No. 2020AP2007

In the Supreme Court of Wisconsin

CATHOLIC CHARITIES BUREAU, INC., BARRON COUNTY DEVELOPMENT 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

BRIEF OF WISCONSIN STATE LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION

A unanimous defeat in United States Supreme Court should serve as a clear reminder to Wisconsin's attorney general: in our constitutional republic—founded to protect natural rights, including religious liberty—it is his duty to uphold our founding charter, not to play games with it. Yet rather than accept defeat—on an issue that Justice Sotomayor said was not "hard"—he appears determined to penalize not only Catholic Charities but every faith-based group in Wisconsin simply for living out its beliefs through service. To that end, disregarding his long-settled "duty to defend the constitutionality of state statutes,"[1] he asks this Court to hold the exemption provision invalid on its face. For many reasons, this Court should decline this radical request. This brief sets forth three.

For one, the AG's "level down" argument hinges on the mistaken premise that the U.S. Supreme Court found fault with the exemption statute as a whole. In fact, the Court made clear—repeatedly and explicitly—that only this Court's application of Wis. Stat. § 108.02(15)(h)2. was unconstitutional. Leaving intact this Court's general motivations-and-activities test, the Court's analysis focused solely on how that test had been applied to create an unlawful denominational preference. With this Court's Free Exercise error having been corrected, the exemption may continue to function as it has for decades, in full compliance with

[1] *State v. City of Oak Creek*, 2000 WI 9, ¶ 23, 232 Wis. 2d 612, 628, 605 N.W.2d 526, 533.

the Constitution.

Second, even if it could be raised in the current posture, the AG's belated facial challenge would fail on the merits. His burden is to prove that the exemption cannot be constitutionally applied in any circumstance. But the statute easily survives this test: so long as this Court's motivations-and-activities test is applied neutrally, the exemption will operate lawfully.

Third, the Legislature's clear purpose was—and is—to benefit religious nonprofits, and if faced with a supposed constitutional defect, it would have chosen to extend—not eliminate—the exemption. The text, its fifty-year history, and the Legislature's repeated addition of exemptions for targeted groups all show a consistent commitment to protecting religious organizations. Indeed, faith-based exemptions are a longstanding feature of Wisconsin's tax scheme, and when courts have narrowed them, the Legislature has responded by expanding coverage.

STATEMENT OF INTEREST

The Legislature has an interest in defending its duly enacted statutes. *See* Wis. Stat. § 803.09(2m). This interest is heightened where the AG himself attacks a statute's constitutionality—in contravention of his duty to defend—and where the question of validity arguably depends on legislative intent.

ARGUMENT

I. THE ATTORNEY GENERAL'S ASSERTION THAT THE U.S. SUPREME COURT FACIALLY INVALIDATED THE EXEMPTION BLINKS REALITY

The premise on which the AG's entire "level down" argument turns—that the U.S. Supreme Court necessarily invalidated the statute as a whole—is false. One need only read the opinion. It repeatedly emphasizes, and Justice Jackson's concurrence confirms, that it was only *this Court's application* of the statute that violated the First Amendment. *See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 250 (2025); *id.* at 270 (Jackson, J., concurring). There is simply no other way to read these sentences:

- "The Wisconsin Supreme Court's application of § 108.02(15)(h)(2) imposed a denominational preference by differentiating between religions based on theological lines." *Id.* at 241.
- "Because the law's application does not survive strict scrutiny, it [namely, the law's application] cannot stand." *Id.* at 241.
- "We granted certiorari to decide whether the Wisconsin Supreme Court's interpretation of § 108.02(15)(h)(2), as applied to petitioners, violates the First Amendment." *Id.* at 247.
- ". . . [A]s applied to petitioners by the Wisconsin Supreme Court, Wis. Stat. § 108.02(15)(h)(2) imposes a denominational preference by differentiating between religions based on theological choices." *Id.* at 250.

- "As the Court explains, the Wisconsin Supreme Court's application of that exemption has created a constitutional problem . . . ." *Id.* at 270 (Jackson, J., concurring).

