is a First Amendment case. In equal protection cases, “leveling down” may sometimes be an appropriate remedy, because “the Constitution simply calls for *equal treatment*.” *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 426 (2010); *see also, e.g., Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017) (leveling down may be appropriate when “the ‘right invoked is that to equal treatment’”). But when a law also “impinge[s] on fundamental rights,” the Constitution has something more to say. *Levin*, 560 U.S. at 426 & n.5 (contrasting “economic legislation” with cases involving substantive rights).

Religious neutrality—the touchstone of the Supreme Court’s decision in this case, *see, e.g., Catholic Charities*, 605 U.S. at 247-49—is *not* simply a constitutional mandate for equal treatment. Rather, as the Supreme Court recognized in *Walz*, it protects substantive fundamental rights—“preserv[ing] the autonomy and freedom of religious bodies while avoiding any semblance of established religion.” 397 U.S. at 672; *id.* at 669 (“The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose

of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.”).

“Each value judgment under the Religion Clauses,” including religious neutrality, “must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.” *Id.* at 669; *id.* at 669 (“[B]enevolent neutrality ... will permit religious exercise to exist without sponsorship and without interference.”). Indeed, *Walz* involved a challenge to state tax exemptions for religious entities, a challenge the Court roundly rejected. *Id.* at 666. *See also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (“Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.”).

First Amendment religious *neutrality* is thus distinguished from Equal Protection Clause *parity*. Religious neutrality ensures a zone of protection for fundamental rights, whereas the Equal Protection Clause focuses solely on equality of treatment. *See also* Mark C. Gillespie, *Level-Up Remedies for Religious Discrimination*, 44 Harv. J.L. & Pub. Pol’y 961, 976 (2021) (“[T]he Constitution prefers level-up remedies in cases where leveling down would gut its protections by denying guaranteed substantive rights.”); Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 Yale L.J. 1185, 1196 (1986) (“The Constitution thus is *not* always indifferent between extension and nullification; rather, an inchoate First Amendment norm often prefers the remedial choice of ‘more speech, not enforced silence.’”).

Here, taking a sledgehammer to Wisconsin’s religious exemption and taxing all religious entities in the state would undermine, not advance, the First Amendment’s mandate of government neutrality toward religion. By contrast, ending Wisconsin’s unconstitutional exclusion of Catholic Charities from a broadly worded religious exemption would advance religious neutrality by protecting religious exercise, avoiding entanglement, and steering clear of church autonomy violations. *See infra* Part II.

In short, Catholic Charities did not bring an Equal Protection Clause case, it brought a Religion Clauses case. Catholic Charities’ injury is not mere unequal treatment; it is having to pay a tax despite a statutory entitlement to an exemption from that tax. Indeed, Catholic Charities has sought its *own* relief from the tax—not to force other groups to pay the tax, too. The Constitution is not “silent” on the appropriate remedy in a case like that. *Contra* Wisconsin Letter at 1. Instead, application of the First Amendment’s doctrine of religious neutrality requires extension of the exemption to Catholic Charities.

D. The law of remedies requires extending the religious exemption to Catholic Charities.

For much the same reasons, any other result would be inconsistent with the law of remedies, too. The Wisconsin Constitution declares that “[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character[.]” Wis. Const. art. I, § 9. But here, a judicial decree expanding the unemployment tax to a wide range of previously exempted religious employers would do nothing to remediate Catholic Charities’ injuries—its obligation to pay an unemployment tax (and its payment of an unconstitutional tax for almost a decade). Instead, Catholic Charities would remain in the

same *status quo* from before the litigation (despite winning an appeal at the U.S. Supreme Court), and in fact, religious employers across the State, including the Diocese of Superior, would be *worse* off. That runs entirely counter to the law of remedies, which limits equitable remedies to the parties before the court. *See Gill v. Whitford*, 585 U.S. 48, 73 (2018) (“A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”); *Trump v. CASA, Inc.*, 606 U.S. 831, 842 (2025) (“As a general rule, an injunction’ could not bind one who was not a ‘party to the cause.”); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 473 (2017) (“In the practice of traditional equity, injunctions did not control the defendant’s behavior against nonparties.”).

