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

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS-RESPONDENTS-PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The Court has before it this choice: Will it remedy the religious discrimination against Catholic Charities Bureau and its subsidiaries[1] by invading the legislative realm to impose a tax on parties not before the Court, or will it eliminate the unconstitutional discrimination that prevents the Charities from accessing the tax exemption at issue in this case?[2]

The Court should always choose the option that respects the separation of powers. The only proper *judicial* remedy is to eliminate the unlawful discrimination, not the lawful benefit. This necessarily follows from the indisputable proposition that the judiciary has no authority to set aside the legislature's work except to the extent necessary to preserve the primacy of the Wisconsin and United States constitutions. If the tax benefit is facially sound, there can be no basis for setting it aside *in toto*. The only legitimate remedial target is the

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[1] This brief will collectively refer to the Catholic Charities Bureau, Inc., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc. as the "Charities."

[2] This brief will refer to the Labor and Industry Review Commission and the Department of Workforce Development collectively as the "State."

unconstitutional impediment that prevents access to the tax exemption on religiously neutral grounds.

Further, when a state engages in discriminatory taxation, the United States Supreme Court has insisted that the proper judicial remedy is to afford the successful plaintiff the tax treatment it would have received absent the discrimination; it is not, as the State would have it, raising taxes on others. If the Court could strike the tax exemption *in toto* as a means of eliminating discriminatory treatment, then not only would the "remedy" do nothing for the successful plaintiff, but it would also impose a tax on an unknown number of unidentified organizations that have not been brought within the Court's jurisdiction. Imposing a new tax obligation on members of the general public might be a permissible *legislative* response to the unconstitutional religious discrimination against the Charities, but it is not a permissible *judicial* remedy.

BACKGROUND

Wisconsin's unemployment compensation system requires most employers to either contribute to the government's unemployment fund through payroll taxes, or reimburse the government for benefits paid to laid-off employees. Wis. Stat. §§ 108.17–108.18, 108.151. The system,

however, is not comprehensive. The legislature chose to exempt over 40 types of employment from the payroll tax/reimbursement obligation. Wis. Stat. § 108.02(15)(f)–(kt).[3]

The exemption at issue in this case applies to those "[i]n the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches … ." Wis. Stat. § 108.02(15)(h)2.[4] As construed by this Court, churches do not operate organizations for a primarily religious purpose unless "both the motivations and the activities of the organization" are religious in nature. *Cath. Charities Bureau, Inc. v. LIRC*, 2024 WI 13, ¶ 57, 411 Wis. 2d 1, 33, *rev'd and remanded*, 605 U.S. 238 (2025) [hereinafter *Catholic Charities I*]. The United States Supreme Court ruled that reading a religious activities test into the tax exemption involved the "paradigmatic form of denominational discrimination." *Cath. Charities Bureau, Inc. v. LIRC*, 605 U.S. 238, 249 (2025) [hereinafter *Catholic Charities II*].

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[3] For the sake of simplicity, this brief will not distinguish between these alternative obligations and will refer to both as payroll taxes.

[4] This brief will refer to Wis. Stat. § 108.02(15)(h)2. as the "tax exemption."

The Court must now formulate a remedy for the religious discrimination against the Charities. The parties have presented two possible options. The State recommends that the Court strike down the facially legitimate legislative decision to create a tax exemption. The Charities, on the other hand, ask the Court to eliminate the unconstitutional religious activities test that has impeded them from qualifying for the tax exemption. It cannot be a matter of constitutional indifference which option the Court chooses. The judiciary's responsibility is to uphold lawful legislative policies and enjoin only their unlawful applications. Nothing else will properly respect the separation of powers between the judicial and legislative branches. Here, this Court's religious activities test caused an unconstitutional application of the legislature's chosen tax exemption. Therefore, it is the unconstitutional religious activities test the Court must eliminate, not the lawful tax exemption.

