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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

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?

PARTIES TO THE PROCEEDINGS

Petitioners were the petitioners-appellees below. They are Catholic Charities Bureau, Inc., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc.

Respondents were the respondents-appellants below. They are the State of Wisconsin Labor and Industry Review Commission and the State of Wisconsin Department of Workforce Development.

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.

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INTRODUCTION

This case is about whether Wisconsin can pick and choose which religious groups to tax based on the state's own cramped, idiosyncratic understanding of what constitutes "religious" behavior. Specifically, can Wisconsin disqualify Catholic Charities from an otherwise-available tax exemption because, in keeping with Catholic teaching, it hires both Catholics and non-Catholics, helps both Catholics and non-Catholics, and does not proselytize those it serves? As we explain below, the Constitution says no.

Like many other states, and consistent with the Federal Unemployment Tax Act, 26 U.S.C. 3309, Wisconsin exempts certain "churches" and religious "nonprofit organizations" from paying taxes into the state's unemployment compensation system. Wis. Stat. § 108.02(15)(h). For example, Wisconsin exempts the Diocese of Superior, a Roman Catholic diocese, from the unemployment compensation tax because it is a church.

But Wisconsin refuses to extend an exemption to the Diocese of Superior's separately incorporated charitable ministry arm, Catholic Charities. That is because under Wisconsin law, as definitively interpreted by the Wisconsin Supreme Court, Catholic Charities must show that its activities are sufficiently similar "in nature" to whatever the state determines to be "typical" religious activities. Pet.App.26a-27a, 29a. And in the Wisconsin Supreme Court's view, Catholic Charities' ministry "to individuals with developmental and mental health disabilities" is not religious activity at all but is instead "primarily charitable and secular." Pet.App.30a. Indeed, for the Wisconsin Supreme Court, the "Catholic" in "Catholic Charities" is entirely

superfluous because services to the disabled "can be provided by organizations of either religious or secular motivations, and the services provided would not differ in any sense." Pet.App.30a.

Also important—according to the Wisconsin Supreme Court—is what Catholic Charities does *not* do: "attempt to imbue program participants with the Catholic faith [or] supply any religious materials to program participants or employees." Pet.App.29a. If Catholic Charities were to proselytize those it serves, refuse to help non-Catholics, or refuse to hire non-Catholics, then its activities might fit the stereotypes of religion the Wisconsin Supreme Court relies on. But because Catholic Charities' religious beliefs do not allow it to conform to those stereotypes, its ministry is not "religious in nature" and it thus flunks the test for obtaining a religious exemption.

This is therefore a simple case. Wisconsin has denied Catholic Charities a religious exemption that the state freely extends to other religious organizations based on the absurd view that Catholic Charities' aid to the needy isn't actually religious at all. The Religion Clauses of the First Amendment do not allow such a remarkable conclusion. Instead, the Clauses work in tandem to protect a sphere of autonomy for religious organizations, to prevent entanglement of church and state, and to prohibit government discrimination among religious organizations. Wisconsin's effort to pick and choose among religious groups—and carve out works of mercy from the realm of the "religious" altogether—thus violates the Constitution three times over.

OPINIONS BELOW

The decision of the Supreme Court of Wisconsin (Pet.App.1a-124a) is reported at 3 N.W.3d 666. The decision of the Court of Appeals of Wisconsin (Pet.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 (Pet.App.169a-188a) is not reported. The decision of the Douglas County Circuit Court (Pet.App.189a-211a) is not reported.

JURISDICTION

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:

> (b) This 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 law states in relevant part:

> (h) "Employment" as applied to work for a nonprofit organization * * * does not include service:
>
> 1. In the employ of a church or convention or association of churches; [or]
>
> 2. 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)(1)-(2).

STATEMENT OF THE CASE

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

The Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301-3311 "call[s] 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 those employers owe to the federal government and reducing their overall tax burden. *Id.* at 775 n.3; 26 U.S.C. 3302(a)(1).

To allow their employers to take advantage of the federal tax credit, all states (including Wisconsin) have complementary statutes, which the Secretary of Labor reviews and annually certifies as compliant with FUTA's requirements. See 26 U.S.C. 3304(a), (b). These complementary statutes must impose, at a minimum, the same level of 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."); *St. Martin*¸ 451 U.S. at 775 n.3 (similar).

FUTA contains a religious exemption that narrows the scope of the law's mandatory coverage requirements in three circumstances. First, the law exempts any "church or convention or association of churches." 26 U.S.C. 3309(b)(1)(A). Second, the law exempts any nonprofit "operated primarily for religious purposes," but only if also "operated, supervised, controlled, or principally supported by a church or convention or association of churches." 26 U.S.C. 3309(b)(1)(B). Third, the law exempts religious schools that are "operated primarily for religious purposes" and are federally tax-exempt under 26 U.S.C. 501(c)(3). 26 U.S.C. 3309(b)(1)(C).

Twice before, this Court considered constitutional claims challenging the scope of FUTA's "religious purposes" exemption but resolved both cases on alternative grounds. *St. Martin*, 451 U.S. at 788 (holding religious school plaintiffs were exempt from South Dakota's unemployment tax under 26 U.S.C. 3309(b)(1)(A)); *California* v. *Grace Brethren Church*, 457 U.S. 393, 417 (1982) (holding the Tax Injunction Act prohibited a federal district court from entering declaratory relief).

Today, forty-seven states have adopted language identical, or nearly identical, to FUTA's exclusion of nonprofits "operated primarily for religious purposes." See Pet.6 n.1. Wisconsin thus requires nonprofits which meet certain minimum qualifications to pay into its state unemployment program, Wis. Stat. § 108.02(13)(b), while exempting nonprofits "operated primarily for religious purposes" under Wis. Stat. § 108.02(15)(h)(2), a provision nearly identical to FUTA's exemption.[1]

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 comprised of over 75,000 Catholics stretching over 15,000 square miles of northern Wisconsin. Pet.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." Pet.App.382a,

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[1] The only differences—the omission of two instances of the words "which is"—are immaterial. Compare Wis. Stat. § 108.02(15)(h)(2) with 26 U.S.C. 3309(b)(1)(B).

428a. Since 1917, Catholic Charities has carried out this mission by "providing services to the poor and disadvantaged as an expression of the social ministry of the Catholic Church." Pet.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." Pet.App.383a, 431a. Catholic Charities views this ministry as a mandate of Catholic social teaching and a primary tenet of the faith. Pet.App.373a-379a. And 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." Pet.App.384a, 429a.

