No. 24-154

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., *et al.*,

Petitioners,

v.

WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF *AMICUS CURIAE* FIRST LIBERTY INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated exclusively to defending religious liberty for all Americans. Through pro bono legal representation of both individuals and institutions, First Liberty's clients include people of diverse religious beliefs, including individuals and institutions of the Catholic, Protestant, Islamic, Jewish, Falun Gong, and Native American faiths.

First Liberty is actively engaged in litigation in multiple states across the country where governments are seeking to suppress, exclude, and redefine religious charitable conduct. *See*, *e.g.*, *Dad's Place of Ohio v. City of Bryan*, No. 3:24-cv-00122 (N.D. Ohio 2024); *Church of the Rock, Inc. v. Town of Castle Rock*, No. 1:24-cv-01340-DDD-KAS (D. Colo. 2024); *Gethsemani Baptist Church v. City of San Luis*, No. 2:24-CV-00534-GMS (D. Ariz 2024). In each of these cases, the government has argued that the ministries at issue are not religious uses as contemplated by their municipal ordinances. But the First Amendment guarantees the right of all Americans to engage in religious exercise defined by the manner dictated by their sincere religious beliefs rather than the government's preferences. Courts across the country have a duty to ensure that the government cannot draw arbitrary lines regarding what is and is not a religious exercise.

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1. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

As an amicus, First Liberty maintains an interest in preserving religious liberty for religious organizations across the country who provide religiously motivated charitable services to their communities.

SUMMARY OF THE ARGUMENT

The Free Exercise Clause guarantees the right of people of faith to engage in religious exercise, including religious charitable ministries. As this Court explained over 80 years ago and reaffirmed recently, the First Amendment "embraces" both the "freedom to believe and freedom to act." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly," but also "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). Thus, religiously motivated conduct enjoys "special protection" under the Free Exercise Clause. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 713 (1981). And any attempt by the government to determine which religiously motivated actions are sufficiently religious enough to enjoy either constitutional protection or eligibility for a government benefit like tax exemption is "obnoxious to the Constitution." *See Cantwell*, 310 U.S. at 306.

Despite this bedrock constitutional principle, both government officials and courts across the country have embraced the notion that the government may pick and choose which religiously motivated activities ought to be allowed and encouraged and which should be

suppressed and discouraged. That government officials now feel emboldened to draw such lines is concerning but unsurprising given this Court's curtailment of the protection afforded to such religious conduct in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). But such a result degrades and threatens religious practices that do not comport with the government's understanding of religion.

This Court has long forbidden such governmental inquiries, and this case provides a good example of why. By disregarding the religious motivation underlying Catholic Charities' religious conduct in favor of a test that limits religious conduct to activities such as preaching and teaching about a religious faith, the Wisconsin Supreme Court adopted a rule that not only improperly opines upon which religious teachings and actions are central to a religious faith, but also indirectly coerces religious organizations to abandon certain religious conduct deemed to be secular with the carrot of tax exemptions if they do so. Such a result is incorrect as a matter of both first principles and this Court's recent precedent. To correct this error and restore protections to all religious exercise, this Court should reverse the Wisconsin Supreme Court.

ARGUMENT

I. The Wisconsin Supreme Court's improper cabining of religious exercise threatens religious charities.

In its opinion, the Wisconsin Supreme Court set forth an erroneous understanding of religious exercise that limited religious activities to those involving religious worship, education, or the active sharing of a religious faith. *Cath. Charities Bureau, Inc. v. Lab. & Indus.*

Rev. Comm'n, 3 N.W.3d 666, 682–83 (Wis. 2024). This caricature of religion improperly limits what qualifies as religious exercise in a manner that threatens religious charitable ministries across the country. While this case deals with the availability of tax exemptions for religious nonprofits, its implications extend far beyond the ability of a religious organization to qualify for a government benefit. Indeed, government officials across the country are using various laws to suppress religious ministries providing charitable services to their communities in part based on a lack of respect as to what actions constitute protected religious exercise.

For example, the small town of Bryan, Ohio has embarked on a year-long campaign to force those seeking temporary shelter at Dad's Place, a small church operating a 24/7 ministry, back out onto the streets. To date, the city of Bryan has filed 19 criminal charges against the church's pastor and a civil lawsuit against the church all to shut down the church's ministry based on alleged zoning and fire code violations. Despite issuing a conditional use permit allowing Dad's Place to operate as a church and engage in customarily related religious activities, the City has now taken the position that the church's temporary shelter ministry is an unlawful change of use that is not customarily related to a church's religious activities. And based in part upon an erroneous understanding of what constitutes a burden on a protected religious exercise, both a federal district court and the Sixth Circuit refused to issue an injunction to halt the City of Bryan's discriminatory campaign. *See* Order Denying Preliminary Injunction, *Dad's Place of Ohio v. City of Bryan*, No. 3:24-cv-00122 (N.D. Ohio July 19, 2024); Order, *Dad's Place of Ohio v. City of Bryan*, No. 24-3625 (6th Cir. Sept. 5, 2024).

