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 WISCONSIN

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Wisconsin's brief shows that it would much rather be in a different case than the one it's been litigating. Its position in this Court abandons the rationales for denying the religious-purposes exemption to Catholic Charities that it relied on to prevail in the courts below. After repeatedly telling the state courts that Catholic Charities' service to the poor, the hungry, the elderly, and the disabled was "purely secular," Wisconsin now avoids the argument entirely. And after litigating this as a tax exemption case for the last eight years, suddenly Wisconsin declares that Catholic Charities isn't paying a tax at all.

In place of its old arguments, Wisconsin offers entirely new ones. For the first time in any court, it questions Catholic Charities' understanding of how the Catholic doctrine of subsidiarity applies to the governance of the Diocese of Superior. For the first time, it asserts that Catholic Charities is suffering no burden at all from Wisconsin's discriminatory treatment. And for the first time, it says its discrimination against Catholic Charities is excused by a *tu quoque* analogy to the ministerial exception—in Wisconsin's telling, this Court second-guesses religious beliefs, so it can too.

The brand-new arguments aren't any better than the old ones. Wisconsin still seeks to sever the charitable arm of the Diocese of Superior from the broader religious body that is the Catholic Church. It still seeks to second-guess Catholic Charities' religious answers to religious questions (something this Court has not done). And it is still trying to give a preference to religious groups that serve only members of their own

church or that proselytize when providing social assistance. This Court should discard Wisconsin's new arguments just as Wisconsin has discarded its old ones. No creative legal theorizing can justify the Wisconsin Supreme Court's multiple violations of the Religion Clauses.

Wisconsin also reimagines the facts. It seeks—for the first time in this Court—to contest whether Catholic Charities has suffered any burden at all, even though Catholic Charities is being treated unequally. And it claims that Catholic Charities is just providing "oversight services" to the various ministries it directs, when Catholic Charities both directs the sub-entities' ministry and engages in direct ministry to those in need.

Happily, Wisconsin's new facts are beside the point. Wisconsin's errors are plain on the face of the opinion below. The Wisconsin Supreme Court adopted categories of selection and methods of decision that no civil court ought, so its decision cannot stand.

A. Wisconsin's rule violates the church autonomy doctrine.

This Court has long recognized that church autonomy protects religious groups' ecclesiastical decisions about how they structure their polity. Pet.Br.25-29. Here, the Diocese and Catholic Charities have made religious decisions, rooted in the Catholic Church's teachings on charity and church governance, about how to structure their ministry to the needy across 15,000 square miles of rural northern Wisconsin. Pet.Br.6-7; Pet.App.373a ("[O]ur organization should be directed and guided by those people closest to the

families in need[.]"). But Wisconsin penalizes those religious decisions by denying Catholic Charities a tax exemption based on its religiously motivated church structure, thus severing one part of the body ecclesiastic from the rest of the Church. That violates the church autonomy doctrine.[1]

Wisconsin offers several scattershot arguments in response. None has merit.

1. First, Wisconsin attempts to limit the doctrine's scope. It argues that "narrow church autonomy principles" "protect[] only decisions affecting faith and doctrine." Resp.Br.13, 49. Church polity, in Wisconsin's view, is not such an area. Resp.Br.53.

This argument contradicts decades of precedent. In *Kedroff*, this Court made clear that the Religion Clauses protect not just matters "of faith and doctrine," but also "matters of church government." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952). Likewise, in *Milivojevich*, this Court described the "reorganization of the Diocese" as "an issue at the core of ecclesiastical affairs" and held that allowing civil courts to overrule it "would violate the First Amendment in much the same manner as civil determination of religious doctrine." *Serbian E. Orthodox Diocese for U.S. of Am. & Can.* v. *Milivojevich,* 426 U.S. 696, 708-709, 721 (1976). And in *Hosanna-Tabor*, this Court said that the First Amendment both "'permit[s] hierarchical religious organizations to establish their own

[1] Oddly, Wisconsin calls church autonomy an "accommodation," Resp.Br.2, as well as an "exemption" that this Court "fashion[ed]," Resp.Br.17.

rules and regulations for internal discipline and government,'" and prevents "interfere[nce] with the internal governance of the church." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 187-188 (2012). Church polity is therefore at the heart of what the church autonomy doctrine protects.

