No. _____

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Wisconsin exempts from its state unemployment tax system certain religious organizations that are "operated, supervised, controlled, or principally supported by a church or convention or association of churches" and that are also "operated primarily for religious purposes."

Petitioners are Catholic Charities of the Diocese of Superior and several sub-entities. Although all agree Catholic Charities is controlled by a church—the Diocese of Superior—the Wisconsin Supreme Court held that Catholic Charities is not "operated primarily for religious purposes" and thus does not qualify for the tax exemption. Specifically, the court held that Catholic Charities' activities are not "typical" religious activities because Catholic Charities serves and employs non-Catholics, Catholic Charities does not "attempt to imbue program participants with the Catholic faith," and its services to the poor and needy could also be provided by secular organizations.

The questions presented are:

1. Does a state violate the First Amendment's Religion Clauses by denying a religious organization an otherwise-available tax exemption because the organization does not meet the state's criteria for religious behavior?

2. In addressing federal constitutional challenges, may state courts require proof of unconstitutionality "beyond a reasonable doubt?"

CORPORATE DISCLOSURE STATEMENT

Catholic Charities Bureau, Inc. does not have a parent corporation and does not issue stock.

Catholic Charities Bureau, Inc. is the parent corporation of Barron County Developmental Services, Inc.; Diversified Services, Inc.; Black River Industries, Inc.; and Headwaters, Inc. None of these entities issue stock.

RELATED PROCEEDINGS

There are no directly related proceedings.

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INTRODUCTION

Forty years ago, this Court granted review in a pair of cases to determine whether the imposition of state unemployment taxes on certain religious bodies under the Federal Unemployment Tax Act and identical state statutes violated the First Amendment. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *California* v. *Grace Brethren Church*, 457 U.S. 393 (1982). Lower courts had divided over whether church schools were church-controlled organizations "operated primarily for religious purposes," 26 U.S.C. 3309(b)(1)(B), and thus exempt from unemployment tax, and—if not exempt—over whether FUTA and its cognate state statutes violated the First Amendment.

But neither case resolved the constitutional questions presented. In *St. Martin*, the Court unanimously held that church schools that were not separately incorporated counted as "churches" and were thus protected under the independent exemption for churches in 26 U.S.C. 3309(b)(1)(A). And in *Grace Brethren*, the Court held that the federal district court from which appeal had been taken lacked jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341, so the case had to be dismissed. In both cases, the Court expressly declined to reach the First Amendment questions on which review had been granted. Congress later added a specific exemption that covered religious schools, but the status of other church-controlled but separately incorporated entities remains unaddressed to this day.

The split is thus unfinished business. And as the decision of the Wisconsin Supreme Court in this case shows, it is a split that is growing. The Wisconsin Su-

preme Court recognized the split and weighed in, concluding that Catholic Charities, the separately incorporated charitable arm of the Roman Catholic Diocese of Superior, was not "operated primarily for religious purposes." Acknowledging that Catholic Charities undertakes its charitable activities because of its sincerely held religious beliefs and to carry out the religious mission the bishop has given it, the court nevertheless held that Catholic Charities' activities have no religious purpose because those activities are not, in that court's view, "typical" for a religious organization. The Wisconsin Supreme Court thought it atypical of religion that Catholic Charities does not "attempt to imbue" those it helps with the Catholic faith, and that it hires employees "regardless of religion." And the court held that because Catholic Charities provides services that "can be provided by organizations of either religious or secular motivations," those services do not have a religious purpose. Put another way, it doesn't matter if Catholic Charities gives a cup of water in Jesus' name, because non-religious charities offer cups of water too.

That absurd result deepens a split between state courts that require religious entities to conform to stereotypes to qualify for the "religious purposes" exemption and those that do not. Four states look to the sincerity of the entity's religious beliefs to decide whether it qualifies for the religious purposes exemption, thus avoiding constitutional questions. Four other states, now including Wisconsin, instead determine "religious purpose" based on an assessment of whether a religious organization's charitable activities are "typical" of religion or "objective[ly]" religious. And that thrusts state governments into a thicket of First Amendment

questions under the Free Exercise Clause, the Establishment Clause, and the church autonomy doctrine, not least because it forces agencies and courts to second-guess the religious decisions of religious bodies.

And that split matters. Religious bodies like Petitioners are deeply affected, having to pay unemployment taxes that otherwise could be helping the needy. Moreover, because Petitioners are forced to pay into the state unemployment compensation program, they cannot participate in their church's own unemployment compensation system along with Wisconsin dioceses, including the Diocese of Superior itself. And because the Tax Injunction Act prevents lower federal courts from addressing the matter, only this Court can resolve the split and the underlying constitutional issues in any comprehensive way.

Finally, the decision below deepened a different existing split over the proper burden of proof applicable to federal constitutional claims. According to the Wisconsin Supreme Court, its state laws are presumptively constitutional unless a plaintiff can prove unconstitutionality "beyond a reasonable doubt." This heightened standard conflicts with the practices of all federal courts and most state courts—which analyze federal constitutional claims without such a burden—and is fundamentally at odds with this Court's constitutional jurisprudence. And because only a few state courts still adhere to this heightened standard for adjudicating federal constitutional claims, it too generally avoids federal review.

The Court should not allow these longstanding splits to fester any longer. It should grant review on both questions presented.

OPINIONS BELOW

The decision of the Supreme Court of Wisconsin (App.1a-124a) is reported at 3 N.W.3d 666.The decision of the Court of Appeals of Wisconsin (App.125a-168a) is reported at 987 N.W.2d 778. The decision of the Court of Appeals of Wisconsin certifying this appeal to the Supreme Court of Wisconsin (App.169a-188a) is not reported. The decision of the Douglas County Circuit Court (App.189a-211a) is not reported.

JURISDICTION

The Supreme Court of Wisconsin issued its opinion on March 14, 2024. App.1a. On May 30, 2024, Justice Barrett extended the time to file a petition for certiorari until August 11, 2024. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." U.S. Const. Amend. I.

The Federal Unemployment Tax Act states in relevant part that "[t]his section shall not apply to service performed (1) in the employ of (A) a church or convention or association of churches, (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches, or (C) an elementary or secondary school which is operated primarily for religious purposes, which is described in section 501(c)(3), and

which is exempt from tax under section 501(a)." 26 U.S.C. 3309(b)(1).

Wisconsin's Unemployment Insurance and Reserves laws state in relevant part that "'Employment' * * * does not include service: * * * In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches." Wis. Stat. § 108.02(15)(h)(2).

