SUPREME COURT OF WISCONSIN
Appeal No. 2020AP2007
Circuit Court Case No. 2019 CV 324

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 APPEAL FROM THE COURT OF APPEALS REVERSING THE CIRCUIT COURT OF DANE COUNTY HONORABLE KELLY J. THIMM, PRESIDING

BRIEF OF NON-PARTIES NATIONAL ASSOCIATION OF EVANGELICALS AND FOURTEEN OTHER MAJOR RELIGIOUS ORGANIZATIONS AND RELATED ENTITIES AS *AMICI CURIAE*

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INTRODUCTION[1]

The miserly remedy requested by the State on remand calls to mind a poem by American poet and illustrator, Shel Silverstein: "Now I lay me down to sleep, I pray the Lord my soul to keep, And if I die before I wake, I pray the Lord my toys to break. So none of the other kids can use 'em. . . . Amen."[2]

With respect to the statutory religious exemption at issue here, that is essentially what the State is asking this Court to do: Because withholding that exemption from Catholic Charities Bureau was found to violate the First Amendment by the U.S. Supreme Court, *see Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 250 (2025), on remand the State asks that this exemption be judicially repealed from the state code. *See* State Remedial Br. at 36. Thus, the State attempts to deprive not only Catholic Charities, but many other religious organizations of an exemption on which they have long relied, even while exemptions for secular organizations remain untouched.

To justify its novel remedy, the State argues that because the U.S. Supreme Court found the exemption facially discriminatory, striking the provision is justified. *See id*. at 13, 25-26. But that overlooks that the U.S. Supreme Court "granted certiorari to decide whether the Wisconsin Supreme Court's interpretation of [the exemption], *as applied to petitioners*, violates the First Amendment." *Cath.*

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[1] The Court granted *Amici*'s motion for leave to file a non-party brief on or before November 17, 2025 in an order on November 4, 2025.

[2] *See* Shel Silverstein, *Prayer of the Selfish Child,* thecynicalcrayon:tumblr, https://tinyurl.com/mschk4pd.

Charities, 605 U.S. at 247 (emphasis added). And that is what the Court unanimously held.

Moreover, by repealing a valuable statutory exemption for an entire class of religious organizations while keeping the exemptions in place for secular organizations, the State's proffered remedy invites the Court to violate the Constitution in new ways. *Amici* urge this Court to decline that perilous invitation.[3]

ARGUMENT

I. Repealing Wisconsin's Tax Exemption for Religious Organizations Would Not Cure the State's First Amendment Violation.

The State seeks to fix its previous unconstitutional religious discrimination by denying to *all* organizations operated for a religious purpose the challenged unemployment tax exemption. In other words, the State wants to level down for this whole class of religious organizations rather than leveling up for Catholic Charities Bureau. But that solution would create fresh violations under the Establishment Clause and flouts U.S. Supreme Court precedent in a host of related contexts.

A. Leveling-down Statutory Exemptions Would Defy the Establishment Clause.

For one thing, by singling out all religious organizations covered by the religious-purposes exemption for disfavored treatment in an effort to rectify the unconstitutional treatment of *one* religious organization, while continuing to recognize exemptions for secular organizations, the State would violate the Religion

[3] *Amici* are listed in the Appendix.

Clauses anew. It would do that by "affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). After all, the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Or, as the Court has explained, "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, . . . subject to unique disabilities." *Bd. of Educ. of Westside Cnty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment)).

On that principle, the Court in an earlier case rejected a dissenting justice's suggestion that school officials deny funding to a student-led magazine based on the religious content it contained. The majority explained that such government conduct "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995).

Here, too, the State's proposed judicial repeal would subject religious organizations to "unique disabilities" that at least some other comparable secular groups do not suffer, and that these religious organizations previously did not have imposed on them. *Mergens*, 496 U.S. at 248 (citation omitted). To snatch from the religious organizations what the State still hands to the secular ones would manifest

a "hostility to religion," and a preference for those who believe in no religion. *Id.* This the Establishment Clause forbids. *See id*.

B. Leveling-down Here Would Flout Controlling U.S. Supreme Court Precedent.

Not only would the State's requested remedy plainly violate the Establishment Clause, but leveling down would also run contrary to binding U.S. Supreme Court precedent.

1. One of those precedents is controlling, *Espinoza v. Montana Department of Revenue*, where the Court held that the Montana Supreme Court's elimination of a tax credit program violated the Free Exercise Clause. 591 U.S. 464, 487-88 (2020). There, after a lower state court ruled that refusing to provide an education tax credit for private religious schools would violate the U.S. Constitution, Montana sought to repeal the tax credit, arguing that there cannot be a "free exercise violation" because the tax program no longer existed. *Id*. at 487. The State's position here is practically identical. *See* Wisconsin Remedial Br. at 24. And its argument fails just as Montana's did in *Espinoza:* Eliminating the exemption would target religious organizations in violation of the Free Exercise Clause. *See* 591 U.S. at 487-88. Here, as there, the elimination of a program benefiting religion would be motivated by a desire to find a "mechanism" to disallow religious organizations from taking a benefit afforded by state law but that violated the federal Constitution. *Id.* at 487.