In the same vein, Wisconsin says church autonomy becomes relevant only when "the state controls a church's decision"—*i.e.*, when the state acts "with legally binding effect to override a church decision." Resp.Br.48. But this Court has long recognized that church autonomy guarantees can be triggered by "secular control *or manipulation*." *Kedroff*, 344 U.S. at 116 (emphasis added). Far from "narrowly shield[ing]" religious bodies, the "broad principle" of church autonomy protects against government attempts "even to influence" church governance matters. Compare Resp.Br.47 with *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 746-747 (2020). See also *Hosanna-Tabor*, 565 U.S. at 194 (requested relief would "operate as a penalty on the Church"); *Carson* v. *Makin*, 596 U.S. 767, 778 (2022) ("[T]he First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'"); *Larson* v. *Valente*, 456 U.S. 228, 234, 246 (1982) (Establishment Clause violated where Minnesota statutory exemption placed higher administrative burdens on some religious groups).

2. Unable to narrow the church autonomy doctrine, Wisconsin next claims that there is no burden on Catholic Charities, so Catholic Charities cannot raise a church autonomy claim (or any other claim under the Religion Clauses). Resp.Br.34, 38-40, 44. But Catholic

Charities suffers three burdens—it is unable to participate in the Catholic bishops' own unemployment benefits program, it suffers unequal treatment because of its religion, and it suffers economic burdens.

As Catholic Charities explained in its opening brief, it seeks to join the Diocese of Superior, its subentity Challenge Center, and most other Wisconsin Catholic diocesan entities in the Catholic Unemployment Pay Program (CUPP). Pet.Br.11-13. Wisconsin's refusal to allow it the religious-purposes exemption means that Catholic Charities is unable to join the program. That in turn means it is unable to meet its "social justice responsibilities by providing church funded unemployment coverage" and show solidarity both with its workers and with the rest of the Church in Wisconsin. Pet.App.433a. That alone is a burden, and Wisconsin has nothing to say to this point.

Catholic Charities also suffers the burden of discrimination. The Religion Clauses protect "'religious observers against unequal treatment' and against laws that impose special disabilities on the basis of religious status." *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 475 (2020). In *Trinity Lutheran*, for example, the Court rejected a similar argument that there was no "meaningful[] burden," holding that "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 462-463 (2017); see also *Morris Cnty. Bd. of Chosen Freeholders* v. *Freedom From Religion Found.,* 586 U.S. 1213, 1215 (2019) (statement of Kavanaugh, J.) (discussing "principle of religious equality"); Pet.Br.23-24. In brief, "government may not treat religious persons, religious

organizations, or religious speech as second-class." *Shurtleff* v. *City of Boston*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring).

In light of all this, Wisconsin concedes that the denial of a benefit on account of one's religious belief or practice sometimes constitutes a cognizable burden. Resp.Br.39 (discussing *Sherbert* and *Lukumi*). But Wisconsin also says there is no burden here because Catholic Charities doesn't say that paying the tax "would violate their religious faith." Resp.Br.40. That wrongly assumes that burdens exist only when government requires a believer to do something that is religiously forbidden. But burdens also exist where government penalizes a believer for undertaking religious behavior. See, *e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543 (1993) (penalty for engaging in ritual sacrifice). That is true even when the religious exercise is part of the faith but not required by the faith. See, *e.g.*, *Espinoza*, 591 U.S. at 475-476 (participation in tuition assistance program).

Wisconsin attempts to distinguish these cases by arguing that the religious-purposes exemption is not a "generally available" benefit. Resp.Br.40. But a benefit need not be available to everyone to be considered "generally available." *E.g.*, *Trinity Lutheran*, 582 U.S. at 455 (grants "award[ed] * * * on a competitive basis to those scoring highest based on several criteria"). Instead, generally available means it would be available *but for* the religious belief or exercise at issue. See *Carson*, 596 U.S. at 773 (benefit available only in certain school districts).

