No. 24-154

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., ET AL.,

Petitioners,

v.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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

JAMES E. BARRETT
EIMER STAHL LLP
224 S. Michigan Avenue
Suite 1100
Chicago, IL 60604

RYAN J. WALSH
Counsel of Record
EIMER STAHL LLP
10 East Doty Street
Suite 621
Madison, WI 53703
(608) 620-8346
rwalsh@eimerstahl.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST[1]

The Wisconsin State Legislature is the bicameral legislative branch of the state government of Wisconsin. Wis. Const. art. IV, § 1. Under the state constitution, the Legislature's power "encompasses the ability to determine whether there shall be a law, to what extent the law seeks to accomplish a certain goal, and any limitations on the execution of the law." *Evers v. Marklein*, 2024 WI 31, ¶ 12.

When making Wisconsin law, the Legislature is mindful of the constitutional bounds on its power, including the federal religion clauses, *see* U.S. Const. amend. I, and the parallel state rule that the Legislature may not "interfer[e] with . . . the rights of conscience" or give "preference . . . to any religious establishments or modes of worship," Wis. Const. art. I, § 18.

The Wisconsin Supreme Court, however, did not heed those limitations in the decision below. It instructed state bureaucrats administering Wisconsin's religious-nonprofit unemployment-tax

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, that no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no entity or person, aside from *amicus curiae*, its members, or its counsel, made a monetary contribution to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent to file this brief pursuant to Rule 37.2.

exemption to exclude all but "typical" religious organizations. This holding flouts both the federal and state constitutions and blatantly misinterprets Wisconsin law. The Legislature enacted the exemption to protect religious exercise—"typical" or niche—not to harm religious minorities.

The Legislature has a strong interest in vindicating its law and holding the court below accountable for its misinterpretation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal constitution bans religious establishment because it is dangerous. As with gifting a coat of many colors, what may start with good intentions can devolve into resentment and strife. The decision below illustrates the point. It licenses bureaucrats to discriminate against disfavored religious groups. That regressive result is harmful, wrong, and unconstitutional.

I. The founding generation experienced firsthand the suffering that government favoritism inflicts on religious practice. Religious establishments in the American colonies intimidated and persecuted religious minorities. They should have known better, having been persecuted as minorities in Europe. Thankfully, the country eventually came to its senses and decommissioned state religious establishments. Following the First Amendment's lead, Wisconsin, too, rejected religious establishments from the start.

As a result, the state became a diverse haven for religious communities. The state still provides broad protections for religious freedom, including tax exemptions that give faith-based institutions room to breathe.

The decision below, however, conjures up the bygone spirit of religious favoritism. It misinterprets the religious tax exemption to extend to only those religious nonprofits that engage in "typical" religious practice, like holding worship services and preaching sermons. But nothing in the language of the religious exemption empowers state bureaucrats to discriminate against religious minorities who they think don't fit a typical mold.

II. The divisive decision below is not only anachronistic; it is unconstitutional. The government may not discriminate against less-favored religious groups. It may not reserve benefits for "typical" religious nonprofits because that necessarily harms nonprofits run by minority religious groups, the people the First Amendment was designed to protect. On top of that, the decision directs state agencies to assess whether an organization's claims are generally accepted among coreligionists, so it encourages government meddling and intrareligious conflict, too.

No group should have to satisfy a panel of judges that it is religious enough for a tax exemption. This Court should grant certiorari and reverse.

ARGUMENT

I. LIKE OTHER STATES, WISCONSIN SEEKS TO PROMOTE RELIGIOUS PRACTICE OF ALL KINDS THROUGH ITS CONSTITUTION AND TAX EXEMPTIONS, NOT JUST PRACTICES THAT SOME JUDGES DEEM "TYPICAL" FOR RELIGION.

The court below took a sledgehammer to Wisconsin's religious unemployment-tax exemption. It instructs state bureaucrats to deny the exemption to any religious nonprofit organization that doesn't conform to "typical" religious behavior. App.26a. That openly discriminatory decision is wrong. The Wisconsin Legislature enacted the exemption to encourage religious freedom, not to stir up religious conflict by mistreating religious minorities.

The state court's misreading is inexcusable given Wisconsin's long history as a haven for diverse religious exercise and the Legislature's plain intent. And besides, the First Amendment bans the state from doting on favored religious groups.