ARGUMENT

I. THE COURT MUST RESPECT THE SEPARATION OF POWERS WHEN FASHIONING A REMEDY

The solution to unconstitutional discrimination in access to a benefit is, of course, equal access. *Heckler v. Mathews*, 465 U.S. 728, 740

(1984) ("when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment … ." (cleaned up)). The required equality in treatment can be restored in one of two ways: either by denying the benefit to everyone, or by enjoining the unconstitutional discrimination that prevents otherwise-qualified parties from accessing the benefit. *Id.* (Equality "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.").

Although both solutions result in equal treatment, it does not necessarily follow that both are equally available as a *judicial* remedy. The Wisconsin Constitution separates and defines the type of power each of the three branches of government may exercise,[5] which means that while the government may legitimately remedy a particular problem, the *nature* of the remedy depends on which branch provides it. Here, the legislature—as the lawmaking branch of government and author of the

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[5] "Three clauses of the Wisconsin Constitution embody this separation: Article IV, Section 1 ('[t]he legislative power shall be vested in a senate and assembly'); Article V, Section 1 ('[t]he executive power shall be vested in a governor'); and Article VII, Section 2 ('[t]he judicial power ... shall be vested in a unified court system')." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 159-60.

benefit in question—would be free to choose either option. The judiciary is not. The Court cannot implement the State's recommendation without invading the legislative domain twice over: first, by invalidating a facially constitutional legislative policy, and second by prescribing a new legal obligation governing future actions by members of the general public who are not before the Court. Consequently, the Court cannot eliminate the tax exemption as a means of accomplishing equal treatment without violating the Wisconsin Constitution's separation of powers.

A. The Judiciary May Not Invalidate Constitutionally Unobjectionable Statutory Provisions

"Statutes are generally presumed constitutional." *In re Gwenevere T.*, 2011 WI 30, ¶ 46, 333 Wis.2d 273. That presumption protects statutes from being disregarded or set aside by the judiciary without proof of a constitutional deficiency. The tax exemption provided by Wis. Stat. § 108.02(15)(h)2. is entitled to that presumption, which protects it against judicial invalidation in the absence of a proven constitutional defect. Critically, no party has so much as hinted that the tax exemption

is facially unconstitutional.[6] For purposes of this litigation, therefore, the tax exemption's facial constitutionality is beyond peradventure.

The "remedy" the State advocates is one that would be appropriate only if it had alleged, and succeeded in proving, that the tax exemption is facially unconstitutional. Such challenges require a demonstration that "the law cannot be constitutionally enforced under any circumstances." *State v. Roundtree*, 2021 WI 1, ¶ 17, 395 Wis. 2d 94, 102.[7] The remedy for such a deficiency is inherent in the substantive

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[6] The Court suggested there might have been some ambiguity about whether the Charities were making an as-applied or facial challenge. *Catholic Charities I*, 2024 WI at ¶ 77 n.18 ("There are two major types of constitutional challenges: facial and as-applied. … The parties' briefing was not particularly clear regarding which type of challenge [the Charities] bring here."). But there was never any real lack of clarity: A successful facial challenge would have been entirely self-defeating, and there is no reason to believe the Charities' attorneys didn't know this. In any event, the Court acknowledged that its decision assumed an as-applied challenge. *Id.* ("Both LIRC and the court of appeals interpreted the petitioners' challenge to be an as-applied challenge, and we do the same.").

[7] Whether the Court requires "that parties prove statutes unconstitutional beyond a reasonable doubt," or instead undertake the lesser burden of "a plain showing or a clear demonstration that a statute is unconstitutional," the party desiring invalidation of a statutory provision must assume and carry this burden before it may have that remedy. *In re Commitment of C.S.*, 2020 WI 33, ¶ 48, 391 Wis. 2d 35, 71 (Rebecca Grassl Bradley, J., dissenting) (cleaned up).

standard: The Court declares the challenged provision wholly unenforceable. The statutory provision becomes, as a practical matter, a dead letter. Hence, the State's proffered remedy, which is indistinguishable from what would follow a successful facial challenge, is appropriate only for a claim that was never made.

