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 A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR PETITIONERS

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REPLY

The brief in opposition amply confirms that both questions presented should be granted. The Wisconsin Supreme Court deepened an existing split among lower courts over whether government violates the First Amendment when it decides that an admittedly religious charity is not religious enough to merit equal treatment under state FUTA-compliant tax exemption statutes. And the Wisconsin Supreme Court also extended a separate split over whether federal constitutional claims must be proven beyond a reasonable doubt. Both questions are of nationwide importance, and this case gives the Court the perfect vehicle to address them.

This Court should therefore intervene to vindicate the First Amendment. Wisconsin should not be allowed to deny Catholic Charities and religious organizations like it an exemption just because—as required by their faith—they serve all people.

ARGUMENT

I. Only this Court can resolve the split over the First Amendment's application to FUTA-compliant tax exemption statutes.

State supreme courts are split 4-4 over whether they can, consonant with the First Amendment, deny a religious organization a religious tax exemption because the organization does not engage in "typical" religious activities—like worship or proselytizing. Pet.15-23. Respondents don't dispute that the Wisconsin Supreme Court recharacterized Petitioners' religious exercise as primarily secular activity. Instead, they try to minimize the split by pointing to irrelevant facts and quibbling over the merits. Neither gambit

detracts from the need for this Court to resolve this important question of constitutional law.

A. Courts are hopelessly split over whether religious organizations can be denied a religious tax exemption because their behavior is not "typical" enough to qualify.

1. Respondents first say there is no split because some state supreme courts didn't directly address "First Amendment issues." BIO.8. Instead, Respondents claim, these courts were merely interpreting FUTA-compliant state laws. *Ibid.*

Respondents are wrong. As Petitioners explained, several cases in the split engaged in constitutional analysis or (for the courts that came out the right way) simply didn't need to reach any constitutional questions. Pet.18, 20, 21, 23. And, more importantly, a state court need not *analyze* the Constitution for its interpretation of state law to *violate* the Constitution. If Respondents were right, the simplest way for a court to certiorari-proof its opinion would be to ignore the Constitution altogether. That's obviously wrong. This Court has "an obligation to ensure that state court interpretations of [state] law do not evade federal law." *Moore* v. *Harper*, 600 U.S. 1, 34 (2023). And here, there is no question that the decisions on the wrong side of the split are *not* consistent with the demands of the First Amendment. Pet.23-30.

2. Respondents next suggest that all courts in the split are applying the *same* standard. BIO.12. That blinks reality: The split has been acknowledged repeatedly—including in *Terwilliger*, *Mid Vermont Christian School*, and again in the decision below.

Pet.19 n.4. (*Mid Vermont*); Pet.21 (*Terwilliger*); App.142a (this case).

Looking for keys under the streetlight, Respondents scour the opinions on the correct side of the split for evidence of any religious activity, on the theory that—rather than looking at religious motivation or mission—these courts instead balanced religious activities against secular activities and determined that the religious activities predominated. BIO.13. But that's not what they did, and Defendants' scattershot factual citations tell us nothing about the *legal standard* these courts applied.

Idaho. Respondents suggest that *Champion Bake-N-Serve* independently considered the bakery's activities because its analysis distinguished between full-time employees and students receiving "religious training" through their work at the bakery. BIO.12-13. Not so—the court concluded that the bakery's *motivation* for employing students was primarily religious (because it viewed their work as religiously motivated). *Department of Emp.* v. *Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1371-1372 (1979). That's fully consistent with the separate conclusion that the bakery might have had a *different* motivation for employing *other* employees. *Ibid.* And, contra BIO.13, *Nampa Christian* similarly supports Petitioners. There, the court looked to the school's "intent and operations" merely as evidence "*reveal*[*ing*]" its "religious mission and purpose." *Nampa Christian Schs. Found., Inc.* v. *State*, 719 P.2d 1178, 1183 (Idaho 1986) (emphasis added).