Because these courts failed to act, Bryan city officials have now obtained both a preliminary injunction and a criminal conviction ordering Dad's Place and its pastor, Christopher Avell, to shut down their ministry, carrying with it a potential jail sentence for the church's pastor. *See* Decision and Order, *Pool v. Dad's Place*, No. 24CI000100 (Williams Cnty. C.P. Dec. 5, 2024); Order, *State v. Avell*, No. CRB2300708-25 (Bryan Mun. Ct. Jan. 24, 2025). While these decisions are currently being appealed, Dad's Place remains under the threat of being forced to commit what it believes to be sinful conduct by turning away those in need by a city that does not respect the nature of the church's religious exercise and has continually used the petty tools of government to criminalize compassion.

Similarly, The Rock, a church in Castle Rock, Colorado, faces legal sanctions from city officials after it placed two RVs on its property for emergency temporary shelter. *See generally* Order Granting in Part Motion for Preliminary Injunction, *Church of the Rock, Inc. v. Town of Castle Rock*, No. 1:24-cv-01340-DDD-KAS (D. Colo July 19, 2024). After neighbors complained to the City about the RVs, the city sent The Rock a cease-and-desist letter ordering the church to shut down its ministry. According to city officials, the church's temporary shelter ministry did not constitute an approved church use under the relevant zoning regulations. As a result, the church was forced to turn away multiple individuals in desperate need of help, including a mother and her three children who were living in a car. Fortunately, a federal district court has now ordered Castle Rock to allow the church to resume its ministry while the church's lawsuit continues in federal court.

This problem of government unduly limiting, or simply redefining, what constitutes religious exercise extends to food ministries as well. In the small border town of San Luis, Arizona, hunger is an ongoing problem. For over 25 years the Gethsemani Baptist Church has organized the collection and distribution of hundreds of thousands of pounds of food to more than 250 families who regularly line up for help. But this year, the city abruptly shut down the program and began issuing fines anytime the church distributed food. The city even took the extraordinary step of issuing a criminal citation against the church's pastor. The city took these actions in part based upon the nonsensical argument that the church was engaging in improper commercial operations rather than protected religious exercise. The Church is currently litigating its right to feed the hungry in federal court. *See generally* Order, *Gethsemani Baptist Church v. City of San Luis*, No. 2:24-CV-00534-GMS (D. Ariz Nov. 22, 2024)

A common thread runs through the case before this Court and the three cases discussed above: the government is engaging in improper line-drawing regarding what does and does not constitute religious activity. Over 80 years ago this Court condemned such inquiries by government officials when it struck down a state statute prohibiting the solicitation of money for religious purposes unless a state official first blessed the cause underlying the solicitation as being sufficiently religious. *Cantwell*, 310 U.S. at 305. This Court warned that government authority "to determine whether [a] cause is a religious one" is a "censorship of religion" that threatens "its right to survive" and is a "denial of liberty protected by the First Amendment." *Id.* Unfortunately, many government officials and courts have failed to heed this Court's warning. While there are

undoubtedly many reasons for this widespread erroneous understanding of the Free Exercise Clause, one cause that looms large over this problem is the misstep this Court took 50 years after *Cantwell* in *Employment Division v. Smith*.

II. *Employment Division v. Smith*'s evisceration of the Free Exercise Clause laid the groundwork for the Wisconsin Supreme Court's erroneous ruling.

In *Smith*, this Court abruptly discarded the special protection the Free Exercise Clause provides to religiously motivated conduct in favor of a new rule that authorizes any law that burdens religious exercise so long as it does not openly target religious practice. While paying lip service to the obvious fact that religious exercise "involves not only belief and profession but the performance of (or abstention from) physical acts," the Court proceeded to fashion a rule that dismissed the importance of religious motivations underlying a particular act by holding that acts motivated by religious beliefs are no more protected than secular acts from burdens imposed by laws that are neutral and generally applicable. *See Smith*, 494 U.S. at 877–78. Thus, *Smith* blessed the suppression and outright prohibition of religious conduct for virtually any reason, even if the law lacks a compelling government reason and even if the government could accomplish its interest in a way that did not burden the religious conduct. *Id.* at 878. It justified this new rule by stating that holding otherwise would "cour[t] anarchy" and "permit every citizen to become a law unto himself" by "open[ing] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* at 879, 888.

