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

BRIEF FOR AMICI CURIAE RELIGIOUS LIBERTY SCHOLARS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Constitution and Statutes:

Other Authorities:

Page

Other Authorities—continued:

Page

Other Authorities—continued:

INTEREST OF *AMICI CURIAE*[*]

Amici are legal scholars who have studied and written extensively on the law of religious liberty. *Amici* write to underscore the important constitutional considerations in this case, and to urge the Court to vindicate longstanding principles protecting the religious exercise of all faiths. *Amici*'s full titles and institutional affiliations (listed for identification purposes only) appear in the Appendix.

SUMMARY OF ARGUMENT

The First Amendment's Religion Clauses prohibit the government from answering religious questions or discriminating among religions. At a minimum, that means courts may not dole out protection to some religious groups but not others based on favored or supposedly 'typical' religious activities. When administering statutory exemptions whose beneficiaries are religious organizations, courts may not gainsay organizations' sincere religious beliefs to impose their own view of whether an activity is sufficiently religious. The Wisconsin Supreme Court defied those basic principles.

Like many other States and consistent with the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311, Wisconsin requires employers to pay an unemployment-insurance tax, but exempts church-affiliated organizations "operated primarily for religious purposes." Wis. Stat. § 108.02(15)(h)(2); *see* Pet. 5-7 & n.1. In this case, the Wisconsin Supreme Court held that an organization is "operated primarily for religious purposes" only if—in addition

[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

to having a sincere religious motivation—the organization's activities satisfy the court's own understanding of religious activity. Pet.App.26a-28a. The court began by identifying sets of "hallmark[]" or "[t]ypical" religious activities, while disclaiming that these favored activities were "exclusive" or "preconditions." Pet.App.26a-28a (citing *United States v. Dykema*, 666 F.2d 1096, 1100 (7th Cir. 1981)). After offering that disclaimer, however, the Wisconsin court went on to conclude that Catholic Charities was insufficiently religious because it does not accompany its religious works of charity with other court-approved activities like evangelizing, and because it does not discriminate against non-believers. Pet.App.29a-30a. Reasoning further, the court concluded that Catholic Charities' works of mercy are not "primarily religious in nature," because Catholic Charities performs humanitarian "services" that any secular organization could also provide. *Id.* (internal quotation marks omitted).

The Wisconsin Supreme Court's approach violated the First Amendment twice over. First, by conditioning a religious exemption on whether organizations engage in activities the court deemed "primarily religious in nature," the court impermissibly enmeshed judges in religious questions. Pet.App.26a-27a, 29a (internal quotation marks omitted). Under the First Amendment, courts have no business second-guessing a claimant's sincere religious activities to determine whether a judge considers them *specially* or *uniquely* religious. The test employed by Wisconsin invites judges to "scrutiniz[e] whether and how a religious [organization] pursues its … mission," *Carson v. Makin*, 596 U.S. 767, 787 (2022), punishing those who deviate from a judge's "subjective[]" sense of which activities are "stereotypically religious," Pet.App.79a (Grassl Bradley, J., dissenting).

Second, the court penalized Catholic Charities for failing to engage in allegedly "[t]ypical" or "hallmark[]" religious activities, such as distributing religious materials, and for employing and extending its services to non-church members. Pet.App.26a-28a (citing *Dykema*, 666 F.2d at 1100). But by doing so, the court imposed a discriminatory test that treats religious groups differently based not only on the nature of the services they provide, but on their openness to serving non-believers.

Catholics believe that their faith requires them to engage in "corporal," as well as "spiritual," works of mercy.[1] And they believe they are called to perform corporal works of mercy for all in need—because Jesus taught that "whatever you did for one of these least brothers of mine, you did for me." Matthew 25:40 (NAB). The Wisconsin court's dismissal of Catholic Charities' religiously mandated work as insufficiently religious discriminates against faiths that do not fit the court's pre-determined concepts of religiosity. Judges may not pick and choose which groups receive a benefit based on their own idiosyncratic views about the importance of proselytizing or similar matters.

