No. 24-154

In the
Supreme Court of the United States

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

Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Wisconsin's unemployment insurance statute, which exempts religious organizations based on the purpose and nature of their operations, complies with the First Amendment.

2. Whether state courts may require proof of unconstitutionality "beyond a reasonable doubt" in considering federal constitutional challenges.

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INTRODUCTION

This case involves an effort by Catholic Charities of the Diocese of Superior, Wisconsin, and four independently incorporated sub-entities of Catholic Charities to obtain a state statutory exemption from paying unemployment insurance contributions on the grounds that they are "operated primarily for religious purposes." They argue the First Amendment compels this result.

No split of authority among the states' supreme courts exists on that constitutional question, and the Wisconsin Supreme Court decision does not directly conflict with the decision of any federal circuit or state high court. All courts look to some degree at the operations of the group seeking an exemption; none simply grant the exemption solely based on the group's assertion that its activities are religiously motivated. On the merits, the Wisconsin Supreme Court correctly declined to hold that the First Amendment entitles Petitioners to this tax exemption.

Likewise, no split of authority exists regarding the presumption of constitutionality afforded to statutes when their validity is challenged. The variations Petitioners identify are rhetorical, not substantive. And even if a split existed, Petitioners did not raise this issue at any level below and therefore it was not sufficiently developed to warrant this Court's review.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

Wisconsin established its unemployment compensation system in 1932, the first in the Nation. App. 14a. It enacted its law, codified today in Wis. Stat. ch. 108, to "avoid the risk or hazards that will befall those, who, because of employment, are dependent upon others for their livelihood." App. 14a. The law collects "limited funds from a large number of employers, particularly during periods of stable employment, then pay[s] out benefits during periods of high unemployment from the funds that have been accumulated." App. 14a.

Generally, any service performed for pay for a public, private, or nonprofit employer is covered by Chapter 108. App. 15a. But some services are statutorily exempt. Relevant here, Wisconsin law exempts paid service "in 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. Petitioners seek that exemption here.

Catholic Charities states that it provides services to the poor and disadvantaged as an expression of the social ministry of the Catholic church in the Diocese of Superior and that its "purpose . . . is to be an effective sign of the charity of Christ." App. 7a. It also states that its religious mission requires it to offer services to all in need, not just those of the Catholic faith. App. 7a.

Catholic Charities offers various charitable services partly through four separately incorporated sub-entities, the other Petitioners in this case:

- Barron County Developmental Services, Inc., provides job placement, job coaching, and an "array of services to assist individuals with disabilities [to] get employment in the community." This company had no religious affiliation until it joined Catholic Charities in 2014. App. 8a.
- Black River Industries, Inc. provides job training and daily living services to people with developmental or mental health disabilities, as well as those with a limited income. App. 8a–9a.
- Diversified Services, Inc. provides work opportunities to individuals with developmental disabilities. App. 9a.
- Headwaters, Inc., provides services for people with disabilities including training related to activities of daily living and employment, and provides Head Start home visitation services. App. 9a.

People receiving services from these organizations receive no religious training or orientation, and none of them attempts to "inculcate the Catholic faith." App. 10a. Employees need not ascribe to any religious faith. App. 10a.

None of the sub-entities receives funding from the Diocese of Superior. Barron County Development Services, Inc. contracts with the Wisconsin Department of Workforce Development's Division of Vocational Rehabilitation to provide its services. App. 8a. Black River Industries, Inc.'s funding comes largely from county and state government. App. 8a–9a. Diversified Services, Inc. receives its funding from

Family Care, a Medicaid long-term care program, and private contracts. App. 9a. And Headwaters, Inc. is funded primarily through government contracts. App. 9a.

Catholic Charities has participated in Wisconsin's unemployment insurance program since 1972, when it submitted a form describing the nature of its operations as "charitable," "educational," and "rehabilitative," not "religious." App. 10a. The state agency then administering the uninsurance program determined that Catholic Charities was subject to the unemployment insurance law. App. 10a.

In 2015, a Wisconsin trial court determined that a sub-entity of Catholic Charities that is not part of this case was eligible for the religious purposes exception in Wis. Stat. § 108.02(15)(h)2. App. 10a. After that ruling, Catholic Charities and the four sub-entities sought a determination from the Wisconsin Department of Workforce Development, which administers the unemployment compensation system today, that they too are exempt. App. 10a–11a.