A. By the time Wisconsin became a state in 1848, the country had already suffered severe interdenominational and interreligious conflict and learned the hard lesson that state religious establishments do more harm than good. In Virginia, for example, the established Anglican church had aggressively persecuted Baptists: in one infamous incident an Anglican parson and the local sheriff

interrupted a Baptist service, dragged the preacher off the stage, and horsewhipped him. Andy G. Olree, *"Pride Ignorance and Knavery": James Madison's Formative Experiences with Religious Establishments*, 36 Harv. J.L. & Pub. Pol'y 211, 227–28 (2013). Quakers faced similar harsh treatment in Massachusetts; some were killed because the Puritans perceived them as a threat to their Congregationalist churches and pursuit of religious uniformity. Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. Rev. 455, 464 (1991).

In response, states began rejecting establishments in favor of protections for religious freedom. The persecuted Quakers founded Pennsylvania on this very principle: the "charter creating the province of Pennsylvania contained no clause establishing a religion." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 183 (2012). Similarly, Rhode Island's charter prohibited punishment "for any differences in opinion in matters of religion." Hall*, supra*, at 477. By 1791, at least six of the thirteen state constitutions "prohibit[ed] governmental preference among religions or among Christian sects." Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1637 (1989). And by the 1860s, 27 of 37 state constitutions prohibited religious establishment. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American*

History and Tradition?, 87 Tex. L. Rev. 7, 31–32 (2008). Not only did those protections benefit religious dissenters, but they also fostered the development of diverse, competing "religious factions," which served "as a source of peace and stability" by "frustrat[ing] attempts to monopolize or oppress" religious practice. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1515–16 (1990).

Instead of repeating other states' errors, Wisconsin enacted broad protections for religious freedom from inception—and reaped the benefits. The Wisconsin constitution secured "the rights of conscience," guaranteed the freedom to worship, and banned government discrimination between religious groups: "nor shall . . . any preference be given by law to any religious establishments or modes of worship." Wis. Const. art. I, § 18 (1848). And the state quickly became a religious haven for immigrants from every corner of Europe. *Ethnic Groups in Wisconsin: Historical Background*, Max Kade Institute for German-American Studies, University of Wisconsin-Madison, https://mki.wisc.edu/ethnic-groups-in-wisconsin-historical-background/. Protestant Welsh immigrants came from England fleeing both religious and ethnic persecution. *Id.* So many Catholic, Protestant, and Jewish Germans emigrated to Wisconsin that by 1900 about one-third of Wisconsin citizens had been born in Germany. *Id.* And even today one can find Belgian, Norwegian, and Polish communities around the state because they preserved their language and customs by founding their own

churches and religious institutions. *Id.*

Adding to constitutional protections, Wisconsin also provided tax exemptions to encourage its citizens to develop religious institutions. That practice too traces back to "pre-Revolutionary colonial times." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676–77 (1970). In fact, "[f]ew concepts are more deeply embedded in the fabric of our national life . . . than for the government to exercise . . . benevolent neutrality toward churches and religious exercise generally" by granting tax exemptions. *Id.* This "lengthy tradition" still flourishes today: "more than 2,600 federal and state tax laws provide religious exemptions." *Gaylor v. Mnuchin*, 919 F.3d 420, 436 (7th Cir. 2019). Tax exemptions have long been recognized to promote both healthy religious institutions and a healthy barrier against government intrusion into those institutions. *Walz*, 397 U.S. at 676–77.

Wisconsin provides several broad religious tax exemptions. Churches and religious associations are exempt from paying property tax, including on property housing pastors or other members of religious orders. Wis. Stat. § 70.11(4); *see Missionaries of Our Lady of La Salette v. Michalski*, 15 Wis. 2d 593, 597 (1962). Religious schools and religious nonprofit camps receive generous property tax exemptions. Wis. Stat. § 70.11(4), (11); *see Wis. Evangelical Lutheran Synod v. City of Prairie du Chien*, 125 Wis. 2d 541, 551 (Ct. App. 1985). And religious organizations are exempt from paying sales

tax, Wis. Stat. § 77.54(9a)(f); Wis. Admin. Code Tax § 11.14(12)(d), or corporate income tax, Wis. Stat. § 71.26(1)(a).