None of this is to say that Wisconsin must exempt from taxation any and all organizations performing activities with a tangential connection to religion. It may deny an exemption for sham religious organizations lacking a sincere religious mission. And it may deny exemptions for organizations engaged in activities primarily motivated

[1] According to Catholic doctrine, spiritual works of mercy include activities such as "consoling" and "forgiving and bearing wrongs patiently," while corporal works of mercy encompass "feeding the hungry, sheltering the homeless, clothing the naked, visiting the sick," and "giving alms to the poor." Catechism of the Catholic Church § 2447 (2d ed. 2019).

by commercial rather than religious objectives. None of that is prohibited by the Constitution. But a court may not accomplish those ends or further limit an exemption by imposing its own notion of what is and is not a "religious purpose." Pet.App.27a; *see also* Pet.App.29a-30a.

The Wisconsin Supreme Court has told Roman Catholics that two commands of their religion are not religious at all—to serve those in need, and to do so regardless of whether those in need adhere to the same religious beliefs. But religious liberty means liberty for all, not just for those who conform to a judge's intuitions about which religious endeavors count. Allowing this decision to stand would endanger numerous existing exemptions and create a roadmap for undermining religious exemptions across the board.

ARGUMENT

I. The Wisconsin Supreme Court's Decision Defies the Religion Clauses' Basic Guarantees

The Religion Clauses prohibit all governmental actors—including state courts—from deciding religious questions and from discriminating among religions. Conditioning a tax exemption on whether judges view an organization's activities as sufficiently religious, as the court did here, flouts those clear principles. This Court should reaffirm the First Amendment's basic promises and reject the Wisconsin Supreme Court's judge-made test of orthodoxy.

A. Judicial Inquiry into Whether a Church's Religiously Mandated Activities Are "Typically" or "Primarily" Religious Impermissibly Decides Religious Questions

The Wisconsin Supreme Court's decision wreaks havoc upon the constitutional prohibitions on deciding "matters of faith" and avoiding "judicial entanglement in

religious issues." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 747, 761 (2020); *see also, e.g.*, *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). Courts should not be in the business of judging whether activities mandated by an organization's religious mission are *sufficiently* religious to warrant recognition, or, more to the point, "'primarily' religious in nature," based on pre-determined notions of religiosity. Pet.App.29a.

There is no question that the activities in this case are "rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). As the Wisconsin Supreme Court noted, they were "part of [Catholic Charities'] mission 'to carry on the redeeming work of our Lord.'" Pet.App.29a. Under a statute like the one at issue here, that should have been the end of the matter. By going further, the court claimed for itself a power to decide which activities are "primarily" religious based on its own idiosyncratic views. Pet.App.29a-30a. The Constitution prohibits that result.

1. Courts lack the power to make "intrusive judgments regarding contested questions of religious belief or practice." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.). Indeed, "[t]he 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." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

That prohibition on the judicial resolution of religious questions—and the entanglement that accompanies it—follows directly from the Constitution's guarantee of church autonomy, *i.e.*, the "right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe*, 591 U.S. at 746 (cleaned up). Under this principle, churches, not the government, decide how a church's

"work will be conducted." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1398 (1981). Likewise, courts may not "test[] the validity, meaning, or importance of an organization's religious beliefs and practices." Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 Marquette L. Rev. (manuscript at 5, forthcoming 2025), https://ssrn.com/abstract=5099688; *see also, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of scriptural interpretation."); *Rusk v. Espinosa*, 456 U.S. 951, 951 (1982) (summary affirmance).

Allowing courts to adjudicate religious questions permits government actors to "dictate" and "influence" matters of faith and doctrine—an evil that is "one of the central attributes of an establishment of religion." *Our Lady of Guadalupe*, 591 U.S. at 746. Likewise, forcing a religious organization to "predict which of its activities a secular court will consider religious" imposes a "significant burden" on free exercise, effectively "chilling religious activity" that deviates from the government's pre-set template. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987); *id.* at 344 (Brennan, J., concurring in the judgment).