STATEMENT OF THE CASE

A. The Federal Unemployment Tax Act and the religious purposes exemption

In 1935, Congress enacted the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301-3311, which "called for a cooperative federal-state program of benefits to unemployed workers." *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 775 (1981). As part of this cooperative system, employers pay the federal government a percentage of their employees' annual wages to fund job service programs, to support state unemployment agencies (in times of high unemployment), and to support a federally administered fund against which states may borrow to pay unemployment benefits. But these employers can claim a credit of up to 90% of this federal tax for "contributions" they have made to federally approved state unemployment compensation programs (which provide benefits directly to unemployed workers), thus reducing the amount of money they owe to the federal government and reducing their overall tax burden. *Id.* at 775 n.3; 26 U.S.C. 3302(a)(1).

Accordingly—and to ensure their programs remain federally approved—all states (including Wisconsin)

have "complementary" statutes which impose, at a minimum, the coverage mandated by FUTA. See *Wimberly* v. *Labor & Indus. Rels. Comm'n of Mo.*, 479 U.S. 511, 514 (1987) ("The Act establishes certain minimum federal standards that a State must satisfy in order for a State to participate in the program."); *Bleich* v. *Maimonides Sch.*, 849 N.E.2d 185, 188 (Mass. 2006) (similar). The Secretary of Labor reviews all state FUTA-implementation statutes, 26 U.S.C 3304(a), and certifies annually that state laws meet FUTA's requirements, 26 U.S.C. 3304(b).

FUTA exempts church-controlled religious organizations "operated primarily for religious purposes" from payment of the unemployment tax. 26 U.S.C. 3309(b)(1)(B). This exemption was enacted by Congress in 1970. *St. Martin*, 451 U.S. at 776. Since then, forty-seven states have adopted language identical, or nearly identical, to FUTA's language.[1]

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[1] Twenty-three states and the District of Columbia use language identical to Section 3309(b)(1)(B). See Conn. Gen. Stat. § 31-222(a)(1)(E)(i)(II); Del. Code tit. 19, § 3302(10)(D)(i)(II); D.C. Code § 51-101(2)(A)(iv)(I)(b); Ga. Code § 34-8-35(j)(1)(B); Idaho Code § 72-1316A(7)(b); Ind. Code § 22-4-8-2(j)(3)(A)(ii); Iowa Code § 96.1A(16)(a)(6)(a); Kan. Stat. § 44-703(i)(4)(I); Ky. Rev. Stat. § 341.055(19); La. Stat. § 23:1472(12)(F)(III)(a)(ii); Mass. Gen. Laws ch. 151A, § 6(r); Miss. Code § 71-5-11(I)(5)(a)(ii); Mo. Rev. Stat. § 288.034.9(1); Neb. Rev. Stat. § 48-604(6)(g)(i)(B); Nev. Rev. Stat. § 612.121(2)(a)(2); N.C. Gen. Stat. § 96-1(b)(12)(b)(2) (incorporating Section 3309(b) by reference); Ohio Rev. Code § 4141.01(B)(3)(h)(i); Okla. Stat. tit. 40 § 1-210(7)(a)(ii); N.D. Cent. Code § 52-01-01(17)(h)(1)(b); 43 Pa. Con. Stat. § 753(l)(4)(8)(a)(ii); S.D. Codified Laws § 61-1-36(1)(b); Va. Code § 60.2-213(B)(1)(ii); Wash. Rev. Code § 50.44.040(1)(b); W. Va. Code § 21A-1A-17(9)(A).

Twice before, this Court considered constitutional claims challenging the scope of the religious exemption but resolved both cases on alternative grounds. In *St. Martin*, this Court held that the religious school plaintiffs were exempt from South Dakota's unemployment tax under a different FUTA provision (Section 3309(b)(1)(A)), making it "unnecessary * * * to consider the First Amendment issues raised by petitioners." *St. Martin*, 451 U.S. at 788. And in *California* v. *Grace Brethren Church*, this Court resolved the case

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Sixteen states use identical language, including "operated primarily for religious purposes," but make small grammatical changes to other parts of the subsection. See Ala. Code § 25-4-10(b)(21)(a)(2); Alaska Stat. § 23.20.526(d)(9)(B); Ark. Code § 11-10-210(a)(4)(A)(ii); Cal. Unemp. Ins. Code § 634.5(a)(2); Fla. Stat. § 443.1216(4)(a)(2); Md. Labor & Empl. § 8-208(b)(2)(i); Me. Rev. Stat. tit. 26 § 1043(11)(F)(17)(a); Mich. Comp. Laws § 421.43(o)(*i*); N.M. Stat. § 51-1-42(F)(12)(a)(2); 28 R.I. Gen. Laws § 28-42-8(4)(i)(B); S.C. Code § 41-27-260(10)(a); Tenn. Code § 50-7-207(c)(5)(B); Tex. Lab. Code § 201.066(1)(C); Utah Code § 35A-4-205(1)(g)(i)(B); Vt. Stat. tit. 21, § 1301(6)(C)(vii)(I); Wis. Stat. § 108.02(15)(h)(2).

Seven states have made minor substantive changes to FUTA's language, for example to specify that schools are included, or that entities must be nonprofit. See Ariz. Rev. Stat. § 23-615(B)(1) (schools); Colo. Rev. Stat. § 8-70-140(1)(a) (schools); 820 Ill. Comp. Stat. § 405/211.3(A)(2) (schools); Minn. Stat. § 268.035 subd. 20(5) (nonprofit status); N.H. Rev. Stat. § 282-A:9, IV(p)(1) (schools); N.J. Stat. § 43:21-19(i)(1)(D)(i)(II) (schools); Wyo. Stat. § 27-3-105(b)(ii) (deleting second use of "operated").

Of the remaining four states, one utilized identical language, but has since repealed it. 2005 Or. Laws c. 218, § 1 (amending Or. Rev. Stat. § 657.072(1)(a)(B)). Three states employ religious exemptions that turn on ministerial status or function. Haw. Rev. Stat. § 383-7(a)(9)(A); Mont. Code § 39-51-204(2)(a); N.Y. Lab. Law § 563(2)(a)-(c).

on jurisdictional grounds, holding that the Tax Injunction Act prohibited the federal district court from enjoining the collection of state taxes. 457 U.S. 393, 417 (1982).

After this Court's decisions in *St. Martin* and *Grace Brethren*, Congress again amended FUTA to make clear that religious schools are exempt so long as they are "operated primarily for religious purposes,"—even if not "operated, supervised, controlled, or principally supported by a church or convention or association of churches." 26 U.S.C. 3309(b)(1)(C) (enacted 1997).