Worse still, looking retrospectively, Wisconsin cannot remedy Catholic Charities’ injury simply by eliminating the tax exemption. That would not account for the fact that other religious organizations were exempt for almost a decade while Catholic Charities paid an unconstitutional tax. *See Welsh v. United States*, 398 U.S. 333, 362 (1970) (Harlan, J. concurring) (prior religious draft exemptions “created a religious benefit not accorded to petitioner,” making it “clear to me that” reversing Welsh’s conviction and extending him the same benefit is required “under the Establishment Clause of the First Amendment unless Welsh is to go remediless”). Unless the State is prepared to retroactively tax every other formerly exempt organization, simply eliminating the exemption prospectively cannot possibly remedy Catholic Charities’ full injury.

E. Legislative intent requires extending the religious exemption to Catholic Charities.

Denying Catholic Charities an exemption would also contradict the Legislature's intent, in contradiction of the U.S. Supreme Court's repeated instruction that "the touchstone for any decision about remedy is legislative intent." *Office of United States Tr. v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487, 495 (2024). Thus the "key question" is "what the legislature would have willed had it been apprised of the constitutional infirmity." *Id.*; *Morales-Santana*, 582 U.S. at 73 ("The choice between these outcomes is governed by the legislature's intent.").

What is more, "[o]rdinarily, we have reiterated, 'extension, rather than nullification, is the proper course.'" *Id.* at 74. (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)) (collecting cases). Thus, "the preferred rule in the typical case is to extend favorable treatment." *Morales-Santana*, 582 U.S. at 77. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 202-04, 213-17 (1977) (plurality opinion) (survivors' benefits); *Jimenez v. Weinberger*, 417 U.S. 628, 630-31, and n.2, 637-38 (1974) (disability benefits); *Department of Agric. v. Moreno*, 413 U.S. 528, 529-30, 538 (1973) (food stamps); *Frontiero v. Richardson*, 411 U.S. 677, 678-79, and n.2, 691, and n.25 (1973) (plurality opinion) (military spousal benefits). Here, that means extending the tax exemption to Catholic Charities.

This presumption is bolstered by the Legislature's clear intent. Indeed, we don't have to speculate regarding what the Legislature *would* have wanted *had* it been apprised of the situation. Instead, we know: as *amicus curiae* in this Court and at the U.S. Supreme Court, the Legislature made clear that it favored extending the exemption to Catholic Charities. Wisconsin. State Legislature Br. at 8-9, *Catholic Charities*, 605 U.S. 238 (No. 24-154). As their amicus brief explained, "the fact that

an organization practices charity should never disqualify it from a religious tax exemption. If anything, charity is a typical religious act.” *Id.* at 25. Thus, “[c]haritable religious organizations fall in the heartland of Wisconsin’s religious tax exemptions.” *Id.* at 9. *See also id.* at 8 (“a narrower, exclusive exemption would undermine the exemption’s whole purpose.”).

This explicit evidence is further supported by application of the test the U.S. Supreme Court uses to assess legislative intent in these counterfactual scenarios. *E.g., Morales-Santana*, 582 U.S. at 75. When trying to determine what a legislature would have wanted had it been told that the prevailing interpretation of its law was unconstitutional, the Supreme Court “focus[es] on two considerations: [the legislature’s] intensity of commitment to the more broadly applicable rule, and the degree of potential disruption of the statutory scheme that would occur if we were to extend the exception.” *John Q. Hammons*, 602 U.S. at 496 (cleaned up). These two foundational considerations derive from “Justice Harlan’s concurring opinion in *Welsh v. United States*,” which itself sheds light on this case. *Morales-Santana*, 582 U.S. at 75 (citing *Welsh*, 398 U.S. at 365 (opinion of Harlan, J.)).

In *Welsh*, which extended the draft exemption to a broader class of conscientious objectors, Justice Harlan started by examining Congress’ “intensity of commitment” to the “residual policy” (i.e., how important was the conscientious objector exemption to Congress?). *Welsh*, 398 U.S. at 365. As Justice Harlan explained, “[t]he policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and ‘open’ society, the

important value of reconciling individuality of belief with practical exigencies whenever possible.” *Id.* He further explained that this policy “reflects ... the assumption that beliefs emanating from a religious source are probably held with great intensity.” *Id.* at 366. “When a policy has roots so deeply embedded in history,” Justice Harlan went on, “there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.” *Id.* at 366-67. Justice Harlan thus concluded that extending the religious exemption to a broader class of conscientious objectors was the appropriate remedy because it “cures the defect of underinclusion.” *Id.* at 367.