2. Under the Wisconsin Supreme Court's approach, judges must ask not only whether a religious organization's activities are rooted in its religious mission, but also whether those activities are "primarily religious in nature." Pet.App.29a-30a. Although the court insisted that the "listed hallmarks of a religious purpose are by no means exhaustive or necessary conditions and that the listed activities may be different for different faiths,"

Pet.App.27a, it rigidly applied certain pre-determined criteria to conclude that Catholic Charities' "activities are primarily charitable and secular," and "not 'primarily' religious in nature," Pet. App.29a-30a. In so doing, the court disregarded Catholic Charities' sincerely held religious beliefs, deciding for itself whether the corporal works of mercy that Catholics are called upon to perform are, or are not, integral elements of religious practice and devotion.

For three reasons, the Wisconsin Supreme Court's inquiry contravenes this Court's precedents, requires deciding a religious question, and invites impermissible entanglement.

First, the Wisconsin Supreme Court misread this Court's ministerial-exception precedents to say that courts should undertake their own analyses of "both the professions and actions of the organization to determine the organization's 'mission.'" Pet.App.25a. But the ministerial-exception caselaw holds the opposite: Courts ask whether an employee's activities are important in carrying out duties the *church* considers religiously important, *Our Lady of Guadalupe*, 591 U.S. at 753-56, 759-60, not those a *judge* deems typically or "'primarily' religious." Pet.App.29a. Requiring judges to inquire into whether an activity is "sufficiently" or primarily" religious "forces courts to answer debatable theological questions courts have no authority to answer," and unconstitutionally chills religious activity. Pet.App.114a (Grassl Bradley, J., dissenting).

Second, the court wrongly insisted that a religious organization's activities are not "'primarily' religious" if they may also "be provided by organizations of … secular motivations." Pet.App.29a-30a. Virtually *any* activity—from growing a beard to drinking wine—may be done for

secular as well as religious reasons. *Cf. Holt v. Hobbs*, 574 U.S. 352, 355 (2015) (beard); *Emp. Div. v. Smith*, 494 U.S. 872, 877-78 (1990) (wine). Accordingly, this Court has asked only whether a religious activity is sincere and "rooted in religious belief," not whether it is *specially* or *uniquely* religious. *Yoder*, 406 U.S. at 215. To do otherwise would authorize a court to second-guess religious organizations' determination of religious questions. The test employed by Wisconsin, therefore, impermissibly invites judges to "scrutiniz[e] whether and how a religious [organization] pursues its … mission," *Carson*, 596 U.S. at 787, punishing those who deviate from a judge's "subjective[]" sense of which activities are "stereotypically religious," Pet.App.79a (Grassl Bradley, J., dissenting).

Third, the Wisconsin Supreme Court discounted Catholic Charities' religiosity based on its own expectations of how religious organizations operate. Pet.App.29a-30a. Most notably, the court indicated that the fact that Catholic Charities employs and serves non-Catholics were "characteristics … favoring denial of an otherwise available exemption." Pet.App.48a. But a rule that religious organizations are more likely to qualify for an exemption where they hire or serve only co-religionists necessarily requires judges to "impose their own credentialing requirements" about who qualifies as a true member of the faith, and "risk[s] judicial entanglement" in theological issues as a result. *Our Lady of Guadalupe*, 591 U.S. at 759, 761.

The court also suggested that, to be "primarily religious," Catholic Charities' activities should have been accompanied by distribution of "religious materials." Pet.App.29a. But that demand also invites judicial inquisitions into theological matters, exceeding courts' constitutional warrant and creating profound uncertainty for

religious organizations. To determine whether an organization's activities or materials satisfy the court's test, at minimum a judge would need to scrutinize the itineraries, books, and practices of religious organizations to assess the amount of theological content as a percentage of matters covered. And more likely, to assess how strongly a religious organization's activities or literature cut in favor of applying the exemption, courts would need to assess each book or activity's theological quality, specificity, and consistency with the organization's claimed religious beliefs.

The Wisconsin Supreme Court's intrusive inquiry is anathema to the Constitution's protections. Invariably, asking judges to identify "primarily" religious activities or those a judge deems "hallmarks" of religiosity embroils courts in religious questions, forcing them to assign religious significance based on their own intuitions and biases. Pet.App.27a-29a. Furthermore, under Wisconsin's approach, religious organizations must somehow predict how judges will rate their activities as a condition of receiving a benefit. That exercise threatens to "chill[] religious activity," by making an otherwise available benefit contingent on conformity to a judge-mandated version of religiosity. *Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment).