Catholic Charities also suffers economic burdens. Pet.Br.12. But Wisconsin now asserts that Catholic Charities suffers no economic burdens, going so far as

to claim that "Petitioners do not pay a tax." Resp.Br.52.

This is sophistry. In fact, Wisconsin said throughout the lower court litigation that Catholic Charities was seeking a "tax exemption." Resp.Wis.C.A.Br.35; Resp.Wis.S.Ct.Br.32 ("denial of the unemployment tax exemption to the employers does not violate the U.S. or Wisconsin Constitutions"). The very first sentence of the Wisconsin Supreme Court's decision below stated that Petitioners "seek an exemption from having to pay unemployment tax to cover their employees." Pet.App.4a. Indeed, Chapter 108 was "was enacted to conform" to the Federal Unemployment *Tax* Act. Pet.App.31a.[2]

Wisconsin was right the first time. That Catholic Charities uses "reimbursement financing" to pay the unemployment tax rather than "contribution financing" is irrelevant. Resp.Br.52.[3] These are just two different methods of paying the tax.[4] The primary difference is that contributions are paid on a quarterly basis

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[2] Perhaps out of inadvertence, Wisconsin elsewhere characterizes the payments as a tax. Resp.Br.39 ("paying a tax").

[3] Before filing its brief in this Court, Wisconsin never raised any argument that the difference between contribution financing and reimbursement financing affected the analysis in this case. Because this argument was not raised below, it is waived. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

[4] See Wis. Stat. § 108.151(2) (describing "reimbursement financing" for nonprofit employers); Wis. Stat. § 108.15(3) (contrasting "contribution financing" with reimbursement financing

in advance, while reimbursements are paid once a former employee seeks unemployment benefits, *i.e.*, once there is a taxable event. With both, the state unemployment fund keeps an account in place for the employer and monitors how much money is in the account. If a contribution financing employer's account runs too low, its tax rates go up.[5] Similarly, if a reimbursement financing employer's account runs too low, Wisconsin sends it a bill.[6] And under either method, employers must pay into the unemployment fund to cover their former employees' benefits as they are disbursed. As a result, Catholic Charities has paid the tax when former employees have sought benefits from the State.

Moreover, Catholic Charities expends significant additional resources to comply with the State's system. Pet.Br.11-12; see also Wis.Catholic.Conf.Br.9-11 (discussing CUPP and State systems). Every dollar and staff-hour devoted to administering the State's program can no longer be used for Catholic Charities'

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for government units). Contribution financing is the default for private employers, while reimbursement financing is available to governmental units, nonprofit organizations, and Indian tribes. Wis. Stat. §§ 108.15, 108.151, 108.152. Reimbursement financing employers must deposit an "assurance of reimbursement," such as a bond, with the State. Wis. Stat. § 108.151(4).

[5] See *Unemployment Insurance 2025 Tax Rates*, Department of Workforce Development, https://dwd.wisconsin.gov/ui/employers/taxrates.htm.

[6] Wis. Stat. § 108.151(5)(f).

mission of serving those in need.[7] That is why, *contra* Resp.Br.51, Catholic Charities first sought an exemption almost 25 years ago through its sub-entity Challenge Center. Pet.App.498a. And, once Challenge Center was exempt, Catholic Charities spent most of the past two decades trying to obtain equal treatment for its other ministries—to remove the significant economic and administrative burdens of the tax. Pet.App.450a (Dec. 2003 attempt to withdraw); Pet.App.456a-460a (2005 decision denying exemption).

3. Wisconsin offers a few additional arguments against the application of church autonomy. It argues that because a secular entity can elect to incorporate separately, all such organizational decisions can't be religious. Resp.Br.53. That tracks the Wisconsin Supreme Court's view that what is not exclusively religious must be secular. Pet.App.30a. But adopting that view with respect to church organization would require this Court to ignore the fact that church polity is, for many faiths, deeply doctrinal. See Eleven Denominations Br.15-19 (discussing the different polities religious groups use to further their charitable beliefs).