By issuing such a broad and sweeping rule, this Court laid the foundation for governments and courts across the country to minimize the significance of religious motivations underlying a religious act and suppress religious expression. The Wisconsin Supreme Court's opinion in this case is just the latest example of an issue that has plagued our system of government for almost 35 years and downgraded religious liberty to a second-class right by many courts in this country. Indeed, the opinion echoes many aspects of *Smith*'s flawed reasoning.

For example, the court's holding—that religiously motivated charitable services are no different from secular services if the service at issue could be provided by a secular organization—echoes *Smith*'s holding that religiously motivated conduct should be treated no differently than secular conduct when it is burdened or prohibited by a law. *Cf. Cath. Charities*, 3 N.W.3d at 684. Therefore, a religious "orphanage," "home for the aged," or a ministry for "individuals with developmental and mental health disabilities" is no different from its secular counterpart because they involve "wholly secular endeavor[s]" that could "be provided by organizations of either religious or secular motivations, and the services provided would not differ in any sense." *Id.* at 683–84. The court justified this downgrade of religious motivations in favor of determining the religiosity of acts by stating the alternative would allow "every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.* at 687.

At the heart of both *Smith* and the Wisconsin Supreme Court's analysis is the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v.*

O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006). But such a staunch approach to religious conduct "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 553 (2021) (Alito, J., concurring). Moreover, such an approach leads to the suppression of a bedrock constitutional right that formed the very foundation of our scheme of ordered liberty.

III. The Wisconsin Supreme Court's erroneous adoption of *Smith*'s denial of protection for religiously motivated conduct burdens and suppresses religious exercise.

This Court recently reaffirmed the longstanding principle that the Free Exercise Clause protects not only religious beliefs but also the right to "live out" those beliefs in daily life "through the performance of . . . physical acts." *Kennedy*, 597 U.S. at 524. And no government has the authority to declare what is "orthodox" when it comes to religious beliefs or how those beliefs should be expressed through physical acts. *See W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Nor may the government engage in line drawing to determine whether a particular act motivated by religious belief is religious enough to warrant First Amendment protection. *Thomas*, 450 U.S. at 715. But that is exactly what the government has done here.

Catholic Charities is engaging in religiously motivated conduct by "provid[ing] service to people in need" in the name of Jesus. *See Cath. Charities Bureau*, 3 N.W.3d at

684. Like Catholic Charities, Dad's Place, The Rock, and Gethsemani Baptist provide food and shelter to the needy in the name of Jesus. They take the Biblical command that "faith without works is dead" seriously. *See* James 2:26 (NIV). They also share the beliefs of millions of Americans that pure religion is to "look after orphans and widows in their distress" and to care for "the least of these" in their community. *See* James 1:27 (NIV); Matthew 25:40 (NIV).

But according to the Wisconsin Supreme Court, a person that provides food to the hungry, drink to the thirsty, shelter to the stranger, or clothes to the needy pursuant to Matthew 25's biblical command has not engaged in primarily religious conduct because organizations with secular motivations could feasibly provide the same services. *Cath. Charities Bureau*, 3 N.W.3d at 683–84. What the book of James refers to as pure religion is nothing more than "charitable and secular" activities according to many courts in this country, including Wisconsin courts. *See id.* at 683.

This Court's precedent demonstrates that "belief and action cannot be neatly confined in logic-tight compartments" like those drawn by the lower courts here. *See Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). To do so is to discard the "special protection" the First Amendment guarantees to all forms of religious exercise. *See Thomas*, 450 U.S. at 713. Moreover, evaluating religiously motivated conduct based on whether the conduct is religious enough is simply evaluating the centrality of that conduct to a religion by a different name, something this Court has long forbidden. *See, e.g.*, *id.* at 716; *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 720 (1976) (explaining that civil courts may not decide

"quintessentially religious controversies"); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (noting that, "[p]lainly, the First Amendment forbids civil courts" from evaluating "the interpretation of particular church doctrines and the importance of those doctrines to the religion").

Even *Smith*, despite its multitude of errors, recognized "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular [adherents'] interpretations of those creeds." *Smith*, 494 U.S. at 887 (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). Yet the Wisconsin Supreme Court held that Catholic Charities' activities were not religious in part because they did not "imbue program participants with the Catholic faith [or] supply any religious materials to program participants or employees." *Cath. Charities Bureau*, 3 N.W.3d at 683. To restrict religious exercise to the acts that distribute a religious faith or text is to hold all other religiously motivated conduct is not central to a faith. The First Amendment forbids courts engaging in such inquiries.