B. Judicial Inquiry into Whether a Church's Religiously Mandated Activities Are "Typically" or "Primarily" Religious Risks Favoring Certain Religious Organizations Over Others

If left undisturbed, the Wisconsin Supreme Court's approach to the Religion Clauses would also erode the cardinal command that governmental actors cannot prefer one religion over another.

1. Denominational neutrality is both the "clearest

command of the Establishment Clause" and "inextricably connected with … the Free Exercise Clause." *Larson v. Valente*, 456 U.S. 228, 244-45 (1982); *accord Carson*, 596 U.S. at 787; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Accordingly, "[t]he government must be neutral when it comes to competition between sects," including when administering exemptions. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

This Court's ministerial-exception cases illustrate the principle. There, this Court has held that the First Amendment prohibits the government from interfering with religious groups' employment decisions concerning their "ministerial" employees—employees who perform an important religious role. *Our Lady of Guadalupe*, 591 U.S. at 746; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012). In determining who is a minister under the exception, this Court has warned against relying on one-size-fits-all indicators of religiosity—like employees' titles or specific kinds of religious training—because doing so would risk "impermissible discrimination" among faiths. *Our Lady of Guadalupe*, 591 U.S. at 752-53. Self-evidently, the First Amendment protects all religious organizations, whether the organization's activities are typical among faiths or not.

The same non-discrimination principle applies in the benefits context. In *Carson*, this Court held that the Free Exercise Clause forbids selectively excluding religious schools from receiving state benefits based on their religious activities. 596 U.S. at 780-81. The Court explicitly rejected the idea that a state may exclude only "sectarian" schools that "promote[] a particular faith and present[] academic material through the lens of that faith." *Id.* at 775,

787 (cleaned up). According to the Court, "scrutinizing whether and how a religious school pursues its educational mission would … raise serious concerns about … denominational favoritism." *Id.* at 787.

2. The Wisconsin Supreme Court defied the First Amendment's neutrality principle. The court began its analysis by asking whether Catholic Charities engaged in "[t]ypical" or so-called "hallmark[]" religious activities. Pet.App.26a-29a (citing *Dykema*, 666 F.2d at 1100). That focus ignores one of the core purposes of the Religion Clauses: "preventing government from deciding what kind of religion the populace will or will not practice," especially based on the government's own "preferred orthodoxy." Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871, 919, 929 (2019).

The court insisted that "[t]he Religion Clauses are inherently in tension with each other" and require "balanc[ing] the competing interests" of church and state. Pet.App.35a-36a. But as this Court recently reiterated, that approach is entirely backwards: The Religion Clauses "have 'complementary' purposes, not warring ones." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022) (quoting *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1,13 (1947)). In this case, the court's logic defied the Constitution's ban on denominational discrimination in at least two ways.

First, although the court conceded that Catholic Charities' works of mercy are religiously motivated, it nonetheless deemed Catholic Charities ineligible for an exemption, in part because the organization does not also "imbue program participants with the Catholic faith" via proselytizing. Pet.App.29a. The court thought that proselytizing is a hallmark of religious activity. But a core tenet of

the Catholic faith is that Catholics must "never seek to impose the Church's faith upon others" while serving. Pope Benedict XVI, Deus Caritas Est ¶ 31 (2005); *see also* Pope Francis, General Audience (Jan. 18, 2023) (Catholic charity "is about loving [others] so that they might be happy children of God[,]" "not about proselytism … so that others become 'one of us.'"). The court's emphasis on proselytizing thus drew a discriminatory line, distinguishing between faiths based on how they relate evangelism and service.

The consideration of other faith traditions further illustrates the problem. Many Jews similarly view service as a distinct mode of worship separate from proselytizing, and most Jews do not proselytize at all. *See, e.g.*, Allison Berry, *Why Doesn't Judaism Promote Conversion, Whereas Other Faiths Do?*, Jewish Bos. (Jan. 14, 2014), https://tinyurl.com/kjcrtdv7. By contrast, many (not all) evangelical Christians view conversion and overt worship as indispensable elements of their charitable activities. *See* Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341, 1352 & n.48 (2016). Thus, under the Wisconsin Supreme Court's approach, a subset of evangelical Protestants is likely to qualify for the law's tax exemption, while Catholics and Jews will not. That is textbook discrimination based solely on the substance of what different religious groups believe.