Catholic Charities fulfills this mission by carrying out a wide variety of ministries for the elderly, the disabled, the poor, and those in need of disaster relief. Pet.App.372a-373a. From offering shelter to the elderly poor and those suffering from chronic mental or physical illnesses to ministering to the sick in their homes, Catholic Charities shares the love of Christ with "more than 10,500 people" each year. J.A.120. See, *e.g.*, J.A.103-104, 113-117, 152-153, 169-171, 181-182.

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. Pet.App.386a-402a. Catholic Charities was organized in this way to accord with Catholic teaching on subsidiarity. J.A.200, 208. As one of the seven principles of Catholic social teaching, subsidiarity instructs that it is an "injustice * * * and disturbance of right order to assign to a greater and

higher association what lesser and subordinate organizations can do." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 186 (2004) (quoting Pope Pius XI, *Quadragesimo Anno* ¶ 79 (1931)). This principle allows "intermediate social entities [to] properly perform the functions that fall to them without being required to hand them over unjustly to other social entities of a higher level, by which they would end up being absorbed and substituted." *Ibid.*; Pope Benedict XVI, *Deus Caritas Est* ¶ 31 (2005) ("The increase in diversified organizations engaged in meeting various human needs is ultimately due to the fact that the command of love of neighbour is inscribed by the Creator in man's very nature.").

In keeping with this principle, Catholic Charities also oversees several separately incorporated sub-entities that help it carry out various aspects of its ministry in local communities across a wide area of rural northern Wisconsin. These include Petitioners Headwaters, Barron County Developmental Services, Diversified Services, and Black River Industries. Pet.App.128a-130a. For example, Barron County Developmental Services helps the disabled in Barron County, which is in a part of the Diocese located over 100 miles south of the Diocese's seat in Superior.

The Bishop of the Diocese of Superior has plenary control over Catholic Charities: He "oversees CCB in its entirety, including its sub-entities." Pet.App.7a-8a, 130a. He serves as president of Catholic Charities and appoints its "membership," which consists of the bishop himself, the vicar general of the Diocese of Superior, and the Executive Director of Catholic Charities. Pet.App.7a, 415a-417a. The bishop also appoints

the board of directors of Catholic Charities, which help advise Catholic Charities' membership. Pet.App.419a-421a.

Catholic Charities' membership oversees the entire ministry to ensure fulfillment of Catholic Charities' mission in compliance with Catholic social teaching. Pet.App.28a-29a, 416a-417a. This includes the ministries of Catholic Charities' sub-entities. Each sub-entity signs Catholic Charities' *Guiding Principles of Corporate Affiliation*, which gives Catholic Charities ultimate responsibility for ensuring the sub-entities remain faithful to their Catholic mission. Pet.App.422a-425a. And each sub-entity is directed to comply fully with Catholic social teaching in providing services. Pet.App.8a, 425a. 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. Pet.App.371a-385a. In addition, every new employee receives a welcome letter with Catholic Charities' mission statement, code of ethics, and statement of the ministry's philosophy toward service. Pet.App.131a, 207a, 380a-385a, 469a-475a. All employees are instructed to abide by these documents. Pet.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." Pet.App.128a; see also *Deus Caritas Est* ¶ 32 ("[Charity] has been an essential part of [the Church's] mission from the very beginning."); *James* 1:27 (RSV-CE) ("Religion that is pure and undefiled before God and the Father is this: to visit orphans and widows in their affliction[.]). Indeed, the

Catholic Church "claims works of charity as its own inalienable duty and right." Pope Saint Paul VI, *Apostolicam Actuositatem* ¶ 8 (1965); Catechism of the Catholic Church ¶ 1826 (charity "is the first of the theological virtues"); *Deus Caritas Est* ¶ 25(a) ("For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being."). To Catholic Charities, the purpose, form, and outworking of charity are fundamentally and inescapably religious.

Catholic teaching also confirms that the Church's charitable ministry "must embrace the entire human race." *Compendium of the Social Doctrine of the Church* ¶ 581. 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."). Catholic bodies may not "misus[e] works of charity for purposes of proselytism." *Apostolorum Successores* ¶ 196. 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). And indeed, this same "Ecumenical orientation" informs Catholic Charities' belief that "no distinctions" should be made by "race, sex, or religion" with regard to "staff employed," so that its ministry can be "an effective sign of the charity of Christ." Pet.App.383a.

For Catholic Charities and the Diocese, this is all unto religious ends: Serving those in need consistent

with the above religious teachings "is the best witness to the God in whom we believe and by whom we are driven to love." *Deus Caritas Est* ¶ 31(c). For "[a] Christian knows when it is time to speak of God and when it is better to say nothing and to let love alone speak." *Ibid.* And thus "[i]t is the responsibility of the Church's charitable organizations to reinforce this awareness in their members, so that by their activity—as well as their words, their silence, their example—they may be credible witnesses to Christ." *Ibid.*

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." Pet.App.433a (quoting Pope Saint John Paul II, *Laborem Exercens* (1981)). Prompted by and in accordance with this teaching, 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." Pet.App.433a.

CUPP has long served the needs of employees throughout Wisconsin without issue. CUPP provides the same maximum weekly benefit rate as the State's system. Pet.App.438a. And, in some instances, an employee may receive a higher percentage of his salary than in the State's system, while often receiving benefits more quickly. Compare *ibid.* ("50% of the employee's average weekly gross wages") with Wis. Stat. § 108.06(1) ("[N]o claimant may receive total benefits based on employment in a base period greater than 26

times the claimant's weekly benefit rate * * * or 40 percent of the claimant's base period wages, whichever is lower."). And, unlike participants in the State's program, CUPP participants need not reapply for benefits on a weekly basis. Pet.App.441a. Despite these advantages, the Church can still operate CUPP "more efficiently at lesser cost," when compared to participation in the State's program. Pet.App.149a, 448a, 478a.

Catholic Charities has long sought to join CUPP. Participating in the Catholic Church's unemployment program would bring Catholic Charities into alignment with the Diocese of Superior (which participates in CUPP) and allow Catholic Charities to direct additional resources toward serving those in need.

Thus, in 2004, Catholic Charities requested a religious exemption from the State's system. It argued that it was both controlled by a church and "operated primarily for religious purposes," as required by Section 108.02(15)(h)(2). This request was denied. Pet.App.450a-463a. Then in 2016—after one of Catholic Charities' sub-entities (not a Petitioner here) was held to qualify for the religious exemption under Section 108.02(15)(h)(2), Pet.App.497a-504a—Catholic Charities again sought an exemption from the Department of Workforce Development. The Department first concluded that Petitioners are "operated, supervised, controlled or principally supported by a church." Pet.App.352a, 356a, 360a, 364a, 368a. The Department, however, then held that Catholic Charities was not "operated primarily for religious purposes," Pet.App.351a-370a, and thus did not qualify for an exemption. Catholic Charities appealed. After a two-day hearing, an administrative law judge reversed, ruling for Catholic Charities. Pet.App.291a-350a.