Wisconsin law generally requires nonprofits with four or more employees (and which meet other minimum qualifications) to pay into its state unemployment program. Wis. Stat. 108.02(13)(b). Through its (h)(2) exemption, the State provides a religious exemption identical to FUTA's Section 3309(b)(1)(B) save for the omission of two instances of "which is." Compare Wis. Stat. § 108.02(15)(h)(2) with 26 U.S.C. 3309(b)(1)(B).

B. Catholic Charities and its religious mission

Petitioner Catholic Charities Bureau is a Wisconsin nonprofit corporation and the social ministry arm of the Diocese of Superior, a diocese of the Roman Catholic Church. App.371a. Its mission is "[t]o carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church." App.382a, 428a. Catholic Charities carries out this mission by "providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church." App.383a, 431a. Its purpose is "to be an effective sign of the charity of Christ" by providing services without making distinctions "by race, sex, or

religion in reference to clients served, staff employed and board members appointed." App.383a, 431a. This is a mandate of Catholic social teaching, and a primary tenet of the faith. App.373a-379a. Catholic Charities pledges that it "will in its activities and actions reflect gospel values and will be consistent with its mission and the mission of the Diocese of Superior." App.384a, 429a. Catholic Charities operates dozens of programs in service to the elderly, the disabled, the poor, and those in need of disaster relief. App.373a. In accordance with the Catholic social teaching of subsidiarity, Catholic Charities is separately incorporated from the Diocese of Superior and, like the Diocese, has 501(c)(3) status under the Roman Catholic Church's group tax exemption. App.386a-402a.

Petitioners Headwaters, Barron County Developmental Services, Diversified Services, and Black River Industries are Catholic Charities' sub-entities that provide services primarily to developmentally disabled individuals. App.128a-130a. They are each separately incorporated as Wisconsin nonprofit corporations, and each also enjoys 501(c)(3) status as part of the Roman Catholic Church. App.386a-402a.

The bishop of the Diocese of Superior has plenary control over Catholic Charities and its sub-entities: he "oversees CCB in its entirety, including its sub-entities." App.130a; App.7a-8a. He serves as president of Catholic Charities and "appoints its membership," which consists of leading diocesan clergy and the executive director. App.7a, 415a-417a. The bishop also appoints the boards of directors of Catholic Charities and its sub-entities. App.419a, 422a.

Catholic Charities' membership oversees the ministry and its sub-entities to ensure fulfillment of Catholic Charities' mission in compliance with Catholic social teaching. App.28a-29a, 416a-417a. Each sub-entity signs Catholic Charities' *Guiding Principles of Corporate Affiliation*, which gives Catholic Charities responsibility over many of the sub-entity's major operating decisions. App.422a-425a. Catholic Charities and its sub-entities are directed to comply fully with Catholic social teaching in providing services. App.8a, 425a. And all new key staff and director-level positions receive a manual entitled *The Social Ministry of Catholic Charities Bureau in the Diocese of Superior*, which they must review during orientation. App.371a-385a. In addition, every new employee receives a welcome letter with the Catholic Charities' mission statement, code of ethics, and statement of the ministry's philosophy toward service. App.131a; App207a; App.380a-383a, 469a-475a. All employees are instructed to abide by these documents. App.130a-131a; 207a.

Catholic Charities' ministry is also guided by the principles of its Catholic faith. Specifically, Catholic teaching "'demand[s] that Catholics respond in charity to those in need." App.128a, 58a; see also Pope Benedict XVI, *Deus Caritas Est* ¶ 32 (2005) ("[Charity] has been an essential part of [the Church's] mission from the very beginning."). Indeed, the Catholic Church "claims works of charity as its own inalienable duty and right." Pope Paul VI, *Apostolicam Actuositatem* ¶ 8 (1965).

Catholic teaching also confirms that the Church's charitable ministry "must embrace the entire human race." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 581

(2004). The Church therefore instructs that charity should be exercised "in an impartial manner towards" "members of other religions." Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops* "*Apostolorum Successores*" ¶ 208 (2004); *Apostolicam Actuositatem* ¶ 8 ("[C]haritable enterprises can and should reach out to all persons and all needs."). Charity, moreover, "cannot be used as a means of engaging in * * * proselytism." *Deus Caritas Est* ¶ 31; see also *Apostolorum Successores* ¶ 196 (instructing not to "misus[e] works of charity for purposes of proselytism"). As Pope Benedict XVI explained, "Those who practise charity in the Church's name will never seek to impose the Church's faith upon others." *Deus Caritas Est* ¶ 31.

C. Catholic Charities seeks to participate in the Wisconsin bishops' unemployment assistance program

For the Catholic Church, "[t]he obligation to provide unemployment benefits * * * spring[s] from the fundamental principle of the moral order in this sphere." App.433a (quoting St. Pope John Paul II, *Laborem Exercens* (1981)). Accordingly, in 1986, the Wisconsin bishops created the Church Unemployment Pay Program (CUPP) "to assist parishes, schools and other church employers in meeting their social justice responsibilities by providing church funded unemployment coverage" in accordance with Catholic teaching. App.433a. This program provides the same level of benefits to unemployed individuals as the State's system "more efficiently at lesser cost." App.149a, 448a, 478a. Participating in the CUPP instead of the state's program would allow Catholic Charities to direct additional resources towards helping the needy.

In 2016—after a different sub-entity of Catholic Charities (not a Petitioner here) was held to qualify for the (h)(2) exemption, App.497a-504a—Catholic Charities sought a similar determination from Respondent Department of Workforce Development (DWD). DWD, however, concluded that Catholic Charities and its sub-entities were not operated primarily for religious purposes.[2] App.351a-370a. Catholic Charities appealed. After a two-day hearing, the administrative law judge reversed. App.291a-350a.

DWD then petitioned Respondent Labor and Industry Review Commission (LIRC) for review. LIRC reversed, holding that the (h)(2) exemption turns on an organization's "activities, not the religious motivation behind them or the organization's founding principles." App.227a, 242a, 258a, 273a, 290a. And because Petitioners "provide[] essentially secular services and engage[] in activities that are not religious per se," LIRC concluded that they do not qualify. App.226a, 241a, 257a, 272a, 289a.

Catholic Charities sought review in Douglas County Circuit Court. The Circuit Court reversed LIRC's decision, holding that under the "plain language" and "plain meaning" of the statute, "the test is really why the organizations are operating, not what they are operating." App.209a-210a. And since Petitioners operate out "of th[e] religious motive of the Catholic Church * * * of serving the underserved," their primary purposes are religious. App.209a.

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[2] It is undisputed that Petitioners are "operated, supervised, controlled, or principally supported by a church." App.218a-219a, 297a. Petitioners thus qualify for the (h)(2) exemption if they are "operated primarily for religious purposes." App.5a.