Next, Wisconsin questions—for the first time in eight years of litigation—Catholic Charities' interpretation of what the Catholic Church teaches regarding

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[7] Wisconsin asserts that "Catholic Charities itself does not provide direct services to individuals" and instead provides only oversight. Resp.Br.8. Not so. Catholic Charities itself provides a number of services directly to the needy. For example, Catholic Charities runs an extensive housing program for income-eligible seniors and those with specific disabilities. See JA.211-213; *CCB Housing Management*, www.ccbhousing.org.

subsidiarity. Resp.Br.53. Aside from the fact that such an argument is waived and unsupported by the testimony below, JA.200, JA.208, Pet.App.373a, permitting such second-guessing would violate the Religion Clauses' bedrock rule against civil courts deciding religious questions. See, *e.g.*, *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445-446 (1969) (adjudicating "controversy over church doctrine" was "wholly inconsistent with the American concept of the relationship between church and state").

4. Finally, Wisconsin parades horribles, claiming that relying on church autonomy would put religious exemptions in danger. Resp.Br.45-47. The argument proves too much. Of course legislators (and judges) have to draw lines. See Pet.Br.31-33 (discussing the necessity of distinguishing among different kinds of religious groups). But the task is hardly impossible. Many other states have applied the "operated primarily for religious purposes" language for decades without need of Wisconsin's aberrant test for inherently (or "distinctively") religious activities, and without any apparent constitutional problems. See, *e.g.*, *Kendall* v. *Director of Div. of Emp. Sec.*, 473 N.E.2d 196, 198 (Mass. 1985).

The same is true of other religious exemptions. For example, ERISA's church plan exemption applies to plans established and maintained "by a church or by a convention or association of churches." 29 U.S.C. 1003(b)(2); 29 U.S.C. 1002(33). The unanimous Court had no trouble construing and applying that religious exemption to determine which entities qualified for the exemption in a case that concerned billions of dollars in pension plan obligations. See *Advocate Health*

Care Network v. *Stapleton*, 581 U.S. 468, 482 (2017). The Court cautioned, however, that it mattered *how* government actors applied the exemption. Thus requiring the IRS to decide "whether a particular Catholic religious order should count as" a "church" for purposes of the church plan exemption would "by definition, disfavor[] plans created by church affiliates, as compared to those established by (whatever the IRS has decided are) churches." *Ibid.* Other statutes operate—without constitutional problem—to create exemptions on a rolling basis. Thus the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq*., and its companion the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq*., "operate[] by mandating consideration * * * of exceptions." *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 421 (2006). Establishment Clause challenges to these statutes have all failed. See *id.* at 436 (discussing the "feasibility of case-by-case consideration of religious exemptions" and *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-723 (2005)).

Wisconsin is therefore free to enact an unemployment tax exemption for organizations "operated primarily for religious purposes" in tandem with a separate exemption for churches, just as many other states do. Wis. Stat. § 108.02(15)(h); Pet.Br.6 n.1; *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 782 n.12 (1981). But it cannot then interpret the exemption to privilege only those religious activities the state deems "distinctively religious," forcing

otherwise-exempt entities to reconsider their doctrine and polity.[8]

B. Wisconsin's rule entangles church and state.

This Court has long held that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953). But that is precisely what Wisconsin is doing here. Catholic Charities sincerely believes that showing Christ's love to the disabled, elderly, hungry, and poor is a "religious" activity. Yet Wisconsin has disregarded Catholic Charities' answer to this

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[8] The United States suggests that the Court could resolve this appeal by deciding questions of state law rather than the federal constitutional question presented, invoking *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983), and the doctrine of constitutional avoidance. U.S.Br.13, 27. It is not apparent that this maneuver would result in any constitutional avoidance, since it immediately raises questions of this Court's jurisdiction, not least because the United States asks the Court to extend the rationale of *Michigan* v. *Long* well beyond the context of "independent and adequate state ground" jurisprudence. Indeed, the United States' theory seems to repurpose *Michigan* v. *Long* as a method of providing post-hoc (and unbriefed) saving constructions of state laws that have been challenged on federal constitutional grounds. That makes little sense when the rationale of *Michigan* v. *Long* is to obviate "the need to examine state law." *Michigan* v. *Long*, 463 U.S. at 1041. The maneuver seems particularly inapposite when the United States treats the religious-purposes exemption as entirely optional for states. *Ibid.* ("we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law *required* it to do so") (emphasis added). Catholic Charities cannot object to obtaining relief, but the United States' suggestion would leave Catholic Charities with lesser, and less durable, relief than it would obtain if the Court answered the question presented.

religious question and has decided instead that its "activities are secular," because they do not fit Wisconsin's preconceived checklist of what counts as religiously "typical." Pet.App.26a, 32a.