The Department then petitioned Respondent Labor and Industry Review Commission for review. The Commission reversed, holding that the religious exemption turns on an organization's "activities, not the religious motivation behind them or the organization's founding principles." Pet.App.227a, 242a, 258a, 273a, 290a. And because Catholic Charities "provides essentially secular services and engages in activities that are not religious per se," the Commission concluded that it does not qualify. Pet.App.226a, 241a, 257a, 272a, 289a.

D. Proceedings below

After being denied a religious exemption by Wisconsin, Catholic Charities sought review in Douglas County Circuit Court. The Circuit Court ruled for Catholic Charities, 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." Pet.App.209a-210a. And since Catholic Charities operates out "of th[e] religious motive of the Catholic Church * * * of serving the underserved," its primary purposes are religious. Pet.App.209a.

The Department and the Commission appealed. The Court of Appeals reversed the Circuit Court's order and reinstated the Commission's decision denying Catholic Charities an exemption. Pet.App.127a. The Court of Appeals 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." Pet.App.163a-165a. The Court of Appeals further held

that "the First Amendment is not implicated in this case," rejecting Catholic Charities' constitutional arguments. Pet.App.127a, 157a-159a.

Catholic Charities then petitioned the Wisconsin Supreme Court for review. After granting review, the court first recognized that Catholic Charities was "operated, supervised, controlled, or principally supported by a church," satisfying the first requirement of Section 108.02(15)(h)(2). Pet.App.5a & n.3. But it then held that determining whether Catholic Charities is "operated primarily for religious purposes" under Section 108.02(15)(h)(2) requires not just an inquiry into the ministry's religious "motivations," but also a separate "objective inquiry" into its "activities" to determine whether those activities are "'primarily' religious in nature." Pet.App.21a-22a, 26a-27a, 29a. On this score, the court concluded that Catholic Charities' activities are not primarily religious "in nature" and therefore denied it the Section 108.02(15)(h) religious exemption. Pet.App.32a-33a.

Relying on *United States* v. *Dykema*, 666 F.2d 1096 (7th Cir. 1981), the court listed what it deemed "objective" criteria focused on "[t]ypical" forms of religious exercise. These included "corporate worship services," "administration of sacraments and observance of liturgical rituals," "preaching ministry and evangelical outreach to the unchurched and missionary activity in partibus infidelium," "pastoral counseling," "baptism, marriage, burial, and the like," and "a system of nurture of the young and education in the doctrine and discipline of the church[.]" Pet.App.26a-27a (quoting

Dykema, 666 F.2d at 1100).[2] The court explained, however, that this list of "hallmarks of a religious purpose are by no means exhaustive or necessary conditions and the listed activities may be different for different faiths." Pet.App.27a.

Applying this standard to Catholic Charities, the court acknowledged the parties' agreement that Catholic Charities' motivations for carrying out its ministry are primarily religious. Pet.App.29a. But, looking to whether Catholic Charities "participated in worship services, religious outreach, ceremony, or religious education," the court determined that Catholic Charities' "activities are not 'primarily' religious in nature." *Ibid.* The court observed that Catholic Charities does not "attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees." *Ibid.* Moreover, employment with and services offered by Catholic Charities "are open to all participants regardless of religion." Pet.App.30a.

The court also concluded that Catholic Charities' provision of "services to individuals with developmental and mental health disabilities" and "background support and management services for these activities" "are primarily charitable and secular." Pet.App.30a (describing portions of Catholic Charities' ministry as "a wholly secular endeavor"). The court bolstered its conclusion by suggesting that Catholic Charities' "services can be provided by organizations of either religious or secular motivations, and the services provided

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[2] *Dykema* concerned whether an organization was "operated exclusively for religious * * * purposes" under 26 U.S.C. 501(c)(3).

would not differ in any sense." Pet.App.30a. The court then rejected Catholic Charities' federal constitutional arguments. Pet.App.40a-50a.

Justice Rebecca Grassl Bradley, joined by Chief Justice Ziegler and in part by Justice Hagedorn, dissented. The dissent pointed out that "[t]he majority actually inquires whether Catholic Charities' activities are stereotypically religious." Pet.App.79a. It then noted 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." Pet.App.116a. And it argued 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." Pet.App.83a (citation omitted). The dissent concluded that the majority's approach—asking whether an activity is "religious in nature"—is an inherently entangling question. In the dissent's view, that approach would force the court to "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." Pet.App.117a.

Catholic Charities then sought review in this Court.

SUMMARY OF THE ARGUMENT

The Religion Clauses of the First Amendment work together to protect a sphere of religious independence free from government control and to prevent discrimination against particular forms of religious exercise. This dual aspect of the Religion Clauses makes clear

that Wisconsin's exclusion of Catholic Charities from the Section 108.02(15)(h) religious exemption is unconstitutional in at least three ways.

First, it violates the principle of church autonomy by penalizing Catholic Charities because of its structure, including the fact that it is separately incorporated from the Diocese of Superior. It would violate Catholic social teaching to force Catholic Charities to be "absorbed and substituted" by "social entities of a higher level." *Compendium of the Social Doctrine of the Church* ¶ 186. Wisconsin's decision to deny Catholic Charities the Section 108.02(15)(h) exemption unless it merges with the Diocese thus penalizes it for following specific Catholic teachings about church governance. In a host of church autonomy decisions stretching back over a century, this Court has rejected similar attempts by state governments to meddle with the inner workings of churches. The Religion Clauses, working together, protect 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 of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). And once church authorities decide a question of church government, "the Constitution requires that civil courts accept their decisions as binding upon them." *Serbian E. Orthodox Diocese for U.S. of Am. & Can.* v. *Milivojevich*, 426 U.S. 696, 725 (1976).

Second, Wisconsin's exclusion of Catholic Charities violates the Religion Clauses' prohibition on impermissible entanglement of church and state. The Religion Clauses do not allow "active involvement of the

sovereign in religious activity." *Walz* v. *Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970). Nor do they allow governments (including courts) to decide whether religious institutions "correctly perceive[ ] the commands" of their religion, *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981), or to "second-guess" their beliefs, *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U.S. 732, 751 (2020). Yet here, Wisconsin has taken it upon itself to override the Catholic Church's beliefs about whether (for example) helping those with developmental disabilities is a religious act, and to force Catholic Charities to participate in the State's unemployment compensation system on that basis. That is entanglement forbidden by the Constitution.