Iowa. Respondents note that the religious school in *Community Lutheran* included religion in its curriculum and required its teachers to be Lutheran.

BIO.13. This tells us nothing about the legal standard the court applied. And even a cursory review of the opinion shows that the court applied the correct standard—expressly citing *Champion Bake-N-Serve*. See *Community Lutheran Sch.* v. *Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 291 (Iowa 1982).

Maine. The facts identified by Respondents in *Schwartz* v. *Unemployment Insurance Commission* similarly served as evidence of the organization's religious motivations—not as part of a supposed secular-versus-religious-activities balancing test. Indeed, after citing *Kendall*, the court explained that the Center's outwardly secular activities (like its after-school program) did not at all "diminish its continuing religious purpose." 895 A.2d 965, 970-971 (Me. 2006).

Massachusetts. Even odder, Respondents claim *Kendall* "did not rely on religious motivations alone." BIO.13. But, citing *Champion Bake-N-Serve*, the court treated religious "motive" and religious "purpose" as two variations on the same idea. *Kendall* v. *Director of Div. of Emp. Sec.*, 473 N.E.2d 196, 199 (Mass. 1985). Here too, the facts Respondents flag, BIO.13, did not independently drive the analysis; they supported the conclusion that the Center's ministry was religiously motivated. *Kendall*, 473 N.E.2d at 199.

In short, the fact that the religiously motivated entities in these cases unsurprisingly engaged in some

religious activities Wisconsin deems sufficiently "typical" tells us nothing about the legal standard the courts applied.[1]

3. Finally, respondents suggest that their approach is "consistent" with FUTA's legislative history. BIO.14. But, as an initial matter, this Court isn't being asked to interpret *congressional* intent at all. Instead, this Court has been presented with a decision definitively interpreting Wisconsin law. The question is whether that interpretation complies with the First Amendment. Because Congress lacks the authority to either definitively interpret Wisconsin law or the First Amendment, Congress' intent is beside the point. And, regardless, this Court in *St. Martin* (a case Respondents all but ignore), considered the same legislative history cited by Respondents and gave it minimal weight. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 782, 786-788 (1981); see *id.* at 790-791 (Stevens, J., concurring) ("there is special force to the rule that the plain statutory language should control").

B. The decision below violates the First Amendment.

The approach taken by the Wisconsin Supreme Court and defended by Respondents violates the First Amendment thrice over. Pet.23-31. Respondents claim their position is consistent with the Constitution. BIO.15-19. A fuller response can be saved for the merits, but Petitioners offer a few points here.

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[1] Respondents' attempts to distinguish the intermediate appellate court opinions fail for the same reason. Compare Pet.19-20 with BIO.13-14.

First, Respondents never dispute, and thus concede, that their test favors some religious beliefs over others. Pet.23-26. Instead, Respondents excuse the unequal treatment by arguing that the law doesn't burden Petitioners. BIO.17-19. But Respondents' argument is as outdated as their precedent. Unequal denial of a *benefit* is a textbook burden on Free Exercise rights. *E.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017). And here there is a burden because Wisconsin is denying Petitioners an exemption.

Second, Respondents claim there is no excessive entanglement because Wisconsin "accepted" Petitioners' beliefs and only "relied on [Catholic Charities'] 'primarily charitable and secular' activities" to perform its analysis. BIO.16. But that begs the question. Determining whether various activities—like feeding the hungry—are inherently secular or religious *is* the excessive entanglement. Pet.27-29.