In its brief in this Court, Wisconsin jettisons that position after eight years of litigation, refusing to defend its consistent argument in the courts below that Catholic Charities and its sub-entities "operate for purely secular, not religious, purposes." Resp.Wis.C.A.Br.15. Instead, Wisconsin offers a newly-minted excuse for the entanglement: line-drawing is hard, and how Wisconsin is drawing the line here is similar to how this Court analyzes other questions of religion, in particular whether an employee serves important religious functions for purposes of the ministerial exception analysis. Resp.Br.16-19.[9] Therefore, in Wisconsin's view, since the Court is already doing something similar, it should get a pass for the second-guessing it does here. *Ibid.*

The Court should reject this *tu quoque* argument, just as it rejected a similar argument by analogy in *Our Lady*. There, the Court expressly rejected the Ninth Circuit's suggestion "that the *Hosanna-Tabor* exception should be interpreted narrowly because the ADA and Title VII contain provisions allowing religious employers to give preference to members of a particular faith in employing individuals to do work connected with their activities." *Our Lady*, 591 U.S. at 760 (internal citations omitted). But since "the *Hosanna-Tabor* exception serves an entirely different

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[9] Oddly, Wisconsin rechristens the ministerial exception as a "ministerial exemption."

purpose," the analogy failed. *Ibid.* Similarly, Wisconsin's test serves an entirely different purpose than the ministerial exception—determining which entities are statutorily exempt from the burden of a state unemployment compensation tax is a very different undertaking than determining under the Constitution which roles within a religious organization the courts are not allowed to interfere with.

Nor are the two tests alike in practice. Unlike the court below, courts determining whether a particular employee carries out important religious functions within the religious body do not tally up that employee's activities, determine whether each of those activities (or enough of them) are inherently religious according to the court's lights, and then decide whether the particular role is ministerial or not. Rather, courts resolving ministerial exception questions look at whether the person is expected to "play[] a vital part in carrying out the mission of the church" by considering the "religious institution's explanation of the role of such employees in the life of the religion in question." *Our Lady*, 591 U.S. at 757; see also Scholars' Br.7 (when analyzing the ministerial exception, "[c]ourts ask whether an employee's activities are important in carrying out duties the *church* considers religiously important, not those a *judge* deems typically or 'primarily religious'") (citations omitted).

Thus, far from the abstract and deracinated analysis of "activities" Wisconsin describes in its brief, Resp.Br.17-19, 24-28, and the Wisconsin Supreme Court uses, Pet.App.26a-31a, the ministerial exception's functional analysis as described by this Court and applied by the lower courts is contextualized and relational. It asks, how does the employee function

within the organization? That functional analysis is oriented to how the particular person promotes the "faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. See also *Our Lady*, 591 U.S. at 746 ("institution's central mission"). In short, context matters. And an inevitable part of the context for every religion claim are the sincere and religious beliefs of the claimant.

By contrast, Wisconsin's analysis pays no heed to what relationship there might be between individual actions undertaken by Catholic Charities and its "faith and mission." *Hosanna-Tabor*, 565 U.S. at 190. Wisconsin's "objective inquiry" means ignoring the religious aspect of Catholic Charities' actions altogether.

At one point, Wisconsin grudgingly concedes that "'second-guess[ing]' a church's credentialing views or imposing a 'co-religionist' requirement" is out of bounds. Resp.Br.25 (quoting *Our Lady*, 591 U.S. at 759, 761). But then it says that *Our Lady* "treated the schools' own views as 'important' but not determinative" and that "Petitioners' preferred approach—more-or-less complete deference—did not prevail." *Ibid.* (quoting *Our Lady*, 591 U.S. at 757).