Second, the Wisconsin Supreme Court deemed Catholic Charities insufficiently religious to qualify for the exemption, in part because "employment … and services" offered by Catholic Charities are "open to all … regardless of religion." Pet.App.29a-30a. But conditioning an exemption on a demand that religious organizations hire

or serve only members of their own faith penalizes religious traditions whose beliefs and practices differ on that score.

Jesus taught that "whatever you did for one of these least brothers of mine, you did for me." Matthew 25:40 (NAB). He did not instruct his followers to only take care of each other. Nor do other religious groups limit their charitable works in this way. For instance, Sikhs, Muslims, and Hindus all regularly serve non-adherents. *See, e.g.*, Evan Simko-Bednarski, *U.S. Sikhs Tirelessly Travel Their Communities to Feed Hungry Americans*, CNN.com (July 9, 2020), https://tinyurl.com/rn988axf; Service to Humanity, Al-Islam.org, https://tinyurl.com/mcye9cee; Diana L. Eck, *The Religious Gift: Hindu, Buddhist, and Jain Perspectives on Dana*, 80 Soc. Rsch. 359, 359 (2013). But that is what the Wisconsin court has told religious organizations to do if it wants a tax exemption.

The court has also told Catholic Charities and others not to employ those of other faiths. Some religious organizations require employees to share the organization's faith. *See, e.g.*, Patrick Henry College, Statement of Faith, https://tinyurl.com/yz9x3ay2 (requiring each "trustee, officer, faculty member … as well as all other employees" to affirm the Bible as "inerrant in its original autographs" and that "Christ's death provides substitutionary atonement for our sins," among other beliefs). Others do not: Jewish preschools, for instance, employ non-Jews to teach religious doctrines. *See* Brief for Amici Curiae Stephen Wise Temple and Milwaukee Jewish Day School in Support of Petitioners at 8, *Our Lady of Guadalupe*, 591 U.S. 732 (No. 19-267). Grading religious organizations up or down based on whether they hire co-religionists inherently favors some faiths over others.

In Wisconsin and other jurisdictions applying this approach, courts "less … familiar with minority faith traditions" may not consider all these groups sufficiently religious, solely because they adhere to their particular faith's teachings about hiring or serving non-members. *See* Pet.App.105a-106a (Grassl Bradley, J., dissenting).

* * *

A regime requiring judges to assess whether avowedly religious activities are "primarily religious in nature" enmeshes judges in deciding religious questions, based on their own idiosyncratic views of what is or is not 'really' religious. Likewise, a regime focused on hallmark religious activities necessarily privileges prominent or majoritarian religious views, allowing judges to discriminate based on their own views of "what does or does not have religious meaning." *New York*, 434 U.S. at 133.

This Court should hold that the Constitution prohibits superimposing those inquiries onto broadly phrased religious exemptions like the one at issue here. But at a minimum, this Court should hold that the Wisconsin Supreme Court erred by penalizing Catholic Charities for refusing to proselytize and for serving all in need—decisions that the court acknowledged flow directly from Catholic Charities' sincere religious beliefs. *See* Pet.App.48a.

II. Correcting the Court's Error Will Not Open the Floodgates to Pretextual Claims, Require Expansion of Existing Exemptions, or Upend Neighboring Bodies of Law

In denying Catholic Charities an exemption, the Wisconsin Supreme Court gestured toward fears that doing so would create a flood of exemption claims. *See* Pet.App.23a & n.12. But the court's assertion is nothing more than "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to

make one for everybody"—and it is inaccurate to boot. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

1. Contrary to the Wisconsin Supreme Court's argument, the Religion Clauses do not "render an organization's mere assertion of a religious motive dispositive." Pet.App.23a. As this Court has explained, when examining religious motivation, courts can and do police "pretextual assertion of a religious belief in order to obtain an exemption." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 n.28 (2014); *see also, e.g.*, *United States v. Quaintance*, 608 F.3d 717, 718-19 (10th Cir. 2010). In other words, a court's ability to assess a claimant's sincerity solves the pretext problem that worried the court.