The State offers no alternative rationale upon which this Court could justify invalidating a statute that is not facially unconstitutional. It simply *assumes* that reading the unconstitutional religious activities test into the tax exemption means the Court may do with the statute as it pleases. But that is not so. "The only power possessed by this Court is to prevent any actions in excess of the authority vested in [the legislature] by the constitution." *Outagamie Cnty. v. Smith*, 38 Wis. 2d 24, 40 (1968). Beyond that limited circumstance, the judiciary "is without authority to intermeddle in matters of legislative concern." *Id.* at 39; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (Unless necessary to redress cognizable injury, "courts have no charter to review and revise legislative … action. This limitation is founded in concern about the proper—and properly limited—role of the courts in a democratic society." (citations omitted; cleaned up)). Promulgating and rescinding facially unobjectionable tax exemptions

lies at the very heart of the policy judgment and discretion the Wisconsin Constitution commits to the legislature. It is the judiciary's duty, therefore, to give full force and effect to the legislature's handiwork except to the extent prohibited by a constitutional mandate.

The State has not shown that the legislature facially exceeded its constitutional authority in enacting Wis. Stat. § 108.02(15)(h)(2). So, the predicate to engaging "[t]he only power possessed by this Court" has not been satisfied. *See Outagamie Cnty.*, 38 Wis. 2d at 40. Striking the tax exemption *in toto* in the name of remedying the Court's unconstitutional religious activities test would just compound the constitutional errors in this case by violating the separation of powers.[8]

B. The Judiciary May Not Legislate

The State's preferred "remedy" would violate the separation of powers not only because it would reject a facially valid statutory provision, but also because it would require the judiciary to invoke the legislative power to impose new tax liabilities on the general public. There are, currently, an unknown number of unidentified organizations

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[8] It would be especially anomalous to strike the tax exemption when it was the Court's religious activities test (as opposed to the statutory text itself) that was ruled unconstitutional.

that qualify for the tax exemption. They have not been brought under the Court's jurisdiction, and they have no reason to suspect that the Court is entertaining the State's demand that the *judiciary* impose tax obligations on them that have neither been considered nor approved by the legislature.

"The courts have no power to legislate." *Friedrich v. Zimmerman*, 238 Wis. 148, 298 N.W. 760, 762 (1941). This follows necessarily from the Wisconsin Constitution's grant of the lawmaking power exclusively to the legislature. *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 35, 387 Wis. 2d 511 ("The separation of powers operates in a general way to confine legislative powers to the legislature." (citations omitted)). The Court cannot create new legal obligations for the general public because doing so would be "the equivalent of this court invading the legislative field," which "would amount to legislation by judicial decree. This we cannot do." *Fredricks v. Kohler Co.*, 4 Wis. 2d 519, 525 (1958); *Montello Granite Co. v. Schultz*, 197 Wis. 428, 222 N.W. 315, 317 (1928) (same).

Determining which members of the general public should bear the burden of payroll taxes is a quintessentially legislative concern. And it is the legislature, not the judiciary, that has the authority "to declare

whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate." *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 562 (cleaned up). *See also Gundy v. United States*, 588 U.S. 128, 153 (2019) (Gorsuch, J., dissenting) (the legislative power includes "the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society.'" (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810))).

The legislature has already decided who shall be responsible for payroll taxes by, in part, adopting Wis. Stat. § 108.02(15)(h)2. The State's proposed "remedy" would defy the legislature's explicit decree that those described by that statutory provision (exclusive of the Court's religious activities test, of course) should be exempt from the payroll tax obligation. The State's "remedy" would require the exercise of legislative power, which means it is beyond this Court's authority to adopt.