"More-or-less" is doing a lot of work in that sentence: The words "deference" and "defer" appear nowhere in Catholic Charities' opening brief, much less "complete deference." That's because Catholic Charities is not asking for complete deference to its views any more than the Petitioners in *Our Lady* were. Rather, Catholic Charities is asking that courts take into account—and weigh as "important"—good-faith and sincere explanations of the role of charitable acts in the life of the Catholic Church. *Our Lady*, 591 U.S. at 757. Here, that means that Wisconsin cannot simply

disregard Catholic Charities' statements about the role of charitable assistance to the needy within the context of the Catholic faith.

That also corresponds with another aspect of all religion claims: Civil courts are ill-placed to grade religious answers to religious questions. Although "there may be contexts in which drawing a distinction between secular and religious teaching is necessary, * * * it is inappropriate when doing so involves the government challenging a religious institution's honest assertion that a particular practice is a tenet of its faith." *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.,* 882 F.3d 655, 660 (7th Cir. 2018) (per curiam). "[N]ot only is this type of religious line-drawing incredibly difficult, it impermissibly entangles the government with religion." *Ibid.* (citing *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 343 (1987)). "This does not mean that we can never question a religious organization's designation of what constitutes religious activity, but we defer to the organization in situations like this one, where there is no sign of subterfuge." *Ibid.*

In short, to understand a religion claim a civil court must put it into context, and part of that means taking into account and treating as important the beliefs and practices of the religious institution. At the same time, courts must remain cognizant that they cannot answer those religious questions themselves. Wisconsin has therefore violated the principle of anti-entanglement both by taking Catholic Charities' actions completely out of context and by second-guessing Catholic Charities' beliefs about why it helps the needy.

C. Wisconsin's rule discriminates among religions.

1. The Religion Clauses also prohibit the government from preferring one religious group over another. Pet.Br.43-45. *Larson* grounds this religious neutrality requirement in the "history and logic" of the Establishment Clause while noting that it is also "inextricably connected" with the Free Exercise Clause. *Larson*, 456 U.S. at 245-246. And *Lukumi* makes clear that the Religion Clauses also prevent governments from using categories of selection to disfavor certain religious practices: "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. And once religious favoritism has been shown, the defendant government must overcome strict scrutiny. *Larson*, 456 U.S. at 246; *Lukumi*, 508 U.S. at 546.

Here, the Wisconsin Supreme Court definitively interpreted Wisconsin law to extend religious accommodations only to those groups engaged in religious practices it deemed "typical" or inherently "religious in nature," based on the court's own (supposedly) "objective" conception of what religious groups usually do. Pet.App.26a-27a, 29a. In its brief, Wisconsin offers a grab bag of reasons why this facially different treatment of different religions is permitted. None avails.

Wisconsin first relabels the religious activities it says pass muster as "distinctively" religious. Resp.Br.2. That is mere semantics. "Distinctively" is a word that appears nowhere in the Wisconsin Supreme Court's opinion, nor in any of Wisconsin's briefing to the courts below. Regardless of what label Wisconsin puts on them, Wisconsin's list of favored religious

practices discriminates among religious groups in the same way (or worse than) the 50% rule discriminated among religious groups in *Larson*. Pet.Br.46-48.

Wisconsin next argues that not all denominational preferences "raise concerns about favoring particular religions" or trigger strict scrutiny because they accommodate only "one religious group." Resp.Br.37 (citing *Gillette* v. *United States*, 401 U.S. 437, 452-453 (1971)). But this Court rejected this same argument in *Larson*, explaining that in *Gillette* "conscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic, *despite*" their different religious beliefs. *Larson*, 456 U.S. at 246 n.23 (emphasis added). Therefore, *Gillette* did not permit denominational preferences. *Ibid.*

Larson thus stands for a rule against denominational preferences: Accommodations that alleviate *specific burdens* are unproblematic—whether those burdens are faced by one, a few, or many religious groups. But where government refuses to extend an existing accommodation to a group based on that group's religious identity, beliefs, or practices (*i.e.*, a denominational preference), the refusal must undergo strict scrutiny. *Larson*, 456 U.S. at 246-247.