The Department denied Petitioners' request to withdraw from the program because it determined that they had not established that they are "operated primarily for religious purposes" within the meaning of Wis. Stat. § 108.02(15)(h)2. App. 11a. An administrative law judge reversed that decision, but the final agency decisionmaker, the Labor and Industry Review Commission, affirmed the Department's determination. 11a. On judicial review, the trial court for Douglas County reversed in Petitioners' favor, but the court of appeals and Wisconsin Supreme Court affirmed the Labor and

Industry Review Commission's decision. App. 11a–12a.

The Wisconsin Supreme Court affirmed the court of appeals' interpretation of Wisconsin law. It held that the Commission had correctly interpreted Wis. Stat. § 108.02(15)(h)2., including by reasoning that "both activities and motivations must be considered in a determination of whether an organization is 'operated primarily for religious purposes.'" App. 21a–22a. In other words, the statute required an "objective examination of [Petitioners'] actual activities" to determine whether those activities are "secular in nature" such that Petitioners are "not operated primarily for religious purposes." App. 32a–33a.

Applying that statutory construction to the organizations, the court concluded that Petitioners did not qualify for the religious exemption for two main reasons: (1) they did not seek to imbue participants with the Catholic faith and provided participants with no religious materials (App. 29a); and (2) their activities were primarily charitable and secular (App. 30a), as illustrated by how the activities of one of the sub-entities, Barron County Development Services, Inc., had not changed after it affiliated with Catholic Charities (App. 30a–31a). The court noted how this result was consistent with congressional history of the parallel federal unemployment law, which indicated that "an orphanage or a home for the aged" would not qualify as being "operated primarily for religious purposes" simply by virtue of being "related" to a church. App. 30a.

The court also rejected Petitioners' arguments under the First Amendment, concluding that the statute violated neither the Establishment Clause, the church autonomy principle, nor the Free Exercise Clause.

As to the Establishment Clause, the court held that the statutorily required "neutral and secular inquiry" into Petitioners' "actual activities" (App. 40a–41a) does not improperly "cross into an evaluation of religious dogma" (App. 38a–39a). Rather, that objective analysis is consistent with the inquiry needed for any religious tax exemption laws, which have been recognized as valid throughout American history. App. 41a–44a. And the court held that the statute did not violate the church autonomy principle because it neither "regulate[d] internal church governance nor mandate[d] any activity." App. 45a–46a. Last, the law did not violate Petitioners' free exercise rights because imposing a generally applicable tax is not a constitutionally significant burden. App. 48a–50a.

Petitioners then filed a petition for writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

While Petitioners would like an exemption from paying unemployment insurance contributions, they have not satisfied this Court's criteria for certiorari. The state courts are not split on Petitioners' First Amendment challenges, and Wisconsin's Supreme Court correctly resolved those challenges, in any event. Likewise, there is no state court split on the burden for challenges to the validity of state statutes.

And even if there was, this case is a poor vehicle to resolve it because the issue was not raised below.

I. Certiorari should be denied on the first question presented.

This Court should deny the petition on Petitioners' first question: whether the "religious purpose" exemption in Wis. Stat. § 108.02(15)(h)2., as interpreted by the Wisconsin Supreme Court, violates the First Amendment.

Contrary to Petitioners' assertion, there is no split of authority among the state supreme courts on the First Amendment claims they present. The many state court cases they discuss consider only how to interpret and apply similar statutory exemptions, not whether those exemptions comply with the First Amendment. And Petitioners identify no federal circuit spilt. Without any disagreement among the state courts or lower federal courts, Petitioners' constitutional arguments have not percolated enough to merit certiorari.

In any event, the Wisconsin Supreme Court got it right. Courts routinely deny religious tax exemptions to entities that assert religious motivations without overly entangling themselves in religious matters. That effort does not violate the church autonomy principle because it does not regulate internal church governance or compel any activity. And the unemployment tax does not violate Petitioners' free exercise rights: it imposes no constitutionally significant burden on their religious exercise, and it is a general law that is neutral and nondiscriminatory on questions of religious belief.

A. No split of authority exists on the First Amendment questions Petitioner presents.

Petitioners identify no split on the question of whether states may constitutionally consider an employer's operations, not just its motivations, in deciding whether it is entitled to a religious exemption from a state's unemployment insurance tax system.