DWD and LIRC appealed. The Court of Appeals initially certified the appeal to the Wisconsin Supreme Court, but that court refused the certification. App.169a, 11a n.8. After the refusal, the Court of Appeals reversed the Circuit Court's order and reinstated LIRC's decision. App.127a. The Court of Appeals held that "under a plain language reading of the statute," to qualify as operated primarily for religious purposes, "the organization must not only have a religious motivation, but the services provided—its activities—must also be primarily religious in nature." App.146a. It therefore concluded that although Catholic Charities and its sub-entities "have a professed religious motivation * * * to fulfill the Catechism of the Catholic Church," their "activities * * * are the provision of charitable social services that are neither inherently or primarily religious activities." App.163a-165a. The court of appeals further held that "the First Amendment is not implicated in this case," rejecting CCB's constitutional arguments. App.127a, 157a-159a. Catholic Charities petitioned the Supreme Court of Wisconsin for review.

On March 14, 2024, the Wisconsin Supreme Court held that whether an entity was "operated primarily for religious purposes" required an "objective inquiry" into the entity's "activities" to determine whether they were "'primarily' religious in nature." App.27a, 29a. As part of this inquiry, the court determined that certain "criteria"—"[a]lthough not required"—would be "strong indications that the activities are primarily religious in nature." App.29a. These "objective" criteria focused on "[t]ypical" forms of religious exercise: whether the entity proselytized, whether it "participated in worship services, religious outreach, cere-

mony, or religious education," and whether its employment and ministry are "open to all participants regardless of religion." App.26a; App.29a-30a.

Applying this test, the court found that Catholic Charities' "activities are primarily charitable and secular" because the organization does not "attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees," and because its services "are open to all participants regardless of religion." App.29a-30a.

The Court also rejected Catholic Charities' federal constitutional arguments, repeating seven times that Catholic Charities had to prove "beyond a reasonable doubt" that the Court's new interpretation of the (h)(2) exemption violated the federal constitution. App.7a, 37a, 44a, 47a, 50a, 51a. First, the court held that its interpretation did not entangle courts in religious questions because "[a] court need only determine what the nature of the motivations and activities of the organizations are." App.40a. The court acknowledged that its analysis "requires 'some degree of involvement' with religion," but concluded that this is "inherent" in any statutory exemption scheme. *Ibid*. (citation omitted).

Writing in dissent, Justice Rebecca Grassl Bradley (joined by Chief Justice Ziegler and in part by Justice Hagedorn) highlighted numerous errors in the majority's approach. App.51a-54a. The dissent pointed out that the majority's test puts courts in the "constitutionally tenuous position of second-guessing the religious significance and character of a nonprofit's actions." App.116a. And it explained that the court's approach "belittles Catholic Charities' faith—and many

other faith traditions—by mischaracterizing their religiously motivated charitable activities as 'secular in nature'—that is, not really religious at all." App.83a (citation omitted). Whether an activity is "religious in nature" was an inherently entangling question: "For what constitutes an activity that is 'religious in nature' to change from religion to religion, the court must study the doctrines of the various faiths and decide for itself what religious practices are actually religious. The Constitution bars civil courts from such intrusions into spiritual affairs." App.117a.

REASONS FOR GRANTING THE PETITION

I. The decision below deepens a 4-4 split over whether states can, consonant with the First Amendment, deny church organizations a tax exemption because they do not engage in "typical" religious activities.

The split this Court granted certiorari to review in *St. Martins* and *Grace Brethren* remains unresolved, and the decision below deepens the split. Four state supreme courts deciding whether an unemployment tax exemption is available to a church-controlled religious organization under FUTA have held that the church's sincere beliefs about whether its activities are undertaken to further its religious mission are dispositive. By contrast, four other state supreme courts—including now the Supreme Court of Wisconsin—have

engaged in a "searching case-by-case" analysis of a religious entity's activities, rejecting or ignoring any First Amendment arguments to the contrary.[3]

A. Four states, to avoid constitutional infringement, focus on whether an organization has sincere religious beliefs motivating its activities.

The highest courts of four states focus on whether an organization has sincere religious beliefs indicating that the purpose of its activities is rooted in religious motivation.

Idaho. The Idaho Supreme Court held that a bakery owned and operated by the Seventh-day Adventist Church was operated primarily for religious purposes despite its commercial and secular activities. In reaching this conclusion, the Court reversed the state commission's finding that the "commercial and competitive nature of the production and marketing of the food product produced" meant the bakery should "not [be] considered * * * a 'religious activity.'" *Department of Emp.* v. *Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1372 (Idaho 1979). Instead, the court recognized that the reason the church operated the bakery was plainly religious: "The tenets of the Seventh Day Adventists religion stress the value of labor, and work experience is conceived to be an integral part of the students' religious training. Hence, as a part of their religious training, students at the academy are assigned to work at a bakery, a laundry, a cafeteria, the school or a farm." *Id.* at 1371. It was for this religious reason

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[3] Due to the Tax Injunction Act, 28 U.S.C. 1341, claims concerning these state tax exemptions are not heard in the lower federal courts.

that "the Seventh Day Adventists Corporation owns, operates and controls Champion Bake-N-Serve." *Ibid.* The court rejected the idea that "commercial aspects coexistent with the primary religious purpose" undermined those purposes. *Id.* at 1372. Relying on this statutory interpretation, the Idaho court did not reach any constitutional questions. *Id.* at 1373. Cf. *Nampa Christian Schs. Found., Inc.* v. *State of Idaho*, 719 P.2d 1178, 1180 (Idaho 1986) (concluding that religious school was operated primarily for religious purposes and thus not "address[ing] the constitutional issues raised by both parties").

Iowa. The Iowa Supreme Court similarly interpreted its identical religious exemption to "avoid constitutional issues," holding that a separately incorporated Lutheran secondary school was operated for primarily religious purposes. *Community Lutheran Sch.* v. *Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 289-291 (Iowa 1982). Employing what it called "unusual respect to decisions of the United States Supreme Court interpreting identical language in federal statutes," the court surveyed the caselaw, including *St. Martin* and *Grace Brethren*. *Id.* at 289. The court rejected the state unemployment agency's assertion that the "educational function" of the school was "dominant," instead concluding that the evidence showed the "purpose for creating and operating the parochial schools is to rear children in the Christian faith 'in all their schooling[.]'" *Id.* at 290-291. Because the court interpreted the religious exemption to focus on the reason for which the school operated, it did not need to reach the school's claim that "refusal to exempt them would constitute an unconstitutional denial of religious freedom under the first amendment to the United States Constitution." *Id.* at 289.