Wisconsin also tries to erase interdenominational discrimination from this Court's precedents, claiming that only intentional religious targeting and the favoring of secular interests over religious interests are cognizable. Resp.Br.41-43. Wisconsin offers no explanation of *Sherbert*, *Fowler*, *Zorach*, or *Cutter* on this score. Compare Pet.Br.45 with Resp.Br.41-43. It briefly argues that *Larson* and *Lukumi* are limited to "their facts." But that claim belies their use in a host of cases ever since. See, *e.g.*, *Colorado Christian Univ.*

v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.); *Carson*, 596 U.S. at 780, 787.

Next, Wisconsin tries to bootstrap portions of the compelling interest analysis into the denominational discrimination test. *E.g.*, Resp.Br.36-37. There is, Wisconsin says, "no cause for concern" when a religious group is left out of a religious accommodation, so long as the government can point to any neutral, secular interest that supports the line it has drawn. *Ibid.* (no violation when "accommodation's line serves 'considerations of a pragmatic nature'"). But this puts the cart before the horse. As *Larson* makes clear, consideration of the government's *reason* for distinguishing among religious groups or denominations arises only *after* determining whether the law creates a denominational preference. *Larson*, 456 U.S. at 247 (assessing the government's asserted interests as part of the strict scrutiny analysis *after* determining whether the law favors some religious groups over others).

And, as previously explained, there is no doubt that Wisconsin's line-drawing creates a denominational preference. Pet.Br.44, 46-48. The contours of Wisconsin's religious exemption favor some religious groups over others based on their religious beliefs and exercise—just as Minnesota's 50% rule disadvantaged "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Larson*, 456 U.S. at 246 n.23. And, indeed, Wisconsin doesn't really dispute that its exemption draws such lines between religious groups. See Resp.Br.35-36 (justifying the practice of "targeted accommodations"). Instead, Wisconsin focuses on explaining why the Wisconsin Supreme Court's line is

reasonable. *E.g.*, Resp.Br.36-37. But that's a question for strict scrutiny.

2. Wisconsin's denominational preference fails strict scrutiny. Its stated interest in "ensuring unemployment coverage for its citizens" is neither compelling nor narrowly tailored. Resp.Br.44. As Petitioners have explained, Wisconsin's insurance law is vastly underinclusive. Pet.Br.48-49. And the Catholic Church's own unemployment compensation program advances Wisconsin's interest in "ensuring unemployment coverage for its citizens" at least as well as the State's system. Pet.Br.49; Resp.Br.44.

Wisconsin offers no response to either point, instead merely reiterating its interest in "unemployment coverage for its citizens" and citing *Lee* and *Hernandez*. Resp.Br.44. But in *Lee* this Court explained that "mandatory participation is indispensable to the fiscal vitality of the social security system," and that the "public interest in maintaining a sound tax system is of such a high order," that "religious belief in conflict with the payment of taxes" are not entitled to an exception. *United States* v. *Lee*, 455 U.S. 252, 258-260 (1982); see also *Hernandez* v. *Commissioner*, 490 U.S. 680, 700 (1989) (same for income taxes). Tellingly, Wisconsin doesn't even try to make a similar mandatory-participation argument here—perhaps because so many employers are already exempt from Wisconsin's law that it would blink reality to claim that exempting a few additional religious entities from Wisconsin's program would threaten its solvency. Pet.Br.48-49. *Especially* when the Wisconsin Legislature already created a broad statutory religious exemption—in addition to extensive secular exemptions—such an argument has no merit. See Wis. Stat.

§ 108.02(15)(f), (g), (h), (i), (k) (exempting, among others, certain agricultural laborers, golf caddies, newspaper salespersons, per diem court reporters, taxi drivers, and many others). And Wisconsin's many exceptions further confirm that its interest cannot be compelling. See *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 542 (2021).

Nor does Wisconsin try to explain how applying its "broad" interest in providing access to unemployment benefits can be "narrowly tailored" to Catholic Charities' particular situation. Resp.43-44. Strict scrutiny requires Wisconsin's asserted interest to be measured specifically with respect to *Catholic Charities'* claimed exemption. See *O Centro*, 546 U.S. at 431 (examining with "particularity" the effect of the claimed religious exemption, even where "paramount" interests are at stake). That failure alone dooms its strict scrutiny affirmative defense.