1. No high courts have addressed the First Amendment issues Petitioners raise here, let alone in a way that creates a split.

Petitioners cite seven other state high court cases, but those cases all involve state statutory interpretation issues, not First Amendment ones. The cases all confront similar interpretation questions because the states copied the language of a federal statute, the Federal Unemployment Tax Act (FUTA), which establishes a cooperative federal-state program of benefits to unemployed workers. *See St. Martin Evangelical Lutheran Church v. S. Dakota*, 451 U.S. 772, 775 & n.3 (1981); *Comm. Lutheran Sch. v. Iowa Dep't of Job Serv.,* 326 N.W.2d 286, 287 (Iowa 1982). FUTA—like state statutes copying it—allows qualified state unemployment programs to exclude non-profit employers from coverage as to services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or

> principally supported by a church or convention or association of churches . . . .

26 U.S.C. § 3309(b).

Because many states have adopted that language, multiple state high court decisions discuss what it means and how to apply it as a matter of state law. That is the issue presented in the cases cited by Petitioners—not whether those state statutes complied with the First Amendment.

Begin with the four states that Petitioners highlight as supposedly "focus[ing] on whether an organization has sincere religious beliefs indicating that the purpose of its activities is rooted in religious motivation." Pet. 16. None of them issued a First Amendment holding.

Idaho. In *Department of Employment v. Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1372 (Idaho 1979), Idaho's high court found only that an agency had "erred in its application of the Idaho unemployment security law." It said nothing about the First Amendment. And, as Petitioners candidly admit, *Nampa Christian Schools Foundation v. State of Idaho*, 719 P.2d 1178, 1183 (Idaho 1986) relied on "statutory interpretation" and "did not reach any constitutional questions." Pet. 17.

Iowa. Petitioners also concede that *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) "did not need to reach" any First Amendment questions. Pet. 17. But Petitioners' suggestion that the court construed the statute to "avoid constitutional issues" is inaccurate. Pet. 17. The court applied ordinary statutory interpretation principles and then, after doing so,

noted that it did not need to resolve any First Amendment questions because it had granted the employer an exemption as a matter of statutory interpretation. *Cmty. Lutheran*, 326 N.W.2d at 291–92.

Maine. In *Schwartz v. Unemployment Insurance Commission*, 895 A.2d 965, 970–71 (Me. 2006), Maine's high court never mentioned the First Amendment and instead examined whether "substantial evidence in the record" supported a finding of "primarily religious" purposes.

Massachusetts. Massachusetts' high court found that an organization "satisfie[d] the[ ] statutory requirements" of religious purpose. *Kendall v. Dir. of Div. of Emp. Sec.*, 473 N.E.2d 196, 198–200 (Mass. 1985). In passing, the court mentioned that the default of construing tax exemptions against the taxpayer does not apply when the "free exercise of religion" is at issue, *id.* at 199, but the court never further analyzed whether denying the exemption would have violated the First Amendment.

Then turn to the three states (excluding Wisconsin) that supposedly embody the "opposite side of the split." Pet. 21. Like the first four, none of these issued a First Amendment holding.

Arkansas. Arkansas' high court denied a religious purpose exemption to a Catholic-affiliated hospital based on the court's "interpretation of the statute in a manner separating motivation from purpose of operation." *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark. 1991). As Petitioners note, the case cited *Lemon v. Kurtzman,* 403 U.S. 602 (1971) and *Meek v.*

Pittenger, 421 U.S. 349 (1975) once in passing (Pet Br. 21), but it engaged in no First Amendment analysis whatsoever.

Colorado. Petitioners acknowledge that the Colorado high court in *Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo. 1994) "did not address any constitutional issues." Pet. 22. Instead, it addressed whether the lower court had "properly interpreted the phrase 'operated primarily for religious purposes'" and denied the exemption to a counseling center. *Samaritan Inst.*, 883 P.2d at 4.