When state courts have misconstrued the exemptions to exclude less typical religious uses, the Legislature has expanded them. For example, a state court interpreted the language in the property tax exemption "used exclusively by . . . churches or religious . . . associations" to exclude parsonages, so the Legislature responded by adding the word "parsonages." *Michalski*, 15 Wis. 2d at 597. Then a state court decided that a house for members of a religious order was nonexempt, which forced the Legislature to add an express clause for housing for "members of religious orders." *Id.* at 598. These decisions hammer home the Legislature's plain intent that the religious exemptions are broad exemptions.

Churches and religious organizations are also exempt from paying unemployment tax. Wis. Stat. § 108.02(15)(h). The exemption is all-inclusive. It extends to all religious nonprofit organizations that are a "church or convention or association of churches" or an "organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches." *Id.* § 108.02(15)(h)(1)–(2).

The exemption's plain language exempts religious organizations regardless of whether their beliefs or activities reflect (to some) a traditional or more

marginal religious practice. And that is necessary because a narrower, exclusive exemption would undermine the exemption's whole purpose. For one, when the government exempts some religious groups but not others, it effectively "allie[s] itself with one particular form of religion" and thus "inevitabl[y] . . . "incur[s] the hatred, disrespect and even contempt of those who h[o]ld contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). For another, an exclusive exemption would catalyze interdenominational conflict. "[A]nguish, hardship and bitter strife . . . come when zealous religious groups struggle[] with one another to obtain the Government's stamp of approval." *Id.* at 429.

The broad language also means that many kinds of religious organizations qualify for the exemption, from bakeries to thrift stores. *See Kendall v. Dir. of Div. of Emp. Sec.*, 393 Mass. 731, 735 (1985) (collecting cases interpreting parallel statutes). No doubt that coverage may reduce state revenue, but the cost is more than worth it. Religious nonprofit organizations—of every stripe—are to be treated equally and permitted to keep and spend their funds.

B. The Wisconsin Legislature enacted these laws against the backdrop of constitutional first principles that forbid the government from discriminating against any religion or second-guessing religious beliefs. *Strenke v. Hogner*, 2005 WI 25, ¶ 28. The government may not turn its "power, prestige and financial support" towards or against "a particular religious belief." *Engel*, 370 U.S. at 431. The

government "may not coerce anyone" to alter their religious beliefs or practices. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 537 (2022) (citation omitted). And that, among other things, means it "must be neutral when it comes to competition between sects" and cannot show "partiality to any one group" over the others. *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982). The government thus cannot design laws to deny religious groups access to government benefits. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017).

Nor can the government deny religious protections by questioning the orthodoxy or validity of a religious practice. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). It must apply religious exemptions and protections at arm's length and may not "inquire" whether a person or organization "correctly perceived the commands of their . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981).

The religious unemployment-tax exemption, as written, respects those constitutional limitations. It does not favor any religious group over another but applies to any "body or organization of religious believers." *Church*, Merriam-Webster's Collegiate Dictionary 222 (11th ed. 2003); *see* Wis. Stat. § 108.02(15)(h)(1). And it extends to any religious nonprofit organization run or supported by any religious group. Wis. Stat. § 108.02(15)(h)(2). The

law's broad language (covering any nonprofit "organization operated primarily for religious purposes") makes every effort to avoid picking favorites or defining the exemption in exclusive ways that would stir up resentment between differently treated religious organizations.

The broad language also prevents the state from denying the exemption for discriminatory reasons. For example, the statute does not permit a state agency to refuse the exemption on the grounds that other members of the same faith tradition would not consider the work to have religious underpinnings. *Thomas*, 450 U.S. at 715–16. As long as the claim that the organization operates for religious purposes is not "so bizarre," as long as its work is not "so clearly nonreligious in motivation," then it is exempt. *Id.*

C. The Wisconsin Supreme Court, however, has effectively rewritten the statute, and, clashing with the First Amendment, its revisions threaten to stir up conflict. The decision below turned on the meaning of the phrase "organization operated primarily for religious purposes," and the court held that an organization does not operate primarily for religious purposes unless it "participate[s] in worship services, religious outreach, ceremony, or religious education." App.29a. In its view, those organizations are the "typical" organizations that deserve the exemption. App.26a (alteration adopted).