Maine. In *Schwartz* v. *Unemployment Insurance Commission*, a religious ministry provided "religious and secular services to the coastal communities" of Maine. 895 A.2d 965, 968 (Me. 2006). This included "telemedicine," an "after-school program," and "a used clothing shop and food pantry." *Id.* at 968-969. Interpreting a religious exemption that was substantively identical to FUTA and the Wisconsin statute, the court rejected the claim that these activities undermined the religious purpose of the ministry: "The fact that the Mission provides health care to islanders and an after-school program for students does not diminish its continuing religious purpose." *Id.* at 971. The court also explained that charitable work and even a charitable purpose are not inconsistent with a primarily religious purpose: "The fact that an organization has a charitable purpose and does charitable work does not require the conclusion that its purposes are not primarily religious." *Id.* at 970. Instead, based on "substantial evidence in the record," the court concluded that the motivation and reason for the ministry's charitable activity was primarily religious. *Ibid*. The court did not disturb the lower court's "expansive" reading of the exemption because the "right to free exercise of religion" was at stake. See *Schwartz* v. *Maine Unemployment Ins. Comm'n*, No. AP-2003-028, at 8 (Me. Super. Ct. Aug. 25, 2004) (quoting *Kendall* v. *Director of Div. of Emp. Sec.*, 473 N.E.2d 196, 199 (Mass. 1985)).

Massachusetts. In a case with facts closely resembling this one, the Supreme Judicial Court refused to parse the religious activities of a Catholic charity, concluding that courts must be "quite cautious in attempting to define, for tax [and unemployment insurance] purposes, what is or is not a 'religious' activity * * *

for obvious policy and constitutional reasons." *Kendall*, 473 N.E.2d at 199 (alterations in original). As here, the religious motivations of the charity were not disputed; instead, "[a]t oral argument the claimant * * * argued that this [religious] motivation is distinct from the Center's secular purpose, the education of the mentally retarded." *Id.* at 199. The court rejected this argument, "declin[ing] to impose such rigid criteria in defining religious pursuits." *Ibid.*[4]

Other courts. Numerous state intermediate appellate courts have also concluded that this religious exception focuses on sincerity of mission or motivation. For example, in a case distinguished below, App.83a, 143a-144a n.10, the Illinois Court of Appeals rejected the state's attempts to recharacterize and second-guess the nature of a religious charity's activities. See *By The Hand Club for Kids, NFP, Inc.* v. *Department of Emp. Sec.*, 188 N.E.3d 1196, 1198 (Ill. Ct. App. 2020). The court relied on the church-supervised after-school program's sincere assertion that its activities

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[4] In *Grace Lutheran Church* v. *North Dakota Employment Security Bureau*, the North Dakota Supreme Court relied on this Court's precedents to determine that "church schools" were categorically "operated primarily for religious purposes." 294 N.W.2d 767, 771 n.11 (N.D. 1980) (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)). Accordingly, the court did not separately analyze the church organization's activities.

Similarly, the Vermont Supreme Court, without taking a side, recognized the existence of the split and explained that these "issues have been litigated extensively in other jurisdictions with mixed results, especially with respect to whether similar organizations are operated primarily for religious purposes." *Mid Vt. Christian Sch.* v. *Department of Emp. & Training*, 885 A.2d 1210, 1213. (Vt. 2005).

were religious: "According to By The Hand, the activities of feeding hungry children, helping struggling readers, and occasionally caring for children's medical needs are no less religious activities than leading Bible studies, chapel services, scripture memorization, and prayers." *Id.* at 1214. The government therefore "erred by recharacterizing them as secular activities for purposes of the exemption from the unemployment compensation system." *Ibid.* This meant the court did not need to "reach the parties' constitutional arguments." *Ibid.*

Similarly, the Ohio Court of Appeals—interpreting an identical religious exemption—rejected the argument that a Jewish school was not operated "primarily for religious purposes" because "its curriculum of religious instruction was secondary to secular subjects taught at the school." *Czigler* v. *Administrator,* 501 N.E.2d 56, 57 (Ohio Ct. App. 1985). Instead, the court explained that the religious "exemption is determined by the purpose of the existence and operation of the school. If that purpose be primarily of a religious nature, the exemption applies without regard to the proportion of time devoted to religious instruction." *Ibid.* In other words, "[t]he test is not the activities but the purpose for which they are operated and conducted." *Id.* at 58. That decision "avoid[ed] potentially serious entanglement by the state in violation of the Establishment Clause of the First Amendment" and prevented courts from "entering into the quagmire of proportionality of interference in religious affairs" by foreclosing consideration of the "relative amount of religious activity or instruction" provided. *Id.* at 57-59.

B. By contrast, four states now hold that state agencies can review the activities of a religious organization to determine whether they are "typical" religious behavior without running afoul of the Constitution.

With the addition of Wisconsin, the highest courts of four states now find themselves on the opposite side of the split.

Arkansas. The Arkansas Supreme Court, in an opinion cited below, expressly rejected the test used by courts on the other side of the split, holding that a religious hospital operated by the Sisters of Charity was not operated primarily for religious purposes. See *Terwilliger* v. *St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark. 1991) ("We disagree with the approach taken in the *Kendall* case."). Despite acknowledging that the religious hospital's "sole motivation may be religious in nature," the court held that Saint Vincent's was not operated primarily for religious purposes because the hospital "functioned as any other hospital in the area except in those areas prohibited by the Roman Catholic Church," *id.* at 697, 699, and "no proselytizing takes place, and no religious requirements are involved in hiring and staffing decisions except with reference to 18 employees associated with the chapel," *id.* at 699. In reaching its decision, the court relied on both *Lemon* and *Meek*. *Id.* at 698.

Colorado. In another decision cited below, the Colorado Supreme Court interpreted nearly identical statutory language to reject a religious organization's tax exemption. See *Samaritan Inst.* v. *Prince-Walker*, 883 P.2d 3, 7 (Colo. 1994). As the court explained, there was no dispute that the Samaritan Institute's

"goal * * * is to strengthen and build upon a person's faith," that its "mission statement is described in its by-laws as providing religious outlets 'for people under stress,'" and that it "perceives itself as 'an extension of the ministry of the various churches with which it is affiliated.'" *Id.* at 8. The court, however, concluded that "[t]he evidence indicates that the services provided by the Institute are essentially secular," because the "Institute does not evangelize or proselytize," and "a counselee is not required to participate in any religious discussion or activity." *Ibid.* Thus "[b]ecause the services offered are essentially secular, the Institute does not 'operate primarily for religious purposes.'" *Ibid.* The court did not address any constitutional issues.