Similar considerations support extending the residual policy (i.e., the policy of exempting religious organizations from tax burdens) to Catholic Charities here. Indeed, the Supreme Court in *Walz* found that “[a]ll of the 50 States provide for tax exemption of places of worship,” and cited evidence that “Congress, from its earliest days,” viewed religious tax exemptions as constitutional and consistent with the First Amendment’s protections for religious exercise. *Walz*, 397 U.S. at 676-78 (“[A]n unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.”). And, as in *Welsh*, *Walz* repeatedly emphasized the intensity of beliefs and deep values implicated by the extension or repeal of the tax exemption at issue, explaining (among other things) that “[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times,” than the “benevolent neutrality” approach embedded in the practice of exempting

churches from various taxes. *Id.* at 676. Thus, if faced with the choice of extension or repeal, the deeply rooted nature of religious tax exemptions strongly suggests the Legislature would extend the exception to Catholic Charities.

Turning to the second consideration, extending the tax exemption to Catholic Charities would be easily administered—indeed, the Diocese itself and one of Catholic Charities’ sub-entities (Challenge Center) are *already* exempt and have joined CUPP. In most cases, extending a benefit to the excluded party would impose at least some additional burden on the government. Here, however, extending a tax *exemption* to Catholic Charities would not impose any administrative burden. Nor would it cost the State anything. Wisconsin Br. at 9-10, 40-41, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (“That does not even amount to a ‘tax’—Petitioners merely reimburse the State for any unemployment benefits their employees have received.”). Instead, it would simplify Catholic Charities’ ministry operations by allowing the Diocese and its social ministry “arm” to be treated identically. *Catholic Charities*, 605 U.S. at 264 (Thomas, J., concurring).

But ultimately there is no need for this Court to wrestle through counterfactual scenarios—the Legislature wrote a statute to include Catholic Charities in the first place, the Supreme Court just said the statute must be read to include Catholic Charities, and the Legislature has said in its briefs that it wants to include Catholic Charities. There is no plausible gray area about what the Legislature “would have willed.”

F. Wisconsin has forfeited its remedial choice argument.

Finally, though Wisconsin has during the course of this litigation invented many creative theories for denying Catholic Charities the exemption, it never before claimed that it could resolve this case by eliminating

the religious exemption altogether. Instead, Wisconsin has consistently asserted that the only issue in front of the lower courts, this Court, and the United States Supreme Court is whether Catholic Charities qualifies for the religious exemption.⁴ For example, in the Court of Appeals, Wisconsin represented that “[t]he only issue before the Court is whether the employers are operated primarily for religious purposes.” Wisconsin Br. at 9, *Catholic Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm’n*, 987 N.W.2d 778 (Wis. Ct. App. 2023) (No. 2020AP2007). And before this Court, Wisconsin stated that “[t]he ultimate question” for resolution was “whether the employers are ... entitled to an exemption.” Wisconsin Br. at 14, *Catholic Charities Bureau, Inc. v. Lab. & Rev. Comm’n*, 3 N.W.3d 666 (Wis. 2024) (No. 2020AP2007). Having made those arguments and then lost at the U.S. Supreme Court, Wisconsin cannot now invent a brand-new theory for denying relief to Catholic Charities—let alone one that would simultaneously deny relief to myriad other religious organizations.

Wisconsin has therefore forfeited its leveling-down argument.

II. Eliminating the religious exemption would result in additional constitutional violations.

Deleting the religious exemption (or all exemptions) would also create additional First Amendment violations—four times over: First, eliminating the exemption would violate the church autonomy doctrine. Second, it would result in excessive church-state entanglement. Third, it would

⁴ Nor is it clear that this Court has the *authority* to eliminate the religious exemption. That would effectively impose a tax on not only Catholic Charities but also many other religious groups in the State, despite the rule, derived from the State’s constitution, that “that the tax power must be exerted by the legislative branch of the government.” *Carey v. Ballard*, 148 N.W. 1090, 1092 (Wis. 1914); *see also, e.g., Wis. Prop. Taxpayers, Inc. v. Town of Buchanan*, 992 N.W.2d 100, 104 (Wis. 2023) (“a tax ... is unlawful” “without legislative permission”).

render state law not generally applicable. And fourth, it would raise concerns about religious targeting. As this case shows, “leveling down” would create more constitutional problems than it purports to solve. And this Court “cannot remedy an old constitutional problem by creating a new one[.]” *John Q. Hammons*, 602 U.S. at 504. Instead of going down that path and inviting further intervention by the United States Supreme Court, this Court should follow the United States Supreme Court’s clear directive and grant Catholic Charities the exemption.