Nor would recognizing an exemption here require Wisconsin to allow a flood of exemption claims. Under Wisconsin's law, for-profit businesses are already excluded. Wis. Stat. § 108.02(15)(h). Moreover, nothing in the statute or the Constitution prohibits courts from deeming even church-controlled organizations outside the exemption where the organization's activities are rooted in commercial rather than religious motivation. *Cf. Living Faith, Inc. v. Comm'r*, 950 F.2d 365 (7th Cir. 1991) (applying similar logic under Internal Revenue Code § 501(c)(3)); Pet.App.74a-75a. A church-owned coffee shop may have some general connection to the church's overall mission. But where its primary purpose in serving customers is money rather than ministry, nothing in the Constitution requires Wisconsin to provide an exemption.

Moreover, courts can surely look to an organization's actions as evidence of the organization's sincere religious motivation or lack thereof. For example, when faced with the question whether an organization's mission or its activity is rooted in sincere religious belief, nothing in the

Constitution prevents courts from considering whether an organization "(i) is organized for a self-identified religious purpose … (ii) is engaged in activity consistent with, and in furtherance of, those religious purposes, [or] (iii) holds itself out to the public as religious." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011) (O' Scannlain, J. concurring). The Constitution does not prohibit courts from assessing the connection between an organization's beliefs and its activities. What courts may not do, however, is condition protection on "some preconceived notion of what a religious organization should do," rather than "the particular religion identified by the organization." *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226-27 (2007).

2. Where a legislature has chosen to provide an exemption for entities "operated primarily for religious purposes," the Constitution precludes courts from second-guessing sincerely motivated religious belief as to what is, and what is not, religious activity. *See* Pet.App.6a, 28a (quoting Wis. Stat. § 108.02(15)(h)(2)). But legislatures are also free to limit exemptions to a subset of religious entities, provided they use neutral criteria that do not require courts to answer religious questions or engage in denominational discrimination.

For instance, the Employee Retirement Income Security Act contains an exemption for only a subset of church-controlled organizations—so called "principal-purpose" associations, whose "main job … is to fund or manage [employee] benefit plan[s]." *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 473 (2017). Likewise, many jurisdictions have enacted targeted exemptions that allow "private child-placing agenc[ies]" to refuse to recommend or consent to a foster care or adoption placement that would violate the agency's religious convictions. *See, e.g.*,

Va. Code Ann. § 63.2-1709.3. Nothing in the Constitution forbids distinguishing between religious organizations for purposes of exemptions, provided the law does so in religiously neutral ways.

A similar set of considerations applies to other religious tax exemptions. For instance, under the Internal Revenue Code, "churches" receive special treatment compared to "religious organizations" under § 501(c)(3), insofar as churches qualify for automatic tax exemption. IRS, *Churches, Integrated Auxiliaries and Conventions or Associations of Churches* (Aug. 19, 2024), https://tinyurl.com/4u7zyy6s. And when discerning which entities qualify as a "church" for purposes of the exemption, courts have sometimes looked to a list of factors provided by the IRS. *See, e.g.*, *Spiritual Outreach Soc'y v. Comm'r*, 927 F.2d 335, 338 (8th Cir. 1991). No constitutional problem arises when courts apply those factors to determine whether the organization in question "serve[s] an associational role in accomplishing its religious purpose." *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 232 (Fed. Cl. 2009) (citation omitted). On the contrary, that kind of functionalist inquiry is similar to the long-established ministerial exception, which applies to any employee of a religious organization who performs "vital religious duties." *Our Lady of Guadalupe*, 591 U.S. at 756. Both the Internal Revenue Code and the ministerial exception attach legal consequences to a religious concept (churches and ministers, respectively). And in both contexts, the Constitution requires that courts apply the standard functionally, based on the tenets of each religion. *E.g.*, *Our Lady of Guadalupe*, 591 U.S. at 752-53; *Found. of Human Understanding*, 88 Fed. Cl. at 217.