Maryland. The Maryland Court of Appeals adopted a similar approach when a Lutheran high school sought to qualify for an identical religious exemption. See *Employment Sec. Admin.* v. *Baltimore Lutheran High Sch. Ass'n*, 436 A.2d 481 (Md. 1981). Instead of crediting the apparently undisputed testimony from the school's principal that the school's "primary purpose is religious," the court instead articulated twelve factors for courts to independently assess, including the "[e]xtent of encouragement of spiritual development," the [s]ource[] of financial support," the [c]omposition of student body," and the "[d]egree of academic freedom." *Id.* at 487-488. Applying these factors, the court scrutinized the school's funding streams, the number of credits devoted to "religious training," the "nature of the mandatory chapel services," and "whether the school subscribes to and follows principles of academic freedom." *Id.* at 488-489. Ultimately the court determined that even more evidence and "further proceedings" were necessary. *Id.* at

490. The court chose not to address the constitutional issues presented. *Id.* at 484 n.2.

Other courts. Some intermediate state appellate courts have also joined this side of the split. In *Cathedral Arts Project, Inc.* v. *Department of Econ. Opportunity*, a Florida court of appeals held that an arts ministry controlled by the Episcopal Cathedral of Jacksonville was not operated primarily for religious purposes, reasoning that "[w]hile Appellant's motivation may be religious in nature, its primary purpose in operating * * * is to give art instruction to underprivileged children.") 95 So.3d 970, 973 (Fla. Dist. Ct. App. 2012). The dissent noted that this outcome created a constitutional "Catch-22" for the ministry. *Id.* at 976 (Swanson, J., dissenting).

C. The decision below violates the First Amendment.

The decision below violates the First Amendment by favoring some religions over others, entangling courts in religious questions, and interfering with church autonomy.

1. The decision below favors some religions over others.

Wisconsin's rule expressly discriminates among religious groups, violating both Religion Clauses. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs[.]" *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). Thus "a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic

mass or Protestant church service." *Id.* at 533 (citing *Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953)); see also *Niemotko* v. *Maryland*, 340 U.S. 268, 272-273 (1951) (Jehovah's Witnesses denied use of public park while other religious organizations were given access). This free exercise inquiry looks not just to the "[f]acial neutrality" of a statute or regulation but also to "the effect of a law in its real operation." *Lukumi*, 508 U.S. at 534-536. See also *Carson* v. *Makin*, 596 U.S. 767, 787 (2022) (citing *Larson* v. *Valente*, 456 U.S. 228, 244 (1982)) (in free exercise case, citing "serious concerns" about "denominational favoritism").[5]

Wisconsin's discrimination among religions also violates the Establishment Clause. See *Larson*, 456 U.S. at 253. There, by "impos[ing]" certain registration and reporting requirements "on some religious organizations but not on others" Minnesota ran afoul of the Establishment Clause. The mere "capacity" of the law "to burden or favor selected religious denominations" triggered scrutiny. *Id.* at 255.[6]

The decision below discriminates among religions in two ways. First, it penalizes Catholic Charities for its Catholic beliefs regarding how it must engage in its ministry. The court concluded that Catholic Charities' activities were not religious because:

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[5] Three Justices have indicated that the issue of denominational favoritism is certworthy. See *Roman Catholic Diocese of Albany* v. *Emami*, 142 S. Ct. 421 (2021); cf. *Roman Catholic Diocese of Albany* v. *Harris*, No. 24A90 (application granted July 26, 2024).

[6] *Larson* was not decided under *Lemon*. *Larson*, 456 U.S. at 252.

- "[Catholic Charities] and the sub-entities, * * * neither attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees."
- "Both employment with the organizations and services offered by the organizations are open to all participants regardless of religion."
- Catholic Charities and its sub-entities do not engage "in worship services, religious outreach, ceremony, or religious education."

App.29a-30a. Indeed, after assessing the "nature" of Catholic Charities' activities, the Wisconsin Supreme Court concluded they were "primarily charitable and secular," even though Catholic Charities views them as religious. App.29a-30a.[7]

By penalizing Catholic Charities for engaging in critical parts of its ministry (like serving those in need without proselytizing), Wisconsin did not treat Catholic Charities with religious neutrality. Instead, the state denied Catholic Charities an exemption precisely because its religious beliefs and exercise differed from what the Wisconsin Supreme Court thought were "typical" religious activities. App.26a; see also App.79a

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[7] Federal judges have also wrongly discounted religious motivation because secular charities provide similar services. See, *e.g., Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 764 (9th Cir. 2011) (Berzon, J., dissenting) ("vast majority of World Vision's work consists of humanitarian relief" rather than "explicitly Christian work" so it ought not qualify as "religious" under Title VII). But see *id.* at 741 (O'Scannlain, J., concurring) (World Vision "primarily religious" because its "humanitarian relief efforts flow from a profound sense of religious mission").

(Grassl Bradley, J., dissenting) ("The majority actually inquires whether Catholic Charities' activities are stereotypically religious."). That wrongly disfavors those religious traditions that ask believers to care for the poor without strings attached.

Second, Wisconsin's rule also violates the bedrock principle of neutrality among religions by discriminating against religious groups with more complex polities. The Diocese of Superior operates Petitioners as separately incorporated ministries that carry out Christ's command to help the needy. But if Catholic Charities were not separately incorporated, it would be exempt. App.166a ("the result in this case would likely be different if [Catholic Charities] and its subentities were actually run by the church"). Thus Wisconsin penalizes the Catholic Church for organizing itself as a group of separate corporate bodies in accordance with Catholic teaching on subsidiarity, while other religious entities that include a variety of ministries as part of a single body are unaffected. That penalty on the Church's religiously determined polity violates the Religion Clauses' rule against discrimination among religions. Cf. *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 528-531 (2021) (treating separately incorporated Catholic Social Services as part of Archdiocese). And that makes LIRC's determination to cut off Catholic Charities from the Diocese of Superior all the more baffling.[8]

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[8] Wisconsin cannot hope to meet strict scrutiny, as it has no legitimate, much less compelling, reason for discriminating against Catholic Charities. Although fully briefed by the parties, the Wisconsin Supreme Court did not address strict scrutiny.

2. The decision below entangles courts in religious questions.

This Court has repeatedly confirmed that the Religion Clauses forbid courts from entangling themselves in religious questions. See, *e.g.*, *Carson* v. *Makin*, 596 U.S. 767, 787 (2022) (citing *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 761 (2020)) ("serious concerns" under the First Amendment "about state entanglement with religion"); *Our Lady*, 591 U.S. at 761 (courts must avoid "judicial entanglement in religious issues"); *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("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"); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 679 (1970) (examining "entanglement" within "historical frame of reference.")