A. Denying Catholic Charities an exemption would violate the church autonomy doctrine.

Nullifying the Legislature’s religious purposes exemption would create a church autonomy violation by dividing Catholic Charities from the Diocese of Superior.⁵

The United States Constitution guarantees religious bodies “independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This protection guarantees the “right to organize voluntary religious associations,” *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872), and guards against government interference in matters of polity or church government—that is, how the religious body has organized itself. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976)

⁵ The United States Supreme Court did not reach the church autonomy and entanglement questions, *see Catholic Charities*, 605 U.S. at 246 n.2, but Justice Thomas wrote a lengthy concurring opinion explaining why Catholic Charities would also prevail under church autonomy. *Id.* at 255-270 (Thomas, J., concurring). Were this Court to rule that Catholic Charities does not receive the exemption, the U.S. Supreme Court would have another opportunity to rule on the church autonomy and entanglement issues.

(“[T]he reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs”).

Pursuant to these protections, religious organizations remain free to incorporate in accordance with state law, but they retain their alternative personality as “part of a broader, ‘unincorporated’ religious institution,” which the government may not disregard. *Catholic Charities*, 605 U.S. at 260 (Thomas, J., concurring). For example, in *Watson*, the Supreme Court recognized that although a Kentucky-charted corporation was the nominal title holder of church property, that corporation was not itself the church, and it was “the constitution, usages, and laws of the Presbyterian body”—not Kentucky’s corporations law—that controlled the analysis of the case. *Watson*, 80 U.S. (13 Wall.) at 720. And the Supreme Court found a Free Exercise violation in *Kedroff* when New York relied on its corporations law to put a thumb on the scale in a matter of “the operation of the churches.” 344 U.S. at 107-08.

The State invites this Court into a similar constitutional thicket. Catholic Charities is part and parcel of the Catholic Church and, specifically, the Diocese of Superior. *Catholic Charities*, 605 U.S. at 243; *Catholic Charities*, 3 N.W.3d at 672. Catholic Charities is also controlled by the Diocese of Superior. *Catholic Charities*, 605 U.S. at 243; *Catholic Charities*, 3 N.W.3d at 672. And “Catholic Charities’ mission ‘is to provide service to people in need, to advocate for justice in social structures and to call the entire church and other people of good will to do the same.’” *Catholic Charities*, 3 N.W.3d at 672; *see also Catholic Charities*, 605 U.S. at 243 (“The Bureau’s stated mission is to ‘carry on the redeeming work of our Lord.’”).

Failing to extend an exemption to Catholic Charities would disregard its relationship with the Diocese, despite the State's recognition that the Constitution requires an exemption for the Diocese. Wisconsin Br. at 22-23, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (describing how diocesan employment decisions require First Amendment protection). This approach would penalize Catholic Charities for the Diocese's choice to structure its ministries as separate corporations—a religious decision grounded in church polity and internal governance. Wis.App.178; see *Milivojevic*, 426 U.S. at 721 (“reorganization of the Diocese involves a matter of internal church government”).

And if this Court were to nullify the Unemployment Compensation Act's exemption for both Catholic Charities and the Diocese, the statute would then cover not “just churches but also ministers, a specific job involving religious functions that would present employment disputes the state should ‘stay out of.’” Wisconsin Br. at 22, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020)). The result would be state involvement in matters that “affect[] the faith and mission of the church itself.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). That would be just as unconstitutional as severing Catholic Charities from the Diocese by denying it alone an exemption.

B. Denying Catholic Charities an exemption would cause excessive entanglement.

For much the same reasons, eliminating the religious exemption instead of extending it to Catholic Charities would violate the Religion Clauses' prohibition on entanglement with religion in this case and others.

The rule against impermissible government entanglement in religion is rooted in both Religion Clauses. The Establishment Clause prevents, among other things, “active involvement of the sovereign in religious activity.” *Walz*, 397 U.S. at 668. In a similar way, the Free Exercise Clause protects religious individuals and organizations from government interference with “very sensitive questions of faith and tradition.” *NLRB v. Catholic Bishop*, 440 U.S. 490, 495-96 (1979). Taken together, the Clauses prohibit government officials from getting tied up in religious questions. In *Catholic Bishop*, this led the Supreme Court to interpret the National Labor Relations Act to avoid the “serious constitutional questions”—namely, “excessive entanglement”—that would have resulted if the Act were read to give the NLRB jurisdiction over teachers at Catholic high schools. *Id.* at 501-06.