Third, by denying Catholic Charities the Section 108.02(15)(h) religious exemption, Wisconsin is discriminating among religions. Under the Wisconsin Supreme Court's test, religious groups that serve only those of their own faith or that proselytize can obtain the tax exemption, as can religious groups with a simpler internal structure. But Catholic Charities cannot enjoy the tax exemption because it follows particular Catholic beliefs and has a particular Catholic polity. That cannot be squared with the rule against denominational discrimination articulated in *Larson* v. *Valente*, 456 U.S. 228 (1982) and *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993).

Any one of Wisconsin's three violations of the Religion Clauses would suffice to invalidate Wisconsin's denial of the tax exemption; together the case is overwhelming.

ARGUMENT

The Religion Clauses prohibit Wisconsin from selectively excluding Catholic Charities from the Section 108.02(15)(h) religious exemption. Both Clauses working together do not allow government interference with church governance, government entanglement with religious questions, or unjustified discrimination among religious groups.

I. The Religion Clauses work together to protect both how religious institutions govern themselves inwardly and how those institutions act outwardly.

1. The very first part of the First Amendment has typically been referred to as the "Religion Clauses." In the lower courts, religion-related claims are typically brought under either the Establishment Clause or the Free Exercise Clause.[3] But as this Court has explained, the Religion Clauses "appear in the same sentence of the same Amendment" and therefore a "natural reading of that sentence" indicates that the Clauses have "'complementary' purposes, not warring ones." *Kennedy* v. *Bremerton Sch. Dist.,* 597 U.S. 507, 533 (2022) (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1, 13, 15 (1947)). At the very least, that means that the two Clauses ought to be read *in pari materia*, like other provisions of the Constitution. See, *e.g.*, *Patton* v. *United States*, 281 U.S. 276, 298 (1930), abrogated on other grounds, *Williams* v. *Florida*, 399 U.S. 78, 92 (1970) ("The first ten amendments and the original Constitution were substantially contemporaneous

[3] The Religion Clauses are also frequently offered as defenses, but for ease of discussion in this section we refer to just "claims" rather than "claims or defenses."

and should be construed *in pari materia*."). But the Clauses' complementariness also means—as this Court has recognized—that some religion-related First Amendment claims are rooted in *both* Clauses. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 190 (2012) ("[T]here is a ministerial exception grounded in the Religion Clauses of the First Amendment.").

This means that that the set of all Religion Clauses claims can be divided into three parts: claims based on the Free Exercise Clause alone, claims based on the Establishment Clause alone, and claims rooted in both Religion Clauses.

Cases in which this Court resolved claims only under the Free Exercise Clause include *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021), *Tandon* v. *Newsom*, 593 U.S. 61 (2021), *Thomas* v. *Review Board*, and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), among many others. Some of the claims in this category are subject to the rule of *Employment Division* v. *Smith*, 494 U.S. 872 (1990), but many fall outside *Smith*. Compare, *e.g.*, *Lukumi*, 508 U.S. at 531 (following *Smith*'s rule of neutrality and general applicability) with *Carson* v. *Makin*, 596 U.S. 767 (2022) (no mention of *Smith*).

The second category involves Establishment Clause claims like those addressed by this Court in *American Legion* v. *American Humanist Association*, 588 U.S. 29 (2019) and *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014). Those claims are now governed by the "historical practices and understandings" standard first announced in *Town of Greece* and later elaborated in *Kennedy*. See *Kennedy*, 597 U.S. at 537 (discussing "hallmarks of religious establishments the

framers sought to prohibit when they adopted the First Amendment").

The third category of claims, those rooted in both Clauses, includes not just ministerial exception defenses like those in *Hosanna-Tabor* and *Our Lady*, but also claims related to church property and governance disputes, as in *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). These claims are governed in large part by the standard first laid out in *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872), and later constitutionalized in *Kedroff*. And while claims in this third category comport with, and are directly derived from, "historical practices and understandings" in the sense of *Kennedy*, they are not subject to the ahistorical *Smith* standard. See *Hosanna-Tabor*, 565 U.S. at 190.

2. Although these three categories of Religion Clauses claims often manifest differently in different cases, there are some common themes that can be divined, particularly as related to religious *institutional* litigants like Catholic Charities.

First, government cannot interfere with the inner workings of religious institutions. That reflects "the general principle of church autonomy" which guarantees "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 591 U.S. at 747. Indeed, any government action that "penetrates deeply into the internal affairs" of a religious body is prohibited by the Constitution. *Larson*, 456 U.S. at 253 n.29, 255.

Second, the Religion Clauses also protect religious institutions' sphere of internal control by ensuring

that government cannot get entangled in religious affairs. Thus, no government entity can second-guess religious judgments made by religious institutions. That is because "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). Instead, courts and all other secular authorities must avoid making "determination[s]" that "implicate[] very sensitive questions of faith and tradition." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 495 (1979).

Third, Religion Clauses cases consistently prevent discrimination by government against religious institutions—whether in the form of discrimination between religious and nonreligious institutions or discrimination among different religious institutions. As the Court has repeatedly put it, discrimination against religious bodies because they are religious or because they do religious things is "odious to our Constitution" and cannot stand. *Carson*, 596 U.S. at 779 (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 467 (2017)). Likewise, government cannot "prefer one religion over another." *Larson*, 456 U.S. at 246 (invalidating facially neutral but operatively discriminatory exemption for religious organizations). Cf. *Murphy* v. *Collier*, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring) ("The government may not discriminate against religion generally or against particular religious denominations.").

As a result, the Religion Clauses together protect both how religious institutions govern themselves inwardly and how those institutions act outwardly. That is a direct analogue to the First Amendment's protec-

tion of the conscience of religious individuals. For individuals, the inward sphere of conscience must be left "absolute[ly]" inviolate so that the religious individual can freely determine what she believes to be true with respect to the transcendent. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940). In the same way, the internal processes by which religious bodies determine what they believe—that is, how a religious body forms its own conscience—must also remain free from government interference. And for both individuals and institutions, there is protection for outward physical acts as well, but "in the nature of things," the "freedom to act" on conscience is not as absolute as the inward freedom to form one's conscience. *Cantwell*, 310 U.S. at 303-304. The outward "freedom to act" may not be "infringe[d]" without compelling reason, but it cannot escape "regulation for the protection of society" altogether. *Id.* at 304.