Indeed, Wisconsin offers no response to the fact that the Catholic Church's alternative unemployment compensation system would similarly serve Wisconsin's stated interest in "ensuring unemployment coverage for its citizens." Resp.Br.44; Pet.Br.49 (government must prove application of compelling interest "to the person"). The best it can do is speculate about "other exempted employers" that might not have an alternative system, Resp.Br.44 n.7, but that is the kind of speculative and generalized interest that cannot prevail under strict scrutiny. *O Centro*, 546 U.S. at 436 ("If I make an exception for you, I'll have to make one for everybody, so no exceptions.").

3. In addition to the access-to-unemployment-benefits interest it invoked in the lower courts, Wisconsin now claims for the first time that the Section

108.02(15)(h)(2) exemption also serves an anti-entanglement interest and that its law is "narrowly tailored to avoid entangling the state with employment decisions touching on religious faith and doctrine." Resp.Br.44.

Perhaps this is the tribute vice pays to virtue, since Wisconsin never claimed anti-entanglement as an interest in the courts below, and its own method of deciding the availability of the religious-purposes exemption is highly entangling. See *supra* Section B. But even taking the argument at face value, the anti-entanglement interest cannot possibly justify Wisconsin's actions here. For one thing, Catholic Charities itself would be exempt if it weren't separately incorporated from the Diocese—yet a shift in corporate status has no bearing on the likelihood of entangling employment actions. And Wisconsin's theory that entities engaged in "distinctively religious" activities are more likely to lead to religious employment disputes, Resp.Br.1, does not hold water.

Merely because Catholic Charities does not require employees to be Catholic—a fact Wisconsin emphasizes, Resp.Br.9—does not mean its employees are free to act in ways that disparage or undermine the teachings of the Catholic Church. Pet.App.427a ("Your employment is an extension of Catholic Social Teachings and the Catechism of the Church."); Pet.App.425a (prohibiting sub-entities from "engag[ing] in activities that violate Catholic Social Teachings"). Indeed, *all* employees are expected to follow Catholic Charities' Code of Ethics, which is rooted in Catholic teaching. Pet.App.426a-427a, Pet.App.429a-430a. Catholic Charities is thus—with respect to Wisconsin's alleged

anti-entanglement interest—no different from those religious entities the exemption covers.

Nor is Catholic Charities unique in this regard—many religious groups engage in religious activities not on Wisconsin's "distinctively religious" list, ISKCON Br.7; Jewish Coal. for Religious Liberty Br.9-12, but there is no evidence they are any *less* likely to generate religiously entangling employment disputes. Religious questions can arise in the employment context regardless of whether a religious organization proselytizes, hires co-religionists, and engages in religious worship. Wisconsin's newly-discovered government interest—created *in response to* the line the Wisconsin Supreme Court drew—thus not only lacks record support, it also fails to support the line Wisconsin law draws. Such a poorly drawn interest cannot be compelling.

Indeed, invoking anti-entanglement and anti-establishment interests is often a last redoubt for governments that are engaged in discrimination against religious people. See, *e.g.*, Br. for Resp'ts at 54, *Espinoza*, 591 U.S. 464 (No. 18-1195), 2019 WL 5887033 (arguing that "[t]he purpose of the No-Aid Clause, as explained by the Delegates, was to protect religious liberty and guard against entanglement"); *Carson*, 596 U.S. at 781 (rejecting Maine's anti-establishment argument because a state's "interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling") (cleaned up).

Just as with its broad-access interest, Wisconsin cannot show narrow tailoring with respect to its newly discovered non-entanglement interest. Wisconsin tries to justify the line it has adopted by claiming that it excludes those employers who it thinks are more likely

to "entangl[e] the state with employment decisions touching on religious faith and doctrine." Resp.Br.44. But as with its other stated interest, Wisconsin fails to explain how forcing Catholic Charities to participate in the state's system advances this interest in a way that is least restrictive of religious exercise. See *Ramirez* v. *Collier*, 595 U.S. 411, 430 (2022). If the state's interest is in preventing entanglement, exempting Catholic Charities serves this interest at least as well—and does so without burdening religious exercise.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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