Similar considerations counsel granting Catholic Charities an exemption from the Unemployment Compensation Act here. At every stage, Wisconsin has argued that exempting dioceses, churches, and other houses of worship serves important constitutional interests in avoiding entanglement between the state and religious employers. See Catholic Charities Br. at 27, *Catholic Charities*, 987 N.W.2d 778 (No. 2020AP2007) (exemptions for “church employees and ministers and members of a religious order” “serve[] the same purpose as the ministerial exemption”); Wisconsin Br. at 30, *Catholic Charities*, 3 N.W.3d 666 (No. 2020AP2007) (similar); Wisconsin Br. at 22-23, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (churches “and ministers are categorically exempt” to avoid having to answer “hard questions”; these exemptions serve “disentangling function[s]”). Indeed, as Wisconsin repeatedly

acknowledged before the Supreme Court, the religious-purposes exemption “is an anti-entanglement statute,” Transcript of Oral Argument at 110:8-9, *Catholic Charities*, 605 U.S. 238 (No. 24-154), available at <https://perma.cc/58RB-KKGN>, with the aim of “avoid[ing] excessive entanglement and preserv[ing] the autonomy and freedom of certain religious organizations.” Wisconsin Br. at 21, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (cleaned up); see, e.g., *id.* at 1, 2, 12-13, 15, 22-23, 31-32 (similar); see also *Catholic Charities*, 605 U.S. at 268 (Thomas, J., concurring) (noting this concession).

But “leveling down” would contradict this stated interest. As Wisconsin has explained, “disputes over benefit eligibility can present entangling questions when religious employers decide to discharge employees based on matters of religious faith and doctrine.” Wisconsin Br. at 1, *Catholic Charities*, 605 U.S. 238 (No. 24-154). That’s exactly right: When a religious group “respond[s] that their [employment] actions were mandated by their religious creeds,” the “resolution of such charges ... , in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the [employer’s] religious mission.” *Catholic Bishop*, 440 U.S. at 502. But “it is not only the conclusions that may be reached by the [State] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Id.* By exempting religious organizations, Wisconsin’s Unemployment Compensation Act avoids these entanglements.

Absent an exemption, Wisconsin will effectively push Catholic Charities to merge with the Diocese—placing the state’s thumb on the scale where religious bodies decide what polity and corporate structure best

aligns with the Catholic Church’s teachings. And if this Court were to nullify the Unemployment Compensation Act’s exemption for both Catholic Charities and the Diocese, it would make the Church subject to wide swaths of entangling employment inquiries. Wisconsin Br. at 22-23, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (describing how diocesan employment decisions require First Amendment protection). These constitutional problems can be easily avoided by granting Catholic Charities an exemption.

C. Denying Catholic Charities an exemption would render the Unemployment Compensation Act not generally applicable.

If this Court eliminates the religious exemption, but fails to eliminate secular exemptions from the statute, it would substitute one constitutional violation with another. A law is not generally applicable—and therefore must face strict scrutiny—“if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021).⁶

As the Supreme Court recognized, the Unemployment Compensation Act “exempts over 40 forms of ‘employment.’” *Catholic Charities*, 605 U.S. at 253 (citing Wis. Stat. §§ 108.02(15)(f)-(kt)). That includes, among

⁶ Deleting only the religious-purposes exemption—and thus leaving standing only the church exemption and the minister exemption—would also create a new form of denominational discrimination. Wis. Stat. § 108.02(15)(h)(1), (3). Many different types of religious groups would not qualify for the church or minister exemptions, violating once again “[t]he clearest command of the Establishment Clause” that “the government may not officially prefer one religious denomination over another.” *Catholic Charities*, 605 U.S. at 247 (cleaned up); *cf. Larson v. Valente*, 456 U.S. 228, 234, 246 (1982) (Establishment Clause violated where Minnesota statutory exemption placed higher administrative burdens on some religious groups).

others, work done by public officials and members of the judiciary, Wis. Stat. §§ 108.02(15)(f)(1), (3); work done by nonresident aliens performing certain types of work, *id.* § 108.02(15)(j)(6); certain categories of agricultural labor, *id.* § 108.02(15)(k)(1); and work done by golf caddies, insurance salesmen, and taxi drivers, *id.* §§ 108.02(15)(k)(3), (6), (18).