Importantly, however, the Court has firmly rejected the idea that government can force a trade-off between these two aspects of religious institutional freedom. Government cannot require religious institutions to relinquish their inner freedom to operate in accordance with their beliefs as the price of their outward freedom to participate fully in society. For example, government cannot force a church to "renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified." *Trinity Lutheran*, 582 U.S. at 466. See also *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 478 (2020) ("condition[ing] the availability of benefits upon a recipient's willingness to surrender * * * religiously impelled status" impermissible); *Fellowship of Christian Athletes* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 687 (9th Cir.

2023) (en banc) (cannot force religious student group to renounce its beliefs to obtain official recognition).

II. The Religion Clauses forbid Wisconsin from selectively denying the religious exemption to Catholic Charities.

Wisconsin's arbitrary exclusion of Catholic Charities from the religious exemption violates the Religion Clauses in three ways: church autonomy, entanglement of church and state, and discrimination among religions.

A. Wisconsin's exclusion of Catholic Charities violates the principle of church autonomy by interfering with internal church government.

1. 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*, 344 U.S. at 116. The Court has described this sphere of protection for internal church affairs as "the general principle of church autonomy" or "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 591 U.S. at 747. These questions of "internal government" include the control of church property, see *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969), the appointment and authority of clergy, *Gonzalez*, 280 U.S. at 16-17, replacing church administrators, *Kedroff*, 344 U.S. at 119, and the hiring and firing of parochial school teachers, *Hosanna-Tabor*, 565 U.S. at 196, among many other issues. See *Serbian*, 426 U.S.

at 713-714 ("[C]ivil courts exercise no jurisdiction[] in a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.").

Especially relevant here, the church autonomy doctrine prevents government interference in matters of polity or church government—that is, how the religious body has organized itself. The issue arose on two occasions during the early Republic, in the administrations of Presidents Jefferson and Madison. Jefferson addressed the issue of religious autonomy in response to a letter from the Ursuline Sisters of New Orleans. As part of the Louisiana Purchase, New Orleans had recently come under the government of the United States, and the Sisters were concerned about the security of their property under the new regime. Jefferson reassured the Sisters in response, writing that "your institution will be permitted to govern itself according to it's own voluntary rules, without interference from the civil authority." Letter from President Thomas Jefferson to the Ursuline Sisters (July 13, 1804), https://founders.archives.gov/documents/Jefferson/01-44-02-0064 (punctuation as in original). Jefferson continued: "whatever diversity of shade may appear in the religious opinions of our fellow citizens, the charitable objects of your institution cannot be indifferent to any; * * * be assured it will meet all the protection which my office can give it." *Ibid.*

In 1811, Madison vetoed an Act of Congress that would have incorporated an Anglican church in federal territory. In his veto message, Madison explained that the civil law Congress sought to enact impinged on the

ability of the church to freely express its chosen religious polity: "The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated." 22 Annals of Cong. 983 (1811). Importantly to Madison, the bill would have made it "so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises." *Ibid.* In Madison's view, then, civil corporate laws could not be written in a way that restricted the ability of the church to express its religious polity in accordance with its beliefs. See Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 Tulsa L. Rev. 7, 15 (2001) (discussing Madison's views).

The Court's subsequent decisions regarding polity have consistently recognized that state corporate governance laws ought to accommodate religious polity. Justice Story adverted to this in *Terrett* v. *Taylor*, holding that the carrying out of "religious duties" by "votaries of every sect" "could be better secured and cherished by corporate powers." 13 U.S. (9 Cranch) 43, 49 (1815).[4] And in *Watson*, the Court treated freedom of church government as a fundamental premise of its decision: "The *right to organize* voluntary religious associations to assist in the expression and dissemina-

[4] Recent lower court Religion Clauses decisions have invalidated state constitutional provisions that barred churches from incorporating. See *Falwell* v. *Miller*, 203 F. Supp. 2d 624, 632 (W.D. Va. 2002) (Virginia); *Hope Cmty. Church* v. *Warner*, No. 3:23-cv-231, 2024 WL 4310866, at *2 (N.D. W.Va. Sept. 26, 2024) (West Virginia).

tion of any religious doctrine, * * * and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned." *Watson*, 80 U.S. at 728-729 (emphasis added). After reviewing state law decisions protecting the freedom of church government, the Court rejected the effort of trustees of a breakaway congregation to sever ties with the broader Presbyterian church.[5]

The Court addressed the constitutionality of state-law restrictions on church government head-on in *Kedroff*, describing the central issue as "strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." *Kedroff*, 344 U.S. at 115. There, New York enacted a statute that would transfer control of the Russian Orthodox cathedral in New York City from the Soviet-controlled Russian Orthodox Church to an American-based Orthodox church. *Id.* at 98. The Court invalidated the New York statute. Relying on *Watson*, it defined "freedom for religious organizations" as the "power to decide * * * matters of church government as well as those of faith and doctrine." *Id.* at 116. By distinguishing "church government" from "faith and doctrine," the Court made clear that the organization of a church—its government or polity—was itself off-limits to secular control. And where the corporate laws of a state came into conflict with the church's chosen polity, those corporate laws

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[5] This effort was one instance of the broader "Trusteeship Controversy" that particularly but not exclusively affected the Catholic Church during the 19th Century. See McConnell, 37 Tulsa L. Rev. at 34-35.

had to give way. That proved equally true of *judicial* interference with the internal government of churches. See *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) ("[I]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.").

The Court vigorously reiterated the point in *Serbian*, which concerned challenges to both the defrocking of a bishop and the reorganization of dioceses of the Serbian Orthodox Church in the United States. 426 U.S. at 708. The Illinois Supreme Court held that both the defrocking and the reorganization were improper under that court's interpretation and application of the Serbian Orthodox Church's constitution and penal code. This Court reversed, holding that the Illinois Supreme Court's decision in favor of the defrocked bishop and against diocesan reorganization "rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes." *Id.* at 708.

Specifically as to the second disputed issue in the case—whether a single diocese of the Serbian Orthodox Church ought to be split into three—the Court held that "the Supreme Court of Illinois substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments forbid." *Serbian,* 426 U.S. at 721. The

Court rejected any detailed discussion of the church constitutions, saying that "[i]t suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs; Arts. 57 and 64 of the Mother Church constitution commit such questions of church polity to the final province of the Holy Assembly." *Ibid.* In short, when church authorities decide a question of church government, "the Constitution requires that civil courts accept their decisions as binding upon them." *Id.* at 725.

2. Wisconsin's rule baldly violates these principles. There is no dispute that Catholic Charities is part and parcel of the Roman Catholic Church and an arm of the Diocese of Superior. Pet.App.213a. Yet Wisconsin effectively severs Catholic Charities from the broader church in order to exclude Catholic Charities from the religious exemption. That violates the Religion Clauses in at least two ways.