Although the opinion also states that "[t]he Wisconsin Supreme Court's interpretation of § 108.02[(15)(h)(2)] facially differentiates among religions based on theological choices," the AG misreads this sentence. *Id.* at 251. As a careful parsing of *this* Court's decision will show, "interpretation" here refers to Part III.C, not Part III.B, of this Court's majority opinion. *See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 2024 WI 13, ¶¶ 37–67, 411 Wis. 2d 1, 3 N.W.3d 666 (2024). And while Part III.B remains good law, Part III.C does not.

Spanning paragraphs 38 to 57, Part III.B sets forth this Court's high-level construction of the exemption. *Id.* ¶¶ 38–57. It "conclude[s] that in determining whether an organization is 'operated primarily for religious purposes' within the meaning of Wis. Stat. § 108.02(15)(h)2., [a court] must examine both the motivations and the activities of the organization." *Id.* ¶ 57; *see also id.* ¶ 46 ("Reading the statute as a whole, the text and structure of Wis. Stat. § 108.02(15)(h)2. indicate that both activities and motivations must be considered in a determination of whether an organization is 'operated primarily for religious purposes.'"). The U.S. Supreme Court did *not* reverse this conclusion. Nor could it have, as the AG notes. Remedial Br. of State Parties at 13. Part III.B therefore remains precedential.

The same is not true of this Court's separate *application* of its activities-and-motivations construction. This application occurs in

an entirely different section of its opinion: Part III.C, comprising paragraphs 58 to 67. 2024 WI 13, ¶¶ 58–67. It begins, "We turn next to *apply* our statutory interpretation to the facts before us." *Id.* ¶ 58 (emphasis added). The section's conclusion, like that of the one before it, is explicit: "An objective examination of the actual activities of CCB and the sub-entities reveals that their activities are secular in nature. We therefore conclude that CCB and the sub-entities are not operated primarily for religious purposes within the meaning of Wis. Stat. § 108.02(15)(h)2." *Id.* ¶ 67. It was precisely *this* conclusion that was the focus of the U.S. Supreme Court's analysis: "Applying that standard"—the one in Part III.B—this "court held" in Part III.C "that petitioners' activities are 'secular in nature,' not religious." 605 U.S. at 245 (quoting 2024 WI 13, ¶ 67). And it was precisely *this* conclusion that the Court rejected, holding that, since Part III.C "explicitly differentiat[es] between religions based on theological practices"—something that Part III.B never does—the "exemption, *as interpreted by its Supreme Court*, [unconstitutionally] grants a denominational preference . . . ." *Id.* at 250 (emphasis added). And it is this conclusion that the U.S. Supreme Court held to be an impermissible "facial[ ] differentiat[ion]." *Id.* at 251.

In sum, because the U.S. Supreme Court held unconstitutional only this Court's application of its motivations-and-activities test—without casting doubt on the test itself—the Supreme Court's decision does not remotely support declaring the statute invalid on its face.

II. THE ATTORNEY GENERAL DOES NOT (AND CANNOT) PROVE THAT THE STATUTE IS UNCONSTITUTIONAL IN ALL OF ITS APPLICATIONS—THE SHOWING THAT IT MUST MAKE TO OBTAIN THE FACIAL REMEDY IT NOW SEEKS

A party asserting that a law is facially unconstitutional must clear several hurdles. Most importantly, the party must show "that the statute cannot be enforced under any circumstances." *Evers v. Marklein*, 2025 WI 36, ¶ 26, 417 Wis. 2d 453, 22 N.W.3d 789 (citation omitted). The party also "must persuade [this Court] that the 'heavy burden' to overcome the presumption of constitutionality has been met." *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854. In an as-applied challenge, by contrast, "the facts of the particular case" are analyzed to assess if a party's "constitutional rights were actually violated." *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 24, 383 Wis. 2d 1, 914 N.W.2d 678 (citation omitted).