Third, Respondents argue that this case is "nothing like" *Kedroff* because it does not involve matters which "belong to the church alone." BIO.17. But the principle of church autonomy articulated in *Kedroff* ensures that secular authorities don't interfere with matters of church governance and organization. Pet.29-30. Here, Respondents never dispute that Wisconsin's rule favors certain types of church structures over others—or that only *exclusively* religious activity counts. *Ibid.*

II. Lower courts are split over whether federal constitutional claims must be proven "beyond a reasonable doubt."

Over a strong dissent, the Wisconsin Supreme Court emphasized—seven times—that it was applying

a "beyond a reasonable doubt" standard. App.7a, 37a, 44a, 47a, 50a, 51a; see also 93a-94a (Grassl Bradley, J., dissenting). That standard is both wrong and at odds with the approach taken by this Court and other federal courts. These courts, if they apply a burden of proving unconstitutionality at all, employ a much lower "plain showing" or "clearly demonstrated" standard. Pet.31.

1. Respondents agree that the Wisconsin Supreme Court applied the "beyond a reasonable doubt" standard. BIO.24. Yet, as they do not dispute, this Court long ago abandoned that standard. The most recent reference Respondents identify is over 100 years old. BIO.21 (citing *Adkins* v. *Children's Hosp. of D.C.*, 261 U.S. 525, 544 (1923)). And the only other federal court they cite picks up this standard from a *state* supreme court. BIO.22 (quoting *Dutra* v. *Trustees of Bos. Univ.*, 96 F.4th 15, 20 (1st Cir. 2024) (quoting *Leibovich* v. *Antonellis*, 574 N.E.2d 978, 984 (Mass. 1991))).

Respondents thus concede that different courts have adopted different formulations of the legal standard—they just claim that this variation is unimportant. BIO.20-21. But precision of language matters, especially when it comes to standards of proof. A narrow win under one standard can become a loss under a more stringent standard. *E.g., Hilburn* v. *Enerpipe Ltd.*, 442 P.3d 509, 527-528 (Kan. 2019) (Stegall, J., concurring in part) (difference between *de novo* and "beyond a reasonable doubt" standards outcome-determinative); *Island County* v. *State*, 955 P.2d 377, 388 (Wash. 1998) (Sanders, J., concurring) (similar discussion).

Furthermore, if Respondents' argument is that "beyond a reasonable doubt" doesn't *really* mean "beyond

a reasonable doubt," BIO.23-24 (standard is "not the high burden of proof it represents in the criminal-law context"), that concession alone is reason to grant review. Two different standards of proof traveling under the same name is a recipe for lower court confusion and inconsistent application of the civil rights laws.

Nor does Respondents' argument make sense of *this* case. Even if many states treat the standard as "hortatory," Wisconsin stands among the small group that applies the "beyond a reasonable doubt" in a way that is often dispositive of federal constitutional claims. The Wisconsin Supreme Court's opinion in this case serves as an exemplar. Pet.33-34. And, tellingly, Respondents do not engage with the opinion below or even cite the other Wisconsin cases applying the same standard. Compare BIO.22, 24 with Pet.34. Like the majority below, Respondents also do not substantively engage the dissenting opinion, which explained how the majority "stack[ed] the deck against Catholic Charities' claims under the Religion Clauses from the outset." App.93a. They instead cite *Mayo*, BIO.23, but fail to mention that the separate writing in *Mayo* identifies this exact split. See *Mayo* v. *Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 700 (Wis. 2018) (Grassl Bradley, J., concurring).

2. Respondents' fallback position is that this case is not the right vehicle for this Court to consider the issue because Petitioners failed to raise a challenge to the standard below. BIO.25. But before the Wisconsin Supreme Court used it, no other adjudicator through five levels of review had mentioned—much less applied—"beyond a reasonable doubt." See BIO.24 (acknowledging that the Wisconsin Court of Appeals did

not use the "beyond a reasonable doubt" standard). Petitioners are not charged with prescience about what erroneous standards a court might invoke; it suffices to mount a challenge to a wrongheaded standard at the first opportunity.