First, Wisconsin's refusal to extend the exemption to Catholic Charities penalizes the Church for how it has organized its ministry. There is no dispute that if Catholic Charities and the Diocese were a single nonprofit corporation, that corporation would be exempt. And there is no dispute that the Diocese's decision to incorporate separate bodies, rooted in Catholic principles of subsidiarity, is a "question[] of church polity." *Serbian*, 426 U.S. at 721; see also *Compendium of the Social Doctrine of the Church* ¶¶ 186-187. Put another way, forcing the Diocese to fully merge Catholic Charities and the Diocese in order to obtain the benefit of the religious exemption restructures the polity of the Catholic Church in Wisconsin just as much as the Illinois Supreme Court in *Serbian* tried to restructure the

polity of the Serbian Orthodox Church. See 426 U.S. at 709. Such a decision "affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190.

The Wisconsin Supreme Court did not deny this point, instead saying it was "unpersuasive" because the lower court could "imagine a non-profit organization structured as a separate sub-entity of a church * * * with both motivations and activities that are religious." Pet.App.46a. That dodges the question. If Catholic Charities were—contrary to its principles of religious polity—folded into the Diocese itself, then it would qualify for the religious exemption under Section 108.02(15)(h)(1) as a "church." It is no answer to shrink the aperture and look at only one part of the statutory exemption regime being challenged.

Second, in deciding whether Catholic Charities is "operated primarily for religious purposes," Wisconsin refuses to consider the *Diocese*'s purposes in setting up and operating Catholic Charities, focusing solely on what it considers to be Catholic Charities' "purposes." Leave to one side the undisputed fact that the "reason that [Petitioners] administer these social service programs is for a religious purpose: to fulfill the Catechism of the Catholic Church." Pet.App.163a-164a. Catholic Charities does not have a separate purpose from the Diocese. It is specifically designed and operated to carry out the Diocese's religious purposes to assist the needy in northern Wisconsin. By putting asunder what the Catholic Church believes belongs together, Wisconsin has subjected the Church to forbidden "secular control or manipulation." *Kedroff*, 344 U.S. at 116. As this Court explained in *Our Lady*, religious entities have "autonomy" with respect to "internal management decisions" that affect their "central

mission." 591 U.S. at 746. In the same way that choosing *who* can serve as a minister is one such "internal management decision," determining *how* to minister to those in need is another. *Ibid.* And indeed, Wisconsin's interference doesn't end there—similar principles of church autonomy prohibit Wisconsin's interference in Catholic Charities' decisions about whom to hire, whom to serve, and whether to proselytize. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 187 ("[T]he First Amendment 'permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government'"); *Our Lady*, 591 U.S. at 746 (recognizing "independence of religious institutions in matters of 'faith and doctrine'").

3. This is not to say that the law can never make distinctions among differently structured religious entities. Indeed, sometimes social facts mean the law *must* do so to remain compliant with the Religion Clauses. For example, the Internal Revenue Code rightfully recognizes that a "minister of a church" is different from a "member of a religious order," 26 U.S.C. 1402(c)(4), or for that matter a "Christian Science practitioner," 26 U.S.C. 1402(c)(5).

Moreover, where necessary the law can and ought to flexibly accommodate the different kinds of religious groupings in the United States. Thus, for tax purposes, many rabbis count as "minister[s] of the gospel," which enables their synagogues to provide them with a tax-exempt housing allowance on the same terms as Christian houses of worship. See, *e.g.*, *Libman* v. *Commissioner*, 44 T.C.M. (CCH) 370 (1982) (applying 26 U.S.C. 107 parsonage allowance to rabbi). Such dis-

tinctions further religious autonomy rather than hindering it. Indeed, failure to account for different religious polities would risk religious discrimination.

The problems arise where distinctions among religious polities result in government disfavor of certain religions or religious entities. A prominent example of this came in the contraceptive mandate litigation, where the federal government created a "church exemption" from the mandate that exempts certain nonprofit entities from filing annual tax returns, including "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 76 Fed. Reg. 46,621 46,623 (Aug. 3, 2011). This narrow exemption created enormous problems for religious orders that were *not* engaged in "exclusively religious activities" as defined by the government, including, for example, the Little Sisters of the Poor. See *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 689 (2020) (Alito, J., concurring). The same would be true in other contexts—if the IRS denied a rabbi the use of the parsonage allowance under 26 U.S.C. 107 because he did not count as a "minister of the gospel," the rabbi's synagogue could bring a church autonomy claim against the government.

In short, where government distinctions among religious polities move from recognizing and accommodating those polities to penalizing religious bodies for their form of church government, they contravene the principles of church autonomy, free exercise, and religious neutrality in violation of the Religion Clauses. And here, there is no question that Wisconsin has penalized the Diocese and Catholic Charities for separately incorporating Catholic Charities in accordance

with its sincere religious beliefs about proper church polity.

B. Wisconsin's exclusion of Catholic Charities entangles church and state.

1. As with church autonomy, the rule against impermissible government entanglement in religion is rooted in both Religion Clauses. On the Establishment Clause side, this constitutional prohibition ensures that government does not become actively involved in religious matters—including answering religious questions—and government officials do not second-guess religious organizations' answers to questions of religious belief.

As this Court explained in *Walz*, the Establishment Clause was originally understood to forbid, among other things, "active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668; see Stephanie H. Barclay, *Untangling Entanglement*, 97 Wash. U. L. Rev. 1701, 1704 (2020) (finding historical support for the doctrine of entanglement "when it has protected religious groups from government interference with the[ir] autonomy, internal affairs, and administration"). Thus, government actions that require a "continuing day-to-day relationship" between church and state, and that have as their "effect * * * an excessive government entanglement with religion," are unconstitutional. *Walz*, 397 U.S. at 674.

In practice, this means that government officials cannot second-guess or purport to resolve disputed religious questions without running afoul of the Constitution. As this Court put it in *New York* v. *Cathedral Academy*, the "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 against religious establishment." 434 U.S. 125, 133 (1977). And this same principle has been reaffirmed in numerous other contexts. *E.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 272 n.11 (1981) (determining "which words and activities fall within 'religious worship and religious teaching' * * * could prove 'an impossible task'" and would create a "continuing need to monitor group meetings to ensure compliance"); *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (prohibition on entanglement requires civil courts to "refrain from trolling through a person's or institution's religious beliefs"); *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.) (prohibition on entanglement "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices").