And indulging in the State's proposal here would go even further than the facts in *Espinoza*, where a scholarship program benefiting all schools, secular and religious, was invalidated. Instead, this Court would be effectively limiting the ability of a *class* of religious organizations to achieve a tax benefit—while preserving that benefit for comparable secular organizations. But "a State 'cannot exclude . . . members of any other faith . . . from receiving the benefits of public welfare legislation[.]'" *Espinoza*, 591 U.S. at 475 (quoting *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947)). Accordingly, eliminating a legislative program because it benefits religious organizations would run afoul of the goal of the Free Exercise Clause to "protect[] religious observers against unequal treatment[.]" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533, 542 (1993)).

In short, embracing the State's proposal would have the same effect as Montana's no-aid provision by barring religious organizations from "public benefits solely because of the[ir] religious character[.]" *Espinoza*, 591 U.S. at 476; *see also Trinity Lutheran*, 582 U.S. at 467 (declaring that the exclusion of a religious organization from a public benefit "is odious to our Constitution"). And religious discrimination is emphatically not a constitutionally viable remedy.

2. In a variety of related contexts, when faced with a decision to level down or level up, the U.S. Supreme has always chosen to extend the benefit to the improperly excluded party.

For instance, in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), the Court did not suggest that Philadelphia could cure its constitutional wrong by terminating its services contract with all religious providers of foster-care services. Instead, the Court held that "[t]he refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." *Id.* at 542. In reversing the Third Circuit and "remand[ing] for further proceedings consistent with this opinion," the *Fulton* Court implicitly ordered Philadelphia to reinstate the contract with Catholic Charities. *Id*. at 542-43. The same remedial approach fits here.

Likewise, in the free-speech context, the Court expanded speech for one person rather than curtailing it for many. *See Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." (citation omitted)). And, as one scholar observed, "[i]f the First Amendment contains *any* affirmative right to free exercise—even merely an obligation for the government to remove impediments of its own making—then a freedom-of-speech-like approach to fashioning remedies is warranted." Mark C. Gillespie, *Level-Up Remedies for Religious Discrimination*, 44 Harv. J.L. & Pub. Pol'y 961, 981 (2021). That is certainly true of this case.

Similarly, in the tax context, the U.S. Supreme Court has shown a clear preference for leveling up: "[I]t is well settled that a taxpayer who has been

subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (citing *Cumberland Coal Co. v. Bd. of Revision*, 284 U.S. 23 (1931); *Greene v. Louisville & Interurban R.R. Co.*, 244 U.S. 499, 514-18 (1917); *Chi. Great W. Ry. Co. v. Kendall*, 266 U.S. 94, 98 (1924); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)).

Wisconsin's proposal thus breaks from clear Supreme Court practice. Rather than grant Catholic Charities relief, the State asks to impose the same burden on all religious organizations who otherwise qualify for the exemption. That approach would depart from Supreme Court precedent leveling up when necessary to cure a constitutional defect.[4]

[4] A federal district court faced a comparable leveling-down proposal in *Business Leaders in Christ v. University of Iowa*, where a state university deregistered a religious student group that refused to allow an openly gay leader, in violation of the school's non-discrimination policy. 360 F. Supp. 3d 885, 892-93 (S.D. Iowa 2019), *aff'd in part and reversed in part,* 991 F.3d 969, 979 (8th Cir. 2021) (noting that the university defendants did not appeal the district court's holding that defendants had violated the Free Exercise Clause and the only issue on appeal was qualified immunity). The student group sued and obtained a preliminary injunction, to which the university responded by leveling down: It deregistered thirty-nine other student groups deemed in violation of the non-discrimination policy while not applying the non-discrimination policy to some non-religious groups. *See InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 969-70, 980 (S.D. Iowa 2019), *aff'd,* 5 F.4th 855 (8th Cir. 2021). The district court protested. In its view, the university "proceeded to broaden enforcement of the Human Rights Policy in the name of uniformity—applying extra scrutiny to religious groups in the process—while at the same time continuing to allow some groups to operate in violation of the policy and formalizing an exemption for fraternities and sororities." *Id.* at 993. The court questioned "how a reasonable person could have concluded this was acceptable[.]" *Id.*

II. Repealing the Exemption Would Deepen the State's First Amendment Violation.

Besides violating the Establishment Clause and flouting U.S. Supreme Court precedent, erasing the religious-purposes exemption for all qualified organizations just to avoid having to give it to one of them would independently offend the Free Exercise Clause.

A. Repealing the Exemption Would Target Religious Organizations Contrary to the Free Exercise Clause.

First, repealing the exemption for organizations pursuing religious purposes is essentially targeting a class of religious entities for an additional tax burden. Intentionally doing so violates the Free Exercise Clause under *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

In *Lukumi*, a city council gerrymandered an ordinance to outlaw religious conduct—the sacrifice of animals—but to allow the identical secular conduct of hunting, slaughtering animals for food, eradicating pests, and euthanasia of animals. *Id*. at 535-37. The ordinance blatantly violated "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief," with that principle being "essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id*. at 543. Nor did it matter that the law was facially discriminatory because the Free Exercise Clause "forbids subtle departures from neutrality," *id*. at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)), and "protects against governmental hostility

which is masked, as well as overt," *id*. Ultimately, the Court found the regulations at issue lacked neutrality and could not satisfy strict scrutiny.