And almost nothing could be more entangling than second-guessing a church's answers to religious questions—including what constitutes religious activity. As this Court explained in *Amos*, "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Corporation of Presiding Bishop* v. *Amos,* 483 U.S. 327, 336 (1987). Avoiding this inquiry "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335.

The decision below runs afoul of this fundamental principle by requiring Wisconsin agencies and courts to conduct an intrusive inquiry into the internal affairs of religious organizations seeking the (h)(2) ex-

emption. See, *e.g.*, App.165a-166a. That kind of detailed inquisition into the beliefs, practices, and operations of a religious body will always entangle Church and State.

Indeed, the court's mode of analysis—examining whether individual activities of religious nonprofits are "inherently" or "primarily" religious in nature—is a recipe for hopeless entanglement. The court decided that Petitioners' "activities are primarily charitable and secular," and that their ministry is a "wholly secular endeavor" despite Catholic Charities' uncontested belief that its charitable ministry "is part of [its] mission to 'carry on the redeeming work of our Lord by reflecting gospel values and the moral teaching of the church.'" App.29a-30a. To reach this result, the court made itself the arbiter of which of a church's actions are "primarily religious in nature," App.29a, and invented criteria for second-guessing a church's religious belief that what it did was filled with religious purpose. App.26a-27a (listing criteria). Cf. *Amos*, 483 U.S. at 343-344 (Brennan, J., and Marshall, J., concurring) ("A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity."); *Carson*, 596 U.S. at 787 ("scrutinizing whether and how a religious school pursues its educational mission" is off-limits).

The Wisconsin court thus went badly astray when it assumed simple lines could be drawn between "primarily religious" activities and secular ones where an entire institution is imbued with religious purpose. See *Amos*, 483 U.S. at 336. Indeed, the court's criteria, such as assessing whether a religious organization serves or employs only co-religionists or conducts

"worship services, religious outreach, ceremony, or religious education," App.29a, will inevitably thrust courts into a constitutional thicket. See *Our Lady*, 591 U.S. at 761.

Worse still, Wisconsin's approach also *requires* courts to second-guess churches' motivations. Indeed, the Wisconsin Court of Appeals admitted it was rejecting Catholic Charities' view of the religious significance of its actions, recognizing that if it looked at Catholic Charities' purpose for engaging in these actions, it would likely have come to a different conclusion. App.165a-166a; App.225a-227a. Forcing government agencies and courts to conduct an ongoing inquisition into church activities is the opposite of separation of church and state.

3. The decision below interferes with church autonomy.

The United States Constitution guarantees religious bodies "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). That "general principle of church autonomy," protects among other things churches' "autonomy with respect to internal management decisions." *Our Lady*, 591 U.S. at 746-747. In *Kedroff*, the New York Legislature attempted to separate certain Russian Orthodox churches it viewed as Communist-controlled "from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod" and transfer control to a U.S.-based Russian Orthodox denomination. *Kedroff*, 344 U.S. at 107. This Court rejected this governmental effort to divide sub-

entities from their larger church body. *Id.* at 116; see also *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721 (1976) ("reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs"); *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (*Kedroff* also applies to judicial determinations).

Wisconsin's discriminatory rule violates the church autonomy doctrine for at least two reasons. First, Wisconsin's approach interferes with matters of church government and organization. By penalizing Petitioners because they are organized as separately incorporated bodies in accordance with the Catholic principle of subsidiarity, Wisconsin has put a gigantic thumb on the religious polity scale for all religious institutions.

Second, Wisconsin does not credit activities that could be "provided by organizations of either religious or secular motivations" as religious. App.30a. That mirrors the government's error in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, where it demanded that a minister's activities be "exclusively religious" to merit protection. 565 U.S. 171, 193 (2012). And just as "manag[ing] the congregation's finances" or "supervising purely secular personnel," did not make a minister's efforts nonreligious, *ibid.*, providing "background support and management services" is anything but a "wholly secular endeavor." App.30a.

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Wisconsin's rule is both absurd and harmful. Absurd, because it can logically lead to the conclusion that the charitable arm of a Catholic diocese is not op-

erated for religious purposes. Harmful, because it discriminates against religious organizations that help people outside their group without proselytizing. Worse yet, the rule takes away resources that would otherwise be used to help the poor and the needy. The Court should intervene to resolve the split and remove this burden on the free exercise of religious institutions in states across the country.

II. The decision below also deepens a split among lower courts over whether federal constitutional violations must be proven "beyond a reasonable doubt."

The decision below also exacerbates an existing split among the lower courts over the burden of proof for federal constitutional claims.

A. Federal courts apply a "plain showing" or "clearly demonstrated" burden of proof to federal constitutional claims.

In most modern cases raising constitutional challenges to statutes, federal courts simply apply the relevant doctrinal standards without any reference to a burden of proving unconstitutionality. See, *e.g.*, *Carson*, 596 U.S. at 778-781; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381-386 (1992). Where they articulate a specific standard, federal courts employ a "plain showing" or "clearly demonstrated" standard. *E.g.*, *United States* v. *Morrison*, 529 U.S. 598, 607 (2000); *Mississippi Comm'n on Env't Quality* v. *EPA*, 790 F.3d 138, 182-183 (D.C. Cir. 2015); *United States* v. *Brunner*, 726 F.3d 299, 303 (2d Cir. 2013).

For its part, this Court has used the phrase "beyond a reasonable doubt" or "beyond a rational doubt" only five times, and only twice as part of a holding. See

Legal Tender Cases, 79 U.S. 457, 531 (1870) (dicta); *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) (dicta); *Powell* v. *Pennsylvania*, 127 U.S. 678, 684 (1888) (holding); *Federal Housing Admin.* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958) (holding); *Stanton* v. *Stanton*, 421 U.S. 7, 10 (1975) (dicta).

The "beyond a reasonable doubt" standard has, of course, its roots in criminal law. See James Q. Whitman, The Origins of Reasonable Doubt 114-123 (2008) (discussing history of standard in the twelfth and thirteenth century). In the nineteenth century, jurists began to sporadically use the term outside the criminal context, though never as "a *rule* that the relevant courts actually applied." Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"*, 74 Rutgers U. L. Rev. 1429, 1437 (2022).