Respondents also say that the opinion below provides inadequate discussion for this Court to resolve the issue. BIO.20. But the opinion below is utterly typical of how state courts misuse the "beyond a reasonable doubt" standard to minimize federal constitutional rights. And many jurists—including the dissent here—have analyzed the issue in depth. See, *e.g.*, App.93a-94a; *Mayo*, 914 N.W.2d at 697-705 (Grassl Bradley, J., concurring); *State* v. *Grevious*, 223 N.E.3d 323, 343 (Ohio 2022) (DeWine, J., concurring in judgment); *Hilburn*, 442 P.3d at 526-531 (Stegall, J., concurring in part); *Island County*, 955 P.2d at 384 (Sanders, J., concurring). Where a split is already clear, this Court does not require the challenged decision to discuss it in treatise-level detail.

III. This case presents an excellent vehicle to address these questions of nationwide importance.

Both questions presented are of nationwide importance, and both can be squarely addressed in this appeal.

1. The first question presented concerns an issue of nationwide importance, demonstrated not least by the fact that 47 states have identical or near-identical statutory language. Pet.6 n.1. If the Wisconsin Supreme Court's decision is allowed to stand, religious organizations of all stripes in Wisconsin will be di-

rectly and negatively affected. And because the relevant statutory language is identical across so many jurisdictions, Wisconsin's rule promises to find traction in other states as well.

Moreover, because the religious entities affected often operate on shoestring budgets, adoption of the Wisconsin rule will have an outsize effect on the ability of these organizations to continue serving the needy. Indeed, as the many amici explain, minority religious groups, whose religious practices are often unfamiliar to nonadherents, will face "disproportionate[] disadvantage." ISKCON Br.4. See also Jewish Coalition Br.1-4, 6-15 ("the State's 'true religiosity' test systematically harms minority religions like Judaism"); LCMS Br.14-16 (describing effects of Wisconsin rule on variety of religions). In short, the First Amendment is of vital importance and the lower court's interpretation represents a grave threat to its application.

More broadly, whether government can properly classify specific *behaviors* as objectively religious or nonreligious, as opposed to *beliefs*, is an important and recurring one. See, *e.g., Thomas* v. *Review Bd.*, 450 U.S. 707, 718-719 (1981) (discussing termination of employment for "'personal' reasons" or for "religious reasons"); cf. *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972) ('Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."). Thus drinking wine can be a religious act based not on something inherent to the behavior, but on the web of belief that surrounds the act. Drinking a cup of wine at a Passover seder has profound importance because of the relevant context of belief; by contrast, drinking a cup of wine on an airplane flight would (normally)

have no religious significance. That broader and very important question is directly implicated by the Wisconsin Supreme Court's rule. Indeed, "Wisconsin's test is a blueprint for undermining religious exemptions across the board." Religious Scholars Br.15.

2. The second question presented is also of nationwide importance—by virtue of the importance of the burden of proof in deciding constitutional claims. Whether a federal constitutional claim must be proven beyond a reasonable doubt, by clear and convincing evidence, or some other standard is of utmost importance to the outcome of individual cases and entire areas of jurisprudence. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 325 (1993) (distinguishing clear-and-convincing standard from beyond-a-reasonable-doubt standard in the context of an Equal Protection challenge to mental illness commitment proceedings); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252-253 (1986) (discussing importance of following the proper standard of proof on summary judgment). And there is also good reason to end the disjunct caused by having different standards for federal claims in federal and state courts, not least to avoid incentives to forum-shop. Pet.35. This case presents an opportunity to remove this anomaly in the law.

3. This appeal is also an excellent vehicle for resolving both questions presented. It includes a robust record that will allow the Court to fully review both questions. And the Wisconsin Supreme Court directly addressed both questions presented, so there are no obstacles to reaching and resolving both.

Wisconsin's only anti-vehicle argument concerns the second question presented, and rests entirely on its mistaken premise that the Wisconsin Supreme

Court did not address the beyond-a-reasonable-doubt standard. BIO.25. But as noted above, the lower court made a point of invoking the standard and repeating it at every turn of the decision. And Wisconsin says nothing at all about the fact that this Court has already twice found the first question presented cert-worthy. Pet.7-8 (discussing *St. Martin* and *Grace Brethren*).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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