II. EXTENSION OF BENEFITS IS THE ONLY PERMISSIBLE REMEDY IN THIS CASE

The State recounts that *Heckler* said the United States Supreme Court has "never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." 465 U.S. at 738. But nor has it ever considered whether the separation of powers restricts the judiciary's remedial authority to eliminating unconstitutional discrimination as opposed to striking down facially constitutional benefits. Nonetheless, the Supreme Court's practice is almost indistinguishable from what it would be under a separation-of-powers analysis. "Ordinarily," it says, "'extension, rather than nullification, is the proper course.'" *Sessions v. Morales-Santana*, 582 U.S. 47, 74 (2017) (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)). That is particularly so in cases involves financial benefits in which the unconstitutional discrimination "den[ied] benefits to discrete groups." *Id.*[9]

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[9] The *Sessions* Court listed, as examples, *Califano v. Goldfarb*, 430 U.S. 199 (1977) (survivors' benefits), *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (disability benefits), *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (food stamps), *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military spousal benefits).

Further, when the State denies a benefit to an otherwise qualified organization on religiously discriminatory grounds, the United States Supreme Court regularly enjoins the discrimination, not the benefit. In *Widmar v. Vincent*, for example, the Supreme Court affirmed the Eighth Circuit's judgment striking the University of Missouri-Kansas City's policy preventing religious student organizations from using the student center. 454 U.S. 263 (1981). The Court did not agonize over whether it should order the University to close the student center to all student organizations; it simply invalidated the unconstitutional impediment to the otherwise constitutional benefit. The Supreme Court similarly struck down a public-school policy that forbade religious groups from after-school use of school buildings on the same basis as nonreligious groups. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). So, too, with respect to the University of Virginia's refusal to authorize the payment of outside contractors for the printing costs of a religious student publication on the same basis as nonreligious publications. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995). The political authorities in each of these cases were free to subsequently eliminate the benefit entirely, thereby achieving equal treatment. But until

such time, the *judiciary's* responsibility was to remove the unconstitutional impediment so that those who had suffered religious discrimination could access the benefits on the same basis as all others who were similarly situated.

Finally, and conclusively, the United States Supreme Court has held that the only permissible judicial remedy for discriminatory state taxation—like the discrimination suffered by the Charities in this case—is to make the favorable tax treatment available to the successful plaintiff. In *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931), the Supreme Court addressed a claim that county "taxing officers … exacted from petitioner taxes on shares of its stock at rates higher than were exacted of competing moneyed capital,"284 U.S. at 240. The Court said "[t]he right invoked is that to equal treatment," which it acknowledged could "be attained if either their competitors' taxes are increased or their own reduced." *Id.* at 247. And yet it categorically rejected the "remedy" proposed by the State in this case. It said, "it 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." *Id*. (emphasis supplied). So, the Court ordered the county authority to refund the taxes that had been discriminatorily exacted from the plaintiff. The U.S. Supreme Court's judgment is conclusive on this Court. The State engaged in religious discrimination against the Charities in violation of the First Amendment (by interposing a court-created religious activities test between the Charities and the tax exemption). According to *Bennett*, this Court cannot require the Charities "to assume the burden of seeking an increase of the taxes" imposed on others. 284 U.S. at 247. So, the judicial remedy here *must* be to grant the Charities access to the tax exemption.

CONCLUSION

The separation of powers requires that this Court preserve the facially constitutional tax exemption. Additionally, *Bennett* authoritatively declares that the only proper remedy for discriminatory state taxation is to eliminate the tax burden caused by the unconstitutional discrimination.

November 17, 2025

Respectfully submitted,

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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. The length of this brief is 2,994 words.

Dated: November 17, 2025

Electronically signed by

Daniel Kelly

CERTIFICATE OF SERVICE

I hereby certify that this brief (and this Certification) has been served on all opposing parties through the Court's electronic filing system.

Dated: November 17, 2025

Electronically signed by

Daniel Kelly