All of these exemptions undermine Wisconsin's stated interest—"the heavy social cost of depriving the unemployed of benefits." Wisconsin Br. at 44, *Catholic Charities*, 605 U.S. 238 (No. 24-154). Of course, that interest is not implicated by exempting Catholic Charities, since the Catholic Church provides Catholic Charities' employees access to a *more* efficient Church-run unemployment program. *See* Wisconsin Catholic Conference Br. at 9-13, *Catholic Charities*, 605 U.S. 238 (No. 24-154) (comparing state system with Catholic Church's Unemployment Pay Program). Nor would any other citizens of the state burdened by Catholic Charities departure from Wisconsin's system, since Catholic Charities and its sub-entities reimburse Wisconsin only for the benefits their employees actually receive. Wisconsin Br. at 4, 6 n.1, 9, *Catholic Charities*, 605 U.S. 238 (No. 24-154). But even if Wisconsin's purported interest were triggered by exempting Catholic Charities, that same interest is undermined *far more* by exempting members of the judiciary, nonresident aliens, golf caddies, insurance salesmen, and taxi drivers, who may have no alternatives. *See Fulton*, 593 U.S. at 534 (law not generally applicable where it regulated animal sacrifice to protect public health but did not regulate hunters' meat processing or restaurants' garbage disposal (discussing *Lukumi*, 508 U.S. at 544-45)); *Tandon*, 593 U.S. at 62-63 (law not generally applicable where it permitted people to gather at,

among others, hair salons, retail stores, and personal care services, but restricted in-home church gatherings).

As a result, if this Court nullifies the religious purposes exemption but leaves secular exemptions in place, it will be treating comparable secular conduct more favorably than religious exercise, rendering the entire Unemployment Compensation Act not generally applicable and subject to strict scrutiny—a standard the Supreme Court has already unanimously held it cannot meet. *Catholic Charities*, 605 U.S. at 252-53. Indeed, where there are a “wide range of nonprofit organizations eligible to receive” a tax exemption, religious groups cannot be “disqualified ... solely because of their religious character.” *Carson v. Makin*, 596 U.S. 767, 780 (2022). So, to avoid jeopardizing the entire statute, this Court would have to strike down not just the religious purposes exemption, but every comparable secular exemption from the statute. But (as explained below) taking such a sledgehammer to so many other tax exemptions held by unrelated parties, all just to keep excluding Catholic Charities, would be the height of discrimination.

D. Denying Catholic Charities an exemption would constitute religious targeting.

By disregarding the United State Supreme Court’s order and continuing to deny Catholic Charities an unemployment compensation exemption, Wisconsin has acted in a manner that is not neutral toward religion. The government is “obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of [religious actors’] religious beliefs.” *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 584 U.S. 617, 638 (2018). Even “slight suspicion[s]” of religious intolerance or “subtle departures from neutrality” violate the Free Exercise Clause. *Id.*; *Lukumi*,

508 U.S. at 534. To determine whether a law is neutral, courts must “survey” government actions “meticulously.” *Lukumi*, 508 U.S. at 534.

Here, Catholic Charities has sought an exemption to the Unemployment Compensation Act for over twenty years. At every turn, the State has opposed it, even when doing so resulted in “paradigmatic ... denominational discrimination.” *Catholic Charities*, 605 U.S. at 249. It has now turned to leveling down as its latest “mechanism to make absolutely sure” that Catholic Charities and other “religious” groups like it will be “exclude[d].” *Espinoza*, 591 U.S. at 487-88. The State’s continued recalcitrance, when weighed against the sheer number of existing secular exemptions and a Supreme Court order requiring it to grant an exemption, raises more than a “slight suspicion” that the State is “subtl[y] depart[ing] from neutrality.” *Masterpiece*, 584 U.S. at 638. Indeed, it is unavoidably clear that there has been one and only one circumstance in which Wisconsin has *ever* tried to jettison the entire scheme of religious exemptions—when it lost at the United States Supreme Court and was forced to include Catholic Charities. This animus is anything but subtle, and it is fatal under the Free Exercise Clause. *Id.* at 639 (“set[ting] aside” animus-based decision with no discussion of strict scrutiny.)⁷ The only constitutional approach is to grant Catholic Charities an exemption, as the U.S. Supreme Court’s order requires.

CONCLUSION

The Court should affirm the judgment of the Circuit Court.

⁷ Although there is a strong inference of animus here, religious targeting claims under the Free Exercise Clause do not require a showing of animus—animus is a sufficient but not necessary condition. *See, e.g., Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (“Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus.”).

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,328 words.

Dated this 20th day of October, 2025.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 20, 2025, I electronically filed with the Court the above supplemental brief. I also served a true and correct copy of both via email upon:

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