The AG does not and cannot prove that the exemption statute is unconstitutional in all of its applications.[2] This is because, even

[2] The AG's facial challenge fails for many other reasons, too, including at the threshold. For one, judicial estoppel bars a party from "seeking to assert an inconsistent position [that] would . . . impose an unfair detriment on the opposing party," *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001), so because the state agencies (the Department of Workforce Development and the Labor and Industrial Review Commission) previously convinced this Court that the statute itself is constitutional, at the remedial phase they cannot claim it is unconstitutional. Second, as explained in Part I, because the U.S. Supreme Court has already resolved this case on an as-applied basis, all that this Court can do is grant an as-applied remedy. *Tammy W-G.*, 2011 WI 30, ¶ 47 (explaining that as-applied remedies are limited to the parties because "the constitutionality of the statute itself is not attacked").

when applying both this Court's binding motivations-and-activities test (Part III.B) and the Supreme Court's categorical bar on denominational preferences, the statute continues to operate validly in a wide range of circumstances. For example, a church that operates a worship center, religious school, or seminary—where the primary activities are worship services, religious education, or training for ministry—would plainly satisfy both the "motivations" (furthering religious doctrine) and "activities" (conducting worship, teaching faith) prongs. Similarly, a religious order that operates a retreat center, where the activities are centered on prayer, spiritual formation, and religious instruction, would also be constitutionally eligible for the exemption.

Likewise, a nonprofit organization operated by an Indian tribe whose primary mission is the preservation and teaching of tribal spiritual traditions, language, and ceremonies would be eligible. If the tribe establishes a center where the core activities are tribal worship, sacred gatherings, and religious education for tribal members and the broader community, both the "motivations" (to sustain and transmit the tribe's religious heritage) and "activities" (worship, education, ceremonial practice) are plainly religious.

Even for organizations engaged in charitable work, the statute can be constitutionally applied so long as nothing hinges on whether the charity proselytizes or restricts its services to co-religionists. For instance, if a Lutheran social-services agency operates food pantries as an expression of its faith, and its governing documents, leadership, and daily operations are guided by religious principles, the agency could constitutionally qualify

for the exemption.

In short, so long as state actors faithfully apply this Court's motivations-and-activities test and avoid imposing denominational preferences, the statute will have countless constitutional applications.

III. ALTHOUGH THE LEVEL-UP-OR-LEVEL-DOWN QUESTION MIGHT ARISE IN SOME EQUAL PROTECTION CLAUSE CASES, IT DOES NOT IN FREE EXERCISE CLAUSE CASES

Generally, the U.S. Supreme Court remedies religious discrimination by removing undue burdens on religious exercise, not by imposing those burdens on everyone else. After all, the Free Exercise Clause protects a substantive right; it does not simply mandate equal treatment. *See Gillette v. United States*, 401 U.S. 437, 439–41, 461–62 (1971) (Free Exercise claim that excepting certain religious pacifists, such as Quakers, but not others, such as Catholics, from military draft does not, "[s]trictly viewed, . . . implicate problems of comparative treatment of different sorts of objectors").

Several cases illustrate the point. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court struck down a discriminatory animal-slaughter law with multiple exemptions, holding it unconstitutionally burdened a minority religious group's practice. *Id.* at 526–28, 547. The Court did not suggest that the city could cure the violation by banning all animal slaughter; the only permissible remedy was to invalidate the discriminatory law. *Id.* at 547. Similarly, in *Larson v. Valente*, 456 U.S. 228 (1982), the Court enjoined a registration requirement

that burdened some religious organizations but not others, holding that the exemption must be granted equally to all religious groups—never considering whether the state could simply eliminate the exemption. *Id.* at 231–32, 255. And in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Court reversed a conviction under an ordinance that prohibited only certain sects from holding meetings in public parks, finding the law unconstitutionally burdened religious exercise. *Id.* at 67–69.

Thus, the only proper remedy here is to grant Catholic Charities Bureau and its sub-entities the exemption it was unconstitutionally denied. The AG cannot point to a single binding Supreme Court precedent supporting its choice-of-remedies principle in this context.

IV. EVEN IF THIS COURT HAD DISCRETION TO INVALIDATE THE STATUTE ON ITS FACE, LEGISLATIVE INTENT—WHICH THE AG SAYS IS CONTROLLING—REQUIRES GRANTING CATHOLIC CHARITIES THE EXEMPTION

Under the AG's preferred approach, courts "implement what the legislature would have willed had it been apprised of the constitutional infirmity." *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 427 (2010); *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017) (holding inquiry "is governed by the legislature's intent"). The strong default presumption is that "extension, rather than nullification, is the proper course." *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *Sessions*, 582 U.S. at 74. To assess legislative intent, courts "measure the intensity of commitment to the residual policy—the main rule, not the exception—and consider

the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 75 (internal marks and citation omitted).