Maryland. Again, Petitioners concede that Maryland's high court in *Employment Security Association v. Lutheran High School Association*, 436 A.2d 481 (Md. 1981) "chose not to address the constitutional issues presented." Pet. 23. Like the others, the court instead addressed what "factors may appropriately be taken into account" in the religious purposes analysis. *Lutheran High Sch. Ass'n*, 436 A.2d at 487.[1]

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[1] The intermediate state appellate court decisions Petitioners cite on both sides of the "split" likewise did not involve First Amendment holdings. *See By The Hand Club for Kids, NFP, Inc. v. Dep't of Emp. Sec.*, 188 N.E.3d 1196, 1198, 1214 (Ill. App. 2020) (evaluating whether religious afterschool program qualified for Illinois' exemption without "reach[ing] the parties' constitutional arguments"); *Cathedral Arts Project, Inc. v. Dep't of Econ. Opportunity*, 95 So.3d 970, 973 (Fla. App. 2012) (examining whether children's art program qualified for Florida's exemption); *Czigler v. Administrator*, 501 N.E.2d 56, 57 (Ohio App. 1985) (evaluating whether religious school qualified for Ohio's exemption and mentioning only

Because there is no split on a federal question, certiorari should be denied. This Court does not resolve questions of how states interpret their own laws. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.").

2. Even on the statutory interpretation question of how to construe and apply the "religious purpose" exemption, the split that Petitioners posit does not really exist.

Among the cases Petitioners describe as residing on their side of the ledger (Pet. 16–20), it is true that the courts held the entities were operated "primarily for a religious purpose" and thus entitled to the statutory exemption. But that is because the specific facts in those four cases justified this result, not because the courts applied a different test from the ones on Respondents' side of the ledger. More to the point, none of the cases on Petitioners' side looked at the entity's motivation alone—they all also looked to some degree at the entity's activities, just like Wisconsin's supreme court did here.

Idaho. In *Champion Bake-N-Serve, Inc.*, the Idaho court held that services provided by students at a religious college in a church-run bakery qualified for the exemption because it was part of their religious training; services provided by regular fulltime employees at the same bakery did not qualify.

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in passing "potentially serious entanglement by the state in violation of the Establishment Clause").

592 P.2d at 1371–72. And in *Nampa Christian Schools Foundation*, the Idaho Supreme Court held that the statutory language required the court to look at an organization's operations, not just its motivations. 719 P.2d at 1180.

Iowa. In *Community Lutheran School*, the court looked at the operations of the school, including the incorporation of Lutheran faith into "every aspect of all classes." 326 N.W. 2d at 291. The curriculum involved "[s]pecific religious instruction," "religious ceremonies [were] held throughout the day," and teachers had to be Lutherans. *Id.* The school was not engaged in otherwise secular activity motivated by a religious purpose.

Maine. In *Schwartz*, the court examined operational facts including how the entity "[brought] pastors to island communities to lead religious services and provide religious counseling," paid for minister salaries, and had otherwise "maintained its religious emphasis and function." 895 A.2d at 970.

Massachusetts. In *Kendall*, the court rejected a rule that would grant exemptions only to schools "devoted to religious instruction." 473 N.E.2d at 199. But the court noted how the school was "operated in accordance with church principles," provided "[c]lasses in religious education," and held "Saturday mass . . . for the school's resident students." *Id.* Petitioners repeatedly point to *Kendall*, but it did not rely on religious motivations alone.[2]

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[2] The intermediate state appellate cases Petitioners cite similarly considered operational facts, not just motivations. *By The Hand Club for Kids, NFP, Inc.*,

All told, none of those state cases hold that an organization's motivation alone is sufficient to qualify for the "operated primarily for religious purposes" exemption.

This analytical approach is consistent with the congressional history of FUTA, which many state courts have looked to in construing their statutes. *See Samaritan Inst.*, 883 P.2d at 7; *Terwilliger*, 304 S.W.2d at 698; *Sugar Plum Tree Nursery Sch. v. Iowa Dep't of Job Serv.*, 285 N.W.2d 23, 24–25 (Iowa 1979). That history provides examples of what the exception encompasses:

> A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

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188 N.E.3d at 1208–09 (afterschool program qualified for exemption based on executive director's religious goals; governing documents; control of key staff appointments and assets by the church; requirement that all staff adhere to a religious doctrinal statement and regularly attend church; a "pervasive Bible-based program content that includes evangelical study material"; and frequent prayer); *Czigler*, 501 N.E.2d at 58 (religious school qualified where students recognized Jewish holidays, studied Hebrew and religion, and were of the Jewish faith).