The Wisconsin Supreme Court compounds its incorrect understanding of what constitutes religious exercise by holding that denying a generally available public benefit to a religious ministry does not constitute a burden on religious exercise. This Court has repeatedly affirmed that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017) (quoting *Sherbert v.*

Verner, 374 U.S. 398, 404 (1963)). Thus, "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert*, 374 U.S. 398 at 405; *see also Speiser v. Randall*, 357 U.S. 513, 529 (1958) (striking down a tax exemption condition limiting its availability to those who affirmed their loyalty to the state government granting the exemption). Such deterrence can take the form of either "outright prohibitions" or "indirect coercion or penalties on the free exercise of religion." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988). In either instance, government action that places "substantial pressure on an adherent to modify his behavior" is a cognizable "burden upon religion." *Thomas*, 450 U.S. at 718.

Three recent cases from this Court illustrate this doctrine well. First, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, this Court struck down the exclusion of a church—solely because of its religious status—from a Missouri grant program that provided daycares with rubber playground surfaces made from recycled tires. 582 U.S. at 467. The Court explained that forcing a church to choose "between being a church and receiving a government benefit" to receive "even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Id.* at 463, 465. Thus, even when the consequence of such an exclusion is "a few extra scraped knees," excluding a church "from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." *Id.* at 467.

The Court reaffirmed these principles three years later in *Espinoza v. Montana Department of Revenue*,

when it struck down a Montana constitutional provision that "bar[red] religious schools from public benefits solely because of the religious character of the schools." 591 U.S. 464, 475, 487 (2020). As in *Trinity Lutheran*, the Court reaffirmed that Montana could not condition its private school tuition assistance program upon a school "divorc[ing] itself from any religious control or affiliation." *Id.* at 478. It stated that while "[a] State need not subsidize private education . . . it cannot disqualify some private schools solely because they are religious." *Id.* at 487.

Finally, this Court struck down Maine's exclusion of sectarian schools from its tuition reimbursement program in *Carson v. Makin*, 596 U.S. 767, 780 (2022). It found such an exclusion "effectively penalize[d] the free exercise of religion" by conditioning the tuition assistance on a school's religious character. *Id.* It also rejected the distinction Maine attempted to draw between an organization's religious status and the religious activities in which it engages. The Court reasoned that "[a]ny attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism." *Id.* at 787.

The holdings of *Trinity Lutheran*, *Espinoza*, and *Carson* apply with equal force to this case. This is not a case about whether the Free Exercise Clause guarantees religious organizations an exemption from certain taxes. Rather, it is about whether a religious organization may be excluded from a public benefit for which it would otherwise be entitled solely because its religious activities may also be performed by secular organizations. The answer according to this Court's recent precedent is no.

Any attempt to scrutinize whether and how a ministry goes about pursuing its religious mission raises serious Free Exercise concerns by improperly compartmentalizing religious conduct with no regard for how the religious adherent interprets his own faith. *See Yoder*, 406 U.S. at 220; *Thomas*, 450 U.S. at 716. Indeed, limiting a tax exemption program to ministries with certain religious activities, such as those which openly seek to evangelize, while excluding others who engage in religiously motivated activities that might also be performed by a secular organization places "substantial pressure on [those ministries] to modify [their] behavior." *Thomas*, 450 U.S. at 718. Such indirect coercion, which results in the very "denominational favoritism" *Carson* warned against, cannot stand. *Carson*, 596 U.S. at 780; *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs."). Even if the consequence, in all likelihood, is a "decrease in the money available for religious or charitable activities," *Cath. Charities Bureau*, 3 N.W.3d at 692, excluding religious organizations from a benefit for which they would otherwise be qualified, based solely on an arbitrary, court-drawn line is "odious to our Constitution all the same, and cannot stand." *Trinity Lutheran*, 582 U.S. at 467.

CONCLUSION

The improper cabining of what constitutes religious exercise poses a threat to religious ministries that extends far beyond eligibility for a tax exemption. While the Wisconsin Supreme Court never discusses or cites it, the court's reasoning is rooted in the same devaluing of religiously motivated conduct found in *Smith*. This misunderstanding and misapplication of the Free Exercise Clause's protection of religious exercise has "stalk[ed]" this Court's Free Exercise jurisprudence for far too long. *Cf. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). In the appropriate case, this Court should restore the First Amendment's guarantee of religious liberty to ensure that all Americans are free to fully live out their faith according to the dictates of their own consciences. But even under this Court's current precedent, the Free Exercise Clause forbids the kind of indirect coercion Wisconsin is exerting on Catholic Charities. This Court should therefore reverse the Wisconsin Supreme Court.

Respectfully submitted,

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