The same is true of the State's proposed leveling-down remedy. That remedy reveals hostility toward religion by depriving *only* religious organizations of an exemption they otherwise enjoyed and relied on, while preserving the exemption for non-religious organizations. Such targeting triggers strict scrutiny under *Lukumi*, which scrutiny the proposed remedy cannot possibly satisfy: There is no conceivable compelling state interest that would justify excluding religious organizations, and only religious organizations, from an otherwise available exemption.

B. Repealing the Exemption Would Unconstitutionally Treat Religious Organizations Worse than Secular Organizations.

Religious targeting is objectionable enough. But the State's proposal goes further by leaving intact an equivalent exemption for some secular organizations. Treating religious organizations worse than similarly situated secular entities would violate the "most-favored nation" First Amendment principle announced in *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam).

1. There, during the COVID-19 lockdowns, "California treat[ed] some comparable secular activities more favorably than at-home religious exercise" by allowing more people to gather at "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants" than could gather for worship in a private home. *Id*. at 63. These were

"comparable secular activities" because the lower court "did not conclude that those activities pose a lesser risk of transmission than applicants' proposed religious exercise at home." *Id*. (emphasis omitted).

Tandon laid down free exercise principles that readily apply here. "First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id*. at 62 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18-19 (2020) (per curiam)). Thus, "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue. *Id*. (citing *Roman Cath. Diocese*, 592 U.S. at 29-30 (Kavanaugh, J., concurring)).

The State's leveling-down proposal directly collides with this principle. Although some secular organizations will still not get the exemption under that proposal, some will. Yet a whole class of religious organizations will be denied the exemption. Meting out disparate treatment to religious organizations squarely violates *Tandon*.

The second principle the *Tandon* Court articulated was that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. (citing *Roman Cath. Diocese*, 592 U.S. at 18-19). Here, the interest that justifies the unemployment tax is to ensure that Wisconsinites who lose their jobs receive

unemployment benefits. *See Cath. Charities*, 605 U.S. at 252. Measured against that interest, there is no difference between religious organizations and secular organizations. Hence, by treating comparable secular entities better than religious ones, the remedy the State requests would trigger strict scrutiny for this reason as well. *See Tandon*, 593 U.S. at 62; *Roman Cath. Diocese*, 592 U.S. at 18.

2. Nor can it be disputed that the State bears "the burden to establish that the challenged [remedy] satisfies strict scrutiny." *Tandon,* 593 U.S. at 62. That it cannot do because the proposed leveling-down remedy lacks narrow tailoring. *See Cath. Charities*, 605 U.S. at 252-53.

As the U.S. Supreme Court explained, "[t]he distinctions drawn by Wisconsin's regime . . . are vastly underinclusive when it comes to ensuring unemployment coverage for its citizens." *Id*. at 253. That under-inclusiveness stems from "exempt[ing] over 40 forms of 'employment' from its unemployment compensation program," including "religious entities that provide charitable services in a similar manner to [Catholic Charities]" and that are covered by a different exemption.[5] *Id*. And "[t]hat underinclusiveness leaves 'appreciable damage to [the State's] supposedly vital interest unprohibited' and therefore belies the State's claim of narrow tailoring." *Id*. (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015)).

[5] Erasing the religious-purposes exemption would still leave the church exemption and the minister exemption. *See* Wis. Stat. § 108.02(15)(h)(1), (3).

Because the State's proposed remedy fails strict scrutiny, adopting a leveling-down approach would violate the Free Exercise Clause.

CONCLUSION

The State poorly advised this Court when it insisted last time around that denying Catholic Charities the religious-purposes exemption would not cross any constitutional lines. A unanimous U.S. Supreme Court disagreed. Unfortunately, the State's latest contention is equally misguided. Construing Wisconsin law to eliminate the religious-purposes exemption from unemployment tax would likewise defy binding precedent. Accordingly, this Court should decline the State's proposal and accord Catholic Charities the exemption it deserves.

Dated this 17th day of November 2025.

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APPENDIX: List of *Amici*

National Association of Evangelicals

The African Methodist Episcopal Church

American Islamic Congress

Assembly of Canonical Orthodox Bishops of the United States of America

BAPS Swaminarayan Sanstha

The Church of Jesus Christ of Latter-day Saints

Church of Scientology International

Coalition for Jewish Values

Ethics and Religious Liberty Commission of the Southern Baptist Convention

General Conference of the Seventh-day Adventists

Hindu American Foundation

International Society for Krishna Consciousness

Islam and Religious Freedom Action Team

Lutheran Church—Missouri Synod

The Salvation Army National Corporation

CERTIFICATE OF COMPLIANCE

Pursuant to Wisconsin Statute § 809.19(8g), I certify that this brief conforms to the rules in § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,882 words.

Dated this 17th day of November 2025.

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