This prohibition on government entanglement can be traced back to this Court's first modern pronouncements on the meaning of the Establishment Clause. *E.g.*, *Everson*, 330 U.S. at 16 ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."); Barclay, 97 Wash. U. L. Rev. at 1705 ("[I]t is the 1948 decision in *Illinois ex rel. McCollum* that marks the Supreme Court's first use of 'entanglement' as a legal test to assess Establishment Clause violations."); *Colorado Christian*, 534 F.3d at 1261 ("[T]he prohibition on entanglements was formulated as an independent requirement of the Establishment Clause."). And while this Court recently jettisoned the *Lemon* test (which incorporated "excessive entanglement" as its third prong), it is no surprise that

this independent prohibition on government entanglement, which long pre-dated *Lemon*, has remained. See, *e.g.*, *Carson*, 596 U.S. at 787 (recognizing "concerns about state entanglement with religion and denominational favoritism"); *Our Lady*, 591 U.S. at 761 ("determining whether a person is a 'co-religionist' * * * would risk judicial entanglement in religious issues").

2. The prohibition on religious entanglement also flows from the Free Exercise Clause—specifically, from the freedom of religious individuals and organizations to determine their religious beliefs and mission without government coercion, interference, or undue influence.

In *NLRB* v. *Catholic Bishop*, for example, this Court explained that the NLRB's assertion of jurisdiction over certain religious secondary schools entangled the Board in "very sensitive questions of faith and tradition." 440 U.S. at 495-496. While the Board claimed it could resolve "only factual issues," this Court recognized that for the religious plaintiffs, "resolution * * * by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. In other words, even matters which government might consider *secular* can be infused with religious meaning—especially in the context of a religious entity's mission.

This Court also explained that it was not just the Board's ultimate conclusions that would be entangling; instead, "the very process of inquiry" required significant government involvement in the school's op-

erations such that this Court saw "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools," which would result in "serious First Amendment questions." *Catholic Bishop*, 440 U.S. at 502-504; see *id*. at 502 (NLRB's jurisdiction would result in "entanglement with the religious mission of the school in the setting of mandatory collective bargaining."); see generally *Universidad Cent. de Bayamon* v. *NLRB*, 793 F.2d 383, 402 (1st Cir. 1985) (Breyer, J., writing for an equally divided en banc court) (applying *Catholic Bishop* to conclude that the NLRB cannot exercise jurisdiction over a Catholic college because religious values may "permeate the educational process"); *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (applying *Catholic Bishop* to conclude that NLRB's "substantial religious character" requirement would still lead to an "intrusive inquiry" that entangles church and state).

In addition to *Catholic Bishop*, this Court has repeatedly struck down legal standards that require a searching inquiry into, or a second-guessing of, sincere religious beliefs. In *Thomas*, this Court held that it was not "within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Thomas,* 450 U.S. at 716. And in *Corporation of Presiding Bishop* v. *Amos*, the Court held that "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. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." 483 U.S. 327, 336 (1987). And

in *Our Lady*, this Court repudiated the Ninth Circuit's attempt to "second-guess" the Catholic Church's "judgment" regarding the amount of formal religious schooling necessary to teach at a Catholic secondary school and similarly rejected a "co-religionist" requirement for the ministerial exception as too entangling. *Our Lady*, 591 U.S. at 759-761. See also *Fowler*, 345 U.S. at 70 ("[I]t 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."). As Justices Alito and Kagan explained in *Hosanna-Tabor*, the "mere adjudication of such questions"—even apart from the conclusions that a court might reach—"would pose grave problems for religious autonomy." 565 U.S. at 205-206 (Alito, J., concurring).

Government entanglement in religious affairs is thus barred by both Religion Clauses. And, indeed, because together they protect the same sphere of religious independence for—and healthy separation between—church and state, this Court frequently analyzes entanglement concerns without parsing the Clauses one by one. *E.g.*, *Our Lady*, 591 U.S. at 761-762 (rooting entanglement concerns in "the First Amendment"); *Catholic Bishop*, 440 U.S. at 507 (NLRB's "exercise of jurisdiction * * * would implicate the guarantees of the Religion Clauses"). It is thus sufficient to conclude that the Religion Clauses together prohibit government entanglement with religious affairs—that is, government second-guessing of sincere religious beliefs, deciding religious questions, or meddling in the internal affairs of religious organizations are all strictly off-limits.

3. Wisconsin has disregarded these constitutional commands. While both sides agree that Catholic Charities' motivation for serving the poor is primarily religious, Pet.App.28a-29a, the Wisconsin Supreme Court held that further investigation was necessary under Wisconsin law. Pet.App.23a-24a. Specifically, the court decided to make its own "objective inquiry" into Catholic Charities' activities, to determine if those activities are "inherently" "religious in nature." Pet.App.27a, 29a, 56a. The court did this by comparing Catholic Charities' activities to what the court thought were "[t]ypical" forms of religious exercise—like "corporate worship services," "observance of liturgical rituals," and "evangelical outreach." Pet.App.26a. Applying this test, the court found that Catholic Charities' "activities are primarily charitable and secular" because the ministry 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." Pet.App.29a-30a.

Put simply, Wisconsin has taken it upon itself to decide which activities can be religious and which ones can't. That is wrong. Wisconsin courts should not be in the business of deciding religious questions. But it is also wrong because Wisconsin cannot independently interpret Catholic beliefs and tell the Catholic Church which of its ministries are engaged in activities that—according to the state's stereotypes—are religious in nature. Indeed, in so doing, Wisconsin has pressed upon the Catholic Church religious requirements—like proselytizing and serving only Catholics—that directly contradict the Catholic Church's actual religious beliefs. Pet.App.29a-30a; *supra* 6-11. Worse still, Wisconsin has decided that helping those with disabilities

can't be religious because "[s]uch services can be provided by organizations of either religious or secular motivations, and the services provided would not differ in any sense." Pet.App.30a.

Wisconsin's inquiry plainly crosses the line into impermissible entanglement. As this Court has already explained, the very "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 against religious establishment." *Cathedral Acad.*, 434 U.S. at 133. Indeed, entanglement concerns are near their apex when a court is "scrutinizing whether and how a religious [entity] pursues its * * * mission." *Carson*, 596 U.S. at 787.

That is this case. Under the Wisconsin Supreme Court's approach, governments would have to "troll[] through a person's or institution's religious beliefs" to assess whether—in the government's eyes—they are engaged in "typical" "religious" activity. *Mitchell*, 530 U.S. at 828; see also *Amos*, 483 U.S. at 343 (Brennan, J., concurring) ("[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis," which "results in considerable ongoing government entanglement in religious affairs.").