Applying that rule to the Catholic charities, the court held that they do not qualify because they only

provide charity to the needy. App.30a. Put plainly, the court held that charity is not religious because it does not *sound like* church (proselytizing) or *look like* church (worship services). App.26a. That is wrong for several reasons. To start, a church could run a charity with none of these trappings, and so long as the charity was not a legally separate nonprofit entity, it would be exempt. Wis. Stat. § 108.02(15)(h)(1). The decision below thus replaces substance with a senseless distinction.

Even worse, the decision denies the religious exemption to what is arguably the most religious of nonprofits: the charitable arm of the Catholic church. The early Christian church invented the concept of charity: there "were no pre-Christian institutions in the ancient world that [provided] charitable aid, particularly health care, to those in need." Gary B. Ferngren, *Medicine and Health Care in Early Christianity* 124 (2009). The hospital, for example, is, "in origin and conception, a distinctively Christian institution, rooted in Christian concepts of charity and philanthropy." *Id.* And it remained true at the time of the Founding that "charity [was] almost exclusively regarded as within the purview of religion." Michael W. McConnell, *Religion and Its Relation to Limited Government*, 33 Harv. J.L. & Pub. Pol'y 943, 949 (2010). So while the court below seemingly believes that "charitable" activities are "a wholly secular endeavor," App.30a, that is flat wrong. Even the word "charity" is pregnant with religious meaning; in Old English, it meant "Christian love of one's fellows." *Charity*, Oxford English Dictionary 293

(3d ed. 2010). The court below picked about the worst set of facts to argue that a charitable organization is not a religious organization.

Adding insult to injury, the state court declared that the reason it disqualified the Catholic charities from the tax exemption is that they perform charity consistent with Catholic teaching. Catholics believe that practicing Christian faith involves unconditional charity to those in need. *See* Pet. at 10–11. But the state court held that charity is not truly religious unless it comes with strings attached, such as requiring attendance at a worship service or Bible reading. App.29a. The decision below thus denied the Catholic charities the tax exemption because it was *complying* with the religious tenets of its faith rather than practicing charity in the way that the court below arbitrarily considers more religious.

Nothing in the text of the statute even remotely suggests that Catholics (or any religious group) must violate their beliefs about charity to qualify for the tax exemption. The whole point of the statute is to protect nonprofits engaging in charitable work for religious purposes. The theory below—that charity is never religious because it is sometimes secular—is nonsense.

II. FLOUTING THIS COURT'S PRECEDENTS, THE DECISION BELOW WRITES INTO THE TAX EXEMPTION STATUTE A CONTENTIOUS, SECTARIAN DEFINITION OF TRUE "RELIGION" THAT DIRECTS STATE AGENCIES TO SHUT OUT DISFAVORED RELIGIOUS GROUPS.

In denying the Catholic charities the religious tax exemption, the Wisconsin Supreme Court imposed a segregationist regime that violates the constitution, twice over. *First*, it directs the state to deny the religious exemption to any religious groups that don't fit the "typical" Western, Protestant mold. That not only harms Catholics, Jews, Hindus, and other religious groups, but also pits the court's preferred, "typical" religious groups against the others. *Second*, the decision pours gasoline on interdenominational strife because it directs the state to assess whether a nonprofit's religious claims reflect some consensus view of the tenets of that faith. Neither rule can withstand First Amendment scrutiny.

A. To start, the state court replaced the statute's broad religious protection with a discriminatory framework that creates friction between religious groups. Under the new rule, a religious nonprofit is not exempt unless its activities either look or sound like traditional religious activities—"worship services, religious outreach, ceremony, or religious education." App.29a. Put plainly, that means a nonprofit is not religious without pulpits and choirs or hymns and Bible studies.

The state court's philistine conception of religion ignores the diversity and complexity of American religious practice. Most relevant here, both Jews and Catholics "consider charity a central religious practice," and, "according to the Catholic faith, charity is a religious duty they must fulfill in an impartial manner, without proselytizing." App.81a–83a (Bradley, J., dissenting). But there is much more. While many see yoga as enjoyable exercise, Hare Krishnas and Hindus consider it a deeply religious practice.[2] Imposing geographic formations like Devils Tower National Monument in Wyoming are simply vacation destinations to many, but to some Native Americans such places carry deep religious significance.[3] Under the state court's narrowminded conception of religious practice, nonprofits promoting these minority religious practices cannot qualify for the exemption. They are not "typical" enough to make the cut.