S.Rep.No.752, 91st Cong., 2d Sess. 48-49 (1970); H.R.Rep.No.612, 91st Cong., 1st Sess. 44 (1969)) (quoted in *St. Martin Evangelical Lutheran*, 451 U.S. at 781). Those examples—especially the "orphanage or home for the aged" charitable organizations that are merely "church related"—demonstrate how state courts are correctly taking the entity's operations into account.

Petitioners thus offer this Court no developed disagreement among state courts at all, much less one on a federal constitutional issue. As a result, the issue they present is not appropriate for this Court's consideration.

B. The decision below follows directly from this Court's precedents.

The Petition also does not warrant certiorari because the Wisconsin Supreme Court correctly applied this Court's precedents.

Petitioners assert that Wisconsin's statute violates the First Amendment in three ways: (1) by requiring Wisconsin courts to conduct an "intrusive inquiry into the operations of religious organizations"; (2) by violating the church autonomy principle, through "penalizing" its creation of charitable entities separate from the Church; and (3) by abandoning the principle of neutrality through denying an exemption to religious organizations that structure themselves differently. *See* Pet. 23–31. This Court's precedents do not support those claims.

1. The Wisconsin statute, interpreted to require an examination of "both the motives and the activities of the organization" seeking an exemption, does not

require excessive government entanglement with religion. App. 28a. In *Walz v. Tax Commission of the City of New York*, this Court recognized the unremarkable principle that granting exemptions from taxation "occasions some degree of involvement with religion." 397 U.S. 664, 674 (1970). As Justice Harlan explained in his concurrence, "evaluating the scope of charitable activities in proportion to doctrinal pursuits may be difficult," but that difficulty "does not render the interference undue so long as it "does not entail judicial inquiry into dogma and belief." *Id.* at 697 n.1 (Harlan, J., concurring).

The Wisconsin Supreme Court did not cross that line. Contrary to Petitioners' assertion, the Wisconsin Supreme Court never "second-guess[ed]" Catholic Charities' "belief that what it did was filled with religious purpose." Pet. 28. Rather, the Court "accept[ed] these [beliefs] at face value" and did not find Catholic Charities' asserted religious motivations to be "insincere, fraudulent, or otherwise not credible." App. 28a–29a. And it engaged in "no examination of whether CCB's or the sub-entities' activities are consistent or inconsistent with Catholic doctrine." App. 40a. Instead, the Court relied on the organization's "primarily charitable and secular" activities, and especially how the "services provided would not differ in any sense" whether provided by an organization with religious or secular motivations. App. 30a–31a. That does not represent an "inquisition" into religious beliefs (Pet. 28); it is exactly what Congress suggested should be done to determine whether a religious purpose is "primary." *See* H.R. Rep. No. 91-612, at 44 (1969).

2. The Wisconsin Supreme Court also followed this Court's precedents in determining that its interpretation of state law did not violate the church autonomy principle. This Court held in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 119 (1952), that states may not determine questions of religious governance. There, the state court had adjudicated a dispute between two branches of the Russian Orthodox church and ordered that New York churches recognize the governing body of one of those branches. *Id.* at 99 n.3. This Court held that the state violated autonomy principles by "displac[ing] one church administrator with another . . . [and] pass[ing] the control of matters strictly ecclesiastical from one church authority to another." *Id.* at 119.

This case is nothing like the decision invalidated in *Kedroff*. Wisconsin's unemployment insurance law neither requires nor prohibits any particular religious governance structure or leadership. Rather, it "defines what employment is for the purposes of unemployment insurance without reference to any religious principles or any attempt to control internal church operations." App. 45a–46a. That "does not concern matters that are 'strictly' or even remotely 'ecclesiastical,' which belong to the church alone." App. 45a–46a.

3. The Wisconsin Supreme Court also rightly found no violation of the neutrality principle under this Court's precedent. A free exercise challenge requires the claimant to show that his religious exercise was significantly burdened and that the law is not "neutral" or "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). The

state court here correctly held that Petitioners failed at the first step of showing a constitutionally significant burden.

A free exercise clause claimant must demonstrate that the challenged law burdens their freedom to exercise religion in a significant or substantial way: "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985).

The Wisconsin court held that Petitioners had failed to show that the unemployment insurance statute burdened their religious beliefs. App. 49a. The state law did not prohibit Petitioners from engaging in any religious activity and, despite participating for many years in the unemployment insurance program, they did not contend that it significantly or substantially burdened their religious practices or beliefs. App. 49a.