Law Professor James Bradley Thayer advocated for broader adoption of the standard to limit perceived judicial activism. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 151 (1893) (advocating for broad adoption of "beyond a reasonable doubt" standard). Though some courts and scholars embraced it, Thayer's theory never garnered any purchase in this Court. See Spitzer, *Reasoning*, 74 Rutgers U. L. Rev. at 1438 ("The Supreme Court never seriously entertained 'unconstitutional beyond a reasonable doubt' as a working standard."). It last appeared as dictum, 50 years ago, in a quotation of the underlying state court opinion. *Stanton*, 421 U.S. at 11. The "unconstitutional beyond a reasonable doubt" standard is thus "dead" in federal courts. Richard A. Posner,

The Rise and Fall of Judicial Self-Restraint, 100 Cal. L. Rev. 519, 544, 553 (2012).

B. Some state courts continue to use "beyond a reasonable doubt" as a working standard for deciding federal constitutional claims.

Forty-nine states have used this standard in opinions since 1893, though its use has dwindled over time. See Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Review*, 57 S. Tex. L. Rev. 169, 179-182 nn.102-150 (2015) (collecting state cases); Spitzer, *Reasoning*, 74 Rutgers U. L. Rev. at 1440-1441 nn.70-73 (tracking state usage over last two decades). In most cases the phrase is "'simply a hortatory expression' when the justices are really saying that they respect the legislature's role." *Id.* at 1460 (citation omitted).

By contrast, at least five states, including Wisconsin, actively apply the "beyond a reasonable doubt" standard to dispose of federal constitutional claims.

Colorado. Colorado applies "the burden of proving [a statute] unconstitutional beyond a reasonable doubt" to allegations "that a statute infringes on first amendment freedoms." *People* v. *Ford*, 773 P.2d 1059, 1062 (Colo. 1989). See also *Evans* v. *Romer,* 854 P.2d 1270, 1284-1286 (Colo.), cert. denied, 510 U.S. 959 (1993) (employing "beyond a reasonable doubt" standard to decide federal Equal Protection claim).

Connecticut. Connecticut also employs the standard. For example, it used "beyond a reasonable doubt" to reject a Takings Clause claim regarding condemnation of property for economic development by private parties. *Kelo* v. *City of New London*, 843 A.2d 500, 536 (Conn. 2004), affirmed, 545 U.S. 469 (2005).

Hawaii. Similarly, the Supreme Court of Hawaii has applied the "beyond a reasonable doubt" burden of proof to eminent domain challenges. *Housing Fin. & Dev. Corp.* v. *Castle*, 898 P.2d 576, 602 (Haw. 1995).

Montana. Montana requires claimants to prove statutes unconstitutional "beyond a reasonable doubt." For instance, it applied the standard when analyzing whether a state tax transgressed equal protection and due process rights. *Powder River County* v. *State*, 60 P.3d 357, 373-377 (Mont. 2002).

Wisconsin. The Wisconsin Supreme Court has repeatedly applied the standard. See, *e.g.*, *In re Termination of Parental Rts.*, 694 N.W.2d 344, 350-355 (Wis. 2005) (federal Due Process challenge to termination of parental rights) *In re Mental Commitment of Christopher S.*, 878 N.W.2d 109, 120-126 (Wis. 2016) (federal Due Process challenge to commitment of inmate to mental health facility); *State* v. *Smith*, 780 N.W.2d 90, 95-105 (Wis. 2010) (federal Equal Protection and Due Process challenge to sex offender registration statute); *Society Ins.* v. *LIRC*, 786 N.W.2d 385, 402, 404 (Wis. 2010) (federal Due Process and Contract Clause challenge to retroactive application of workers' compensation statute). And here, the court reiterated the standard seven times, relying heavily on this burden of proof (over the dissent's objections) to reject Catholic Charities' constitutional claims. App.7a, 37a, 44a, 47a, 50a, 51a.

C. "Beyond a reasonable doubt" is the wrong standard for federal constitutional claims.

In criminal cases, "beyond a reasonable doubt" is "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358,

363 (1970). But it is entirely misplaced when it comes to constitutional guarantees because the Constitution provides "no textual support" for applying it outside the criminal context. *Island County* v. *State*, 955 P.2d 377, 384 (Wash. 1998) (Sanders, J., concurring). If anything, allowing state courts to give shorter shrift to enumerated federal constitutional rights contravenes the text of the Supremacy Clause.

What's worse, applying the standard threatens constitutional rights. The "beyond a reasonable doubt" standard is, by nature, a presumption, which means there will be "occasions" when the standard is "determinative." *Island County*, 955 P.2d at 388 (Sanders, J., concurring). As a result, a constitutional challenge might fail in a state courthouse in Milwaukee when the same challenge would prevail in the federal courthouse down the street.

Moreover, application of this standard to constitutional claims is inconsistent with modern judicial methodologies. "No originalist, or any other judge committed to a constitutional theory" can embrace the standard. Posner, *Rise and Fall*, 100 Cal. L. Rev. at 537. That is because such theories are premised on the notion that there are identifiable answers to constitutional questions. "[T]he Constitution, unlike evidentiary proof of a fact, does not operate on a continuum." *State* v. *Grevious*, 223 N.E.3d 323, 343 (Ohio 2022) (DeWine, J., concurring). Cf. *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2271 (2024) (deference inappropriate because statutes have meaning "necessarily discernible by a court deploying its full interpretive toolkit"). So "[w]hen a law contravenes the constitution, it is [a court's] duty to say so." *Mayo* v. *Wisconsin Injured Patients & Families Comp. Fund*, 914

N.W.2d 678, 702 (Wis. 2018) (Grassl Bradley, J., concurring).

It may be better that "ten guilty persons escape, than the one innocent suffer." 4 William Blackstone, *Commentaries* 352. But "[i]t is not better, that the Constitution should be violated ninety and nine times by the Legislature than, that the courts should erroneously hold one act of the Legislature unconstitutional." *Varner* v. *Martin*, 21 W. Va. 534, 542 (1883).

III. This case is an ideal vehicle.

This case presents an ideal vehicle for resolving the questions presented. The first question presented was fully and finally litigated through six layers of review, from the Department of Workforce Development to the Wisconsin Supreme Court. That leaves only the federal questions passed on below to be decided by this Court. Moreover, there is an ample record on which to predicate a decision.

With respect to the second question presented, although the Wisconsin Supreme Court was the first in this litigation to invoke the "beyond a reasonable doubt" standard, it relied on it heavily in reaching its judgment. That standard is therefore squarely before this Court.

And without this Court's intervention, the splits are unlikely to resolve themselves. In particular, this case is the cleanest vehicle for addressing the "religious purposes" split to arrive at the Court since *St. Martin* and *Grace Brethren* were decided. The Court should therefore take the opportunity to set this important area of law onto a firmer—and constitutionally sounder—footing.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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AUGUST 2024