That discriminatory treatment is unconstitutional, and for good reason: just as picking favorites turns friends into enemies on the playground, reserving exemptions for only "typical"

---

[2] *Bhakti Yoga*, ISKCON, https://www.iskcon.org/beliefs/bhakti-yoga.php (accessed August 27, 2024); *History of HAF's Take Back Yoga Project*, Hindu Am. Found., https://www.hinduamerican.org/projects/hindu-roots-of-yoga (accessed August 27, 2024).

[3] *A Place of Reverence for Native Americans*, Nat'l Park Serv., https://www.nps.gov/deto/learn/historyculture/reverence.htm (accessed August 27, 2024).

religions stirs up strife between religious groups. The state cannot "prefer one religion over another" based on the court's own little list of must-have features. *Larson*, 456 U.S. at 246.

And reserving benefits for the "typical" religious nonprofit by definition harms nonprofits run by minority religious groups, the very ones the First Amendment was designed to protect. The court's stereotypes of religious activity—"worship services, religious outreach, ceremony, or religious education"—unabashedly reflects "a 'Western' understanding of religion." App.106a (Bradley, J., dissenting).

The decision below also encourages conflict with the state by vesting significant discretion in state bureaucrats to decide where to draw the line for "typical" religious practice. The court below chose only vague factors to govern the typicality analysis, and those factors are "highly susceptible to manipulation." App.80a (Bradley, J., dissenting). Disputable factors kindle litigation, which is dangerous in the explosive context of government-church relations. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). The decision below pits church against state in a constant fight, empowering the state to deny tax exemptions by labeling religious nonprofit work "secular," App.30a, which forces

minority groups to come to court to defend their religious beliefs.

B. To make matters worse, the decision below also directs the state to deny the religious exemption if it concludes that an organization's religious claims are heterodox. This Court has long prohibited lower courts from attempting to act as "arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, which means that the state cannot deny religious protections based on whether a person's views are the generally accepted views in that person's faith tradition. But that is exactly what the decision below requires. The state must determine what activities that faith tradition counts as truly religious and then compare the organization's activities against that list to see if they match, because in the state court's view what counts as a religious activity "may be different for different faiths." App.27a.

That flips the First Amendment on its head, because the whole point of the religion clauses is to protect religious dissenters, whether minority religions or minority groups within a major religion. *Kennedy*, 597 U.S. at 524. The state cannot deny religious exemptions based on its conclusion that the organization's religions claims are not generally accepted "among followers of a particular creed." *Thomas*, 450 U.S. at 715. If the religious claim is not "bizarre," the government must take it at face value. *Id.* "It is not within the judicial ken to question the centrality of particular beliefs *or practices* to a faith, or the validity of particular litigants' interpretations

of those creeds." *Hernandez*, 490 U.S. at 699 (emphasis added).

Denying the exemption to religious dissenters only pours fuel on interdenominational tensions by further punishing them for their refusal to adopt the majority view. That is not the state's place. In fact, that harmful behavior is what drove dissenters like the Baptists and Quakers to reject religious establishments and secure religious freedom in the first place. It is unconstitutional for the state to use its influence to penalize religious dissenters.

* * *

The decision below makes it harder for non-typical religious organizations to qualify for the unemployment-tax exemption. Perhaps, to the court below, that is a feature of its decision, not a bug. After all, in its words, charitable "services can be provided by organizations of either religious or secular motivations, and the services provided would not differ in any sense." App.30a. Put plainly, if secular organizations do similar work, then religious organizations don't deserve a religious exemption. But that is not the court's place to decide. The Legislature granted a religious exemption, and the court may not rewrite it—especially not in a way that violates religious organizations' First Amendment rights.

The ultimate irony is that the decision below punishes the most universally lauded religious

charitable work. No one, not even the court below, doubts the importance of providing basic employment and daily life services to individuals with disabilities or low incomes. App.8a–10a. But rather than thank the Catholic charities for their service, the state court demanded that they "imbue program participants with the Catholic faith"—or take a financial hit. App.29a. These misguided tactics, which flout the First Amendment, should be shut down.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES E. BARRETT
EIMER STAHL LLP
224 S. Michigan Avenue
Suite 1100
Chicago, IL 60604

RYAN J. WALSH
Counsel of Record
EIMER STAHL LLP
10 East Doty Street
Suite 621
Madison, WI 53703
(608) 620-8346
rwalsh@eimerstahl.com

Counsel for Amicus Curiae

September 12, 2024