That holding is consistent with cases like *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 391 (1990), which held that the financial impacts of state taxation schemes on an entity's religious activities are not "constitutionally significant."

Such taxation regimes are unlike the laws in the cases Petitioners rely on here. Pet. 24. The ordinance in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), denied one denomination the ability to pray in a park but allowed

it for others; the criminal conviction for Bible talks in a public park in *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951), similarly burdened that group's free exercise right; and the law in *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982), forced a denomination to register and be regulated as a charity based on its donor base. Tax exemptions for groups that engage in religious activities, in contrast, do not force ineligible groups to do anything and do not burden their free exercise rights.

Here, Petitioners failed to show how "the payment of unemployment tax prevents them from fulfilling any religious function or engaging in any religious activities." App. 50a. That defeats their argument, whether under the Free Exercise or the Establishment Clause.

II. Certiorari should be denied on the second question presented.

Petitioners also ask the Court to resolve a supposed split regarding the burden to overcome the presumption of constitutionality afforded to legislative enactments when challenging the constitutionality of a statute.

This split is illusory, too. This Court and every state's highest court, save Alaska's, has articulated this presumption by saying that a challenger must show beyond a reasonable doubt that a statute is unconstitutional. Other formulations of the presumption have been used too—by the same courts, and even in the same cases—but these represent mere rhetorical variation, not substantive differences in the presumption. Petitioners have failed to point to a

single case where the choice of one formulation of the presumption over another made a difference in the outcome.

And even if a substantive, outcome-determinative split existed, this case presents a poor vehicle to resolve it. The courts below dedicated only one paragraph of discussion to the issue, in a dissent. This lack of development resulted from Petitioners' failure to raise the issue at any point before their petition for certiorari. The issue has therefore not been considered below in a way that tees it up for this Court's consideration.

A. No split of authority exists on the presumption-of-constitutionality question Petitioners present.

Petitioners tell the Court that the decision below reinforced a split that exists over the proper standard for the judicial review of statutes. Pet. 31. Petitioners point out that the Wisconsin Supreme Court, along with the high courts of several other states, sometimes says that a party challenging a statute on constitutional grounds must show its unconstitutionality "beyond a reasonable doubt." *Id.* at 33–34. Petitioners assert that this is a higher standard than that used by other state high courts and the federal courts, which require that unconstitutionality be "clearly" or "plain[ly]" demonstrated. *Id.* at 31–33.

There is no such split. Any difference Petitioners identify is merely a rhetorical one over how to refer to the presumption of constitutionality afforded statutes. This presumption is one courts, both federal

and state, have unanimously adopted when deciding constitutional challenges to statutes. *See* Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. Tex. L. Rev. 169, 172–82 (2015).

All courts (including this one), save Alaska's, have expressed the presumption of constitutionality by saying that a challenger must show beyond a reasonable doubt that a statute is unconstitutional. Green, *supra*, at 172, 179–82 (2015); *e.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525, 544 (1923) ("This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.").

And all courts have also expressed the presumption by saying the showing of unconstitutionality must be clear, plain, or manifest. Green, *supra*, at 176–178; *e.g.*, *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). Sometimes these formulations of the presumption—call them the clarity formulations—appear in the same case as the beyond-a-reasonable-doubt formulation. *See, e.g.*, *State v. Kahalewai*, 541 P.2d 1020, 1024 (Haw. 1975) (holding that the showing of unconstitutionality must be "clear and convincing" and "beyond all reasonable doubt"). In fact, seven states adopted the two formulations in the same case. Green, *supra*, at 185

(New York, Arkansas, Florida, Michigan, Rhode Island, Idaho, and Utah).

Some state courts, including Wisconsin's, prefer a particular formulation of the presumption. *E.g.*, App. 37a. Other state courts and the federal courts continue to use both the beyond-a-reasonable-doubt and clarity formulations. *Compare Dutra v. Trs. of Boston Univ.*, 96 F.4th 15 (1st Cir. 2024) ("A legislative enactment carries with it a presumption of constitutionality, and the challenging party must demonstrate beyond a reasonable doubt that there are no 'conceivable grounds' which could support its validity." (citations omitted)), *with United States v. Anderson*, 771 F.3d 1064 (8th Cir. 2014) ("'[A] general reticence to invalidate the acts of the Nation's elected leaders' and 'proper respect for a coordinate branch of the government' requires that a federal court strike down an Act of Congress only if 'the lack of constitutional authority to pass the act in question is clearly demonstrated.'" (citations omitted)). And still others use a mash-up of the two. *E.g. State v. Crawford*, 478 S.W.2d 314, 316 (Mo. 1972) ("A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly and undoubtedly violates some constitutional provision.")