III. The Wisconsin Supreme Court's Approach Threatens Religious Organizations of All Stripes

The Wisconsin Supreme Court's approach leaves religious groups in an untenable position, especially given the number of religious groups that operate nationwide and now face competing criteria.

1. Like other non-profits, many church-affiliated religious organizations operate on a national scale, fulfilling their religious missions across state lines while varying in their practices concerning things like serving only co-religionists or evangelizing. *See, e.g.*, The Church of Jesus Christ of Latter-day Saints, Philanthropies, https://tinyurl.com/va6puefe (providing aid "without regard to cultural or religious affiliation"); Lutheran Church Charities, Human Care Ministry, https://tinyurl.com/2ke6xzrv (offering food or housing "while making … spiritual support a priority"). Under the Wisconsin Supreme Court's standard, state courts would be empowered to determine what practices count as sufficiently religious. If this Court were to adopt that approach, these organizations and others would face significant pressure to alter their ministries state-by-state, solely to satisfy judicial litmus tests of religiosity. That would place a significant practical burden on religious organizations. And even more offensively, it would deprive them of the basic freedom to "decide matters of faith and doctrine" without judicial "second-guess[ing]." *Our Lady of Guadalupe*, 591 U.S. at 746, 759 (cleaned up).

2. The Wisconsin Supreme Court's approach also threatens to extend to myriad other sorts of religious exemptions. The Wisconsin Supreme Court ostensibly grounded its approach in statutory language limiting the unemployment-tax exemption to organizations "operated primarily for religious purposes." *See* Pet.App.6a, 28a

(quoting Wis. Stat. § 108.02(15)(h)(2)). But courts can easily repurpose an analysis focused on "[t]ypical" or "hallmark[]" religious activities to limit eligibility for any other benefit or exemption. Pet.App.26a-27a (citing *Dykema*, 666 F.2d at 1100). In Maryland, for instance, "religious organization[s]" do not have to pay the sales and use tax on sales "made for the general purposes of the … organization." Md. Tax Gen. § 11-204(b)(1). Under the Wisconsin Supreme Court's test, however, those same religious organizations could be denied this exemption based solely on the insistence that an organization's practices aren't "sufficiently religious" to satisfy a judge's vague predispositions. Pet.App.53a (Grassl Bradley, J., dissenting).

Nor is it difficult to imagine courts employing an approach like Wisconsin's to undermine the ministerial exception itself. For instance, a court employing Wisconsin's test might well reason that, although a religious organization performing charity or engaged in education is motivated by religious belief, because many of its activities "can [also] be provided by organizations of … secular motivations," the Constitution poses no barrier to government dictating who may lead the organization and teach its members. Pet.App.30a. Wisconsin's test is a blueprint for undermining religious exemptions across the board.

Under Wisconsin's approach, religious organizations claiming a tax exemption will likely face invasive litigation touching on core functions mandated by their faith. At the same time, Wisconsin's approach places religious organizations at the whim of state judges and their vision of religiosity. Religious organizations should not be forced to "predict which of [their] activities a secular court will consider religious" as a condition of protection. *Amos*, 483 U.S. at 336.

* * *

The Wisconsin Supreme Court's insistence that its decision inflicts no harm because disfavored groups can still "engag[e] in [their] religious activities," Pet.App.50a, underscores the problem with its analysis. The fact that a religious group can still practice its faith in *some* way is no justification for penalizing a church that defines religious practice more broadly than the court does. *Hobbs*, 574 U.S. at 361-62. As this Court has said, "condition[ing] the availability of benefits upon [a recipient's] willingness to violate a cardinal principle of [its] religious faith effectively penalizes the free exercise of [its] constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Carson*, 596 U.S. at 780.

The Wisconsin Supreme Court's test offered Catholic Charities a "troubling choice": Adhere to your religious beliefs or compromise for a tax break. *See Our Lady of Guadalupe*, 591 U.S. at 753. By putting Catholic Charities in that position, the Wisconsin Supreme Court undermined the First Amendment's basic guarantee.

CONCLUSION

The decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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