Here, the Legislature's intent was and is to extend the exemption to Catholic Charities. To begin with, "the best evidence" of legislative intent is "the language the legislature actually adopted and the executive actually signed." *Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 830 F.3d 1219, 1221 (10th Cir. 2016) (Gorsuch, J.). And here, as this brief explains, *see supra* pp. 10–12, the State can easily apply the language of the exemption in numerous fact patterns without coming close to violating the First Amendment. It should do so.

If that were not enough, the long history of Wis. Stat. § 108.02(15)(h)2. underscores the Legislature's commitment to religious exemptions. *Welsh v. United States*, 398 U.S. 333, 365–66 (1970) (Harlan, J., concurring) (arguing that policy exempting religious conscientious objectors should be extended rather than nullified in part because the policy is "longstanding"). The Legislature has exempted religious nonprofits from its unemployment insurance program almost from inception. A few years after creating the program, the Legislature exempted all nonprofits. § 1, ch. 272, Laws of 1935. And when the Legislature narrowed the nonprofit exemption in 1971, it specifically enacted the religious nonprofit exemption.[3] The religious exemption has

[3] *See* § 6, ch. 53, Laws of 1971 (creating Wis. Stat. § 108.02(5)(g)7.a. (1971–72) later amended and renumbered).

thus remained a fixture of Wisconsin law for nearly a century, even as the statute has been amended more than thirty times.

And not only has the Legislature preserved the religious exemption, but it has also added new exemptions—such as for direct sellers and court reporters (1983 Wis. Act 8, § 7 (creating Wis. Stat. § 108.02(5)(k)15., 161. (1983–84)), employees in prison (2013 Wis. Act 36, § 56 (creating Wis. Stat. § 108.02(15)(kt) (2013–14)), and full-time students employed by summer camps (2021 Wis. Act 231, § 17 (creating Wis. Stat. § 108.02(15)(k)21. (2021–22))—demonstrating a consistent intent to prevent overapplication of the unemployment tax.

More generally, religious exemptions in Wisconsin are a fundamental and indispensable feature of its tax schemes. *See* Wis. Stat. § 70.11(4) (exempting churches, religious associations, and religious schools from paying property taxes); Wis. Stat. § 70.11(11) (exempting nonprofit camps from property taxes); Wis. Stat. § 71.26(1)(a) (exempting religious organizations from paying corporate taxes); Wis. Stat. § 77.54(9a)(f) (exempting religious organizations from paying sales tax); Wis. Stat. § 108.02(15)(h)1., 3. (exempting churches and ministers from unemployment tax); Wis. Admin. Code § Tax 11.14(12)(d) (exempting religious organizations from paying Wisconsin sales and use tax). Indeed, when state courts have misconstrued the exemptions to exclude less typical religious uses, the Legislature has responded by expanding them. *See Missionaries of Our Lady of La Salette v. Michalski*, 15 Wis. 2d 593, 597, 113 N.W.2d 427 (1962) (noting Legislature's addition of the term "parsonages" after a state court

interpreted a tax exemption to exclude parsonages).

In sum, the Legislature's plain purpose in crafting what is now Wis. Stat. § 108.02(15)(h)2. was to benefit religious nonprofits. Given that purpose, the numerous other exemptions in the tax statutes, and the administrative ease of granting the exemption, it is clear that the Legislature, appraised of the supposed unconstitutionality of the statute as drafted, would have chosen to extend it to cover all religiously controlled nonprofits operating for religious motivations.

CONCLUSION

This Court should reverse the decision of the court of appeals and hold that Catholic Charities qualifies for the religious exemption in Wis. Stat. § 108.02(15)(h)2.

Dated: November 3, 2025.

Respectfully submitted,

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WIS. STAT. § 809.19(8g) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (bm) for a brief produced with proportional serif font. The length of this brief is 2782 words.

Dated: November 3, 2025

Electronically signed by Ryan J. Walsh
Ryan J. Walsh

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, I caused the foregoing to be filed with the Court's e-filing system, which will send notice to all registered users.

Dated: November 3, 2025

Electronically signed by Ryan J. Walsh
Ryan J. Walsh