In short, the clarity and beyond-a-reasonable-doubt formulations are just different ways of naming the same presumption—they are "alternative verbal formulations of the same rule." Green, *supra*, at 171, 184, 186 (referring to the two formulations as "synonymous" and "precedentially interchangeable"). Indeed, "[t]o be clearly and truly convinced is to lack any reasonable doubt." *Id.* at 188 (citation omitted).

Petitioners wrongly suggest that the beyond-a-reasonable-doubt formulation places a heavier burden on a party challenging a statute than the clarity formulations do. Pet. 35–36. Any difference is rhetorical. Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"*, 74 Rutgers U. L. Rev. 1429, (2022) (noting that the beyond-a-reasonable-doubt formulation is a "rhetorical commitment to judicial deference" (alteration omitted) (citation omitted); *Island County v. State*, 955 P.2d 377, 384, 393 (Wash. 1998) (Talmadge, J., concurring) (referring to same as "simply a hortatory expression, a guide for our consideration, a reminder that the Legislature—not the Court—is the body the people of our state have chosen to make their laws").

The Wisconsin Supreme Court, among other state high courts, has said as much. In *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, the Wisconsin Supreme Court explained that "[i]n the context of a challenge to a statute's constitutionality, beyond a reasonable doubt expresses the force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute . . . can be set aside." 914 N.W.2d 678, 689 (Wis. 2018) (citation omitted); Spitzer, *supra*, at 1452 (interpreting this line in *Mayo* as "essentially converting the [beyond-a-reasonable-doubt] formulation into a rhetorical flourish meant to emphasize that the justices should have a high degree of confidence of unconstitutionality prior to invalidating a statute"). In other words, "beyond a reasonable doubt" in the judicial-review context is not the high burden of proof it represents in the criminal-

law context. *See In re Commitment of Alger*, 858 N.W.2d 346, 353–54 (Wis. 2015) (distinguishing "unconstitutional beyond a reasonable doubt" from "probably unconstitutional").

The substantive similarity between the clarity and beyond-a-reasonable-doubt formulations of the presumption accounts for why Petitioners cannot point to a single case in which a choice among them had any effect on the outcome. *Accord Island County*, 955 P.2d at 393 (Talmadge, J., concurring) ("I have not heard a judge say, and I have not read a case that says, 'I believe this statute is clearly and convincingly unconstitutional, but I am not persuaded it is unconstitutional beyond a reasonable doubt.'").

Contrary to Petitioners' claim that the beyond-a-reasonable-doubt formulation "threatens constitutional rights," (Pet. 35), the judicial and scholarly consensus is that the formulation is "not a presumption or doctrine that drives the outcome of cases." Spitzer, *supra*, at 1433. This case is in line with that consensus: both the Wisconsin Supreme Court and Wisconsin Court of Appeals held that their shared interpretation of Wis. Stat. § 108.02(15)(h)2 passed constitutional muster, but only the former used the beyond-a-reasonable-doubt formulation. *Compare* App. 50a, *with* App. 162a.

In sum, there is no split. Rather, different states have developed various formulations of the presumption of constitutionality. In practice, the superficial differences in the wording of various formulations are just that—disguises for a "very strong consensus" among courts on how to apply the

presumption of constitutionality. Green, *supra*, at 197.

B. Even if a split of authority existed, this case would be a poor vehicle for this Court to resolve it.

This Court typically will not address issues that were not raised below. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."); *E.E.O.C. v. Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (dismissing writ of certiorari as improvidently granted because issues were not raised below).

Petitioners concede that they failed to raise below their challenge to the beyond-a-reasonable-doubt formulation of the presumption of constitutionality. Pet. 36. As a result, there was but one paragraph of discussion, in a dissent, about the standard. App. 93a–94a. With so little development in the lower courts, and none by the parties, this case is not the one in which to resolve a split, if there were one, regarding the proper beyond-a-reasonable-doubt formulation.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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