Perhaps unwittingly, Wisconsin too has recognized the shortcomings of this approach. After listing some "[t]ypical" religious activities, the court added that typical religious activities "may be different for different faiths." Pet.App.26a-27a. This backhanded concession gives the game away. As the dissent below pointed out, if "what constitutes an activity that is 'religious in nature'" "change[s] from religion to religion, the court must study the doctrines of the various faiths

and decide for itself what religious practices are actually religious." Pet.App.117a. That's exactly what happened here. The court told Catholic Charities that its ministry would be *more religious* if it proselytized, only served Catholics, and only employed Catholics. Pet.App.29a-30a. Ironically, the court's suggestions would have made Catholic Charities' ministry *less Catholic* because they contradict the Catholic Church's actual teachings on charity. *Supra* 9-11.

And if the Wisconsin Supreme Court can't accurately assess the religious beliefs of Wisconsin's largest religious denomination, this approach—even on its own terms—does not bode well for Wisconsin's religious minorities. As the amicus brief from the International Society of Krishna Consciousness points out, "[i]n the case of the Hare Krishnas," determining whether an activity is religious "would, at a minimum, require study of Hindu religious texts, including the Bhagavad-Gita, the Srimad-Bhagavatam, and the Caitanya Caritamrita." ISKCON Cert.Br.8. Such an inquiry should give any jurist serious pause.

Wisconsin's approach thus puts courts between a rock and a hard place: either they must discriminate against minority religious traditions by adopting a "universal" (or, more likely, stereotypical) list of religious activities or they must become experts in every religious denomination so that they can speak authoritatively about what is and is not religious for every faith tradition. Either path would be hopelessly entangling and unconstitutional.

This, however, is not to say that courts can never divide the secular from the religious. Indeed, the First Amendment could not be enforced if it were otherwise. Although the question of what is religious may in edge

cases "present a most delicate question," answering it is part of "the very concept of ordered liberty." *Yoder*, 406 U.S. at 215. Moreover, as this Court explained in *Walz*, "the complexities of modern life inevitably produce some contact" between church and state. *Walz*, 397 U.S. at 676. Thus, the question is not whether this or that approach will result in the "absence of *all* contact" between the religious and the secular—that would be impossible. *Ibid.* (emphasis added).

Courts can constitutionally draw this line by focusing on the sincerity and religiosity of a claimant's beliefs rather than trying to decide whether particular activities are "inherently religious." This person-focused (as opposed to activity-focused) approach avoids impermissible entanglement by not second-guessing sincerely held religious beliefs and has repeatedly proven workable. In *Yoder*, for example, the Court applied a religiosity requirement by distinguishing "philosophical and personal" beliefs from "religious" beliefs. *Yoder*, 406 U.S. at 216. The Court held that those "philosophical and personal" beliefs "do[] not rise to the demands of the Religion Clauses." *Ibid.* See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1493 (1990) ("The historical materials uniformly equate 'religion' with belief in God or in gods, though this can be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms.").

For its part, a sincerity requirement is common to almost all religion claims. In *Holt* v. *Hobbs*, for example, this Court held that "prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is

authentic." 574 U.S. 352, 369 (2015) (quoting *Cutter* v. *Wilkinson,* 544 U.S. 709, 725, n.13 (2005) and citing *Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 717 n.28 (2014)). A sincerity requirement has also been an express part of statutes like the Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act for decades, also with no demonstrated administrability problems. See 42 U.S.C. 2000bb *et seq.*; 42 U.S.C. 2000cc *et seq.* See also, *e.g., United States* v. *Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010) (Gorsuch, J.) (Sincerity "is a factual matter."); *Korte* v. *Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (Sykes, J.) ("Checking for sincerity and religiosity" is well within a "court's authority and competence" and helps to "weed out sham claims."); Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185, 1191 (2017) ("[C]ourts can, and should, adjudicate religious sincerity.").

That line has also proven workable specifically in cases involving FUTA-compliant state exemptions. For example, in *Kendall* v. *Director of Division of Employment Security*, the Massachusetts Supreme Judicial Court held that a Catholic center for persons with mental disabilities was "operated primarily for religious purposes" because there was no practical distinction between the Center's "motive and purpose." 473 N.E.2d 196, 199 (1985). "The fact that the religious motives of the Sisters of St. Francis of Assisi also serve the public good by providing for the education and training of the mentally retarded is hardly reason to deny the Center a religious exemption." *Ibid.* This analysis focusing on motive has been used for many decades in "operated primarily for religious purposes" cases without evident problem.

C. Wisconsin's exclusion of Catholic Charities discriminates among religions.

1. Both Religion Clauses protect against discrimination among religions. The Court has expressly grounded this principle in "the history and logic of the Establishment Clause," *Larson*, 456 U.S. at 246 (citing *Everson*, 330 U.S. at 15), while also recognizing that it is "inextricably connected with the continuing vitality of the Free Exercise Clause," *id.* at 245, and that it prevents "religious gerrymandering," *id.* at 255.[6]

At the time of the founding, "religious establishments of differing denominations were common throughout the Colonies," *Larson*, 456 U.S. at 244, and the receipt of certain government benefits was limited to those establishments, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2176-2178 (2003). Yet, through the Establishment Clause, the First Amendment enshrined a prohibition on such preferences among religious groups. *E.g.*, *Everson*, 330 U.S. at 15 (Establishment Clause means that governments cannot "prefer one religion over another"); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects."). See also *Carson*, 596 U.S. at 787 (noting inquiry focused on use-based distinctions would raise "serious concerns"

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[6] *Larson*'s dual nature—sounding in both the Establishment Clause and Free Exercise Clause—may explain the anomaly of its application of strict scrutiny, 456 U.S. at 246-251—an analysis that typically occurs under the Free Exercise Clause, not the Establishment Clause. Notably, this Court's decisions in *Smith* and *Lukumi* treat *Larson* as effectively Free Exercise Clause precedent. See *Lukumi*, 508 U.S. at 536; *Smith*, 494 U.S. at 877.

about "denominational favoritism" (citing *Larson*, 456 U.S. at 244)).

This prohibition dictated the outcome in *Larson*. There, Minnesota enacted a statutory exemption that placed registration and reporting requirements on religious groups that received most "of their funds from nonmembers"—a requirement not present for religious groups that received most of their funds from members. 456 U.S. at 230-232. As a result, religious groups that emphasized "door-to-door and public-place proselytizing and solicitation" faced higher administrative burdens than groups with other emphases. *Id.* at 234. This Court deemed this a clear violation of the "principle of denominational neutrality" that this Court had "restated on many occasions," and required the law to survive strict scrutiny. *Id.* at 246.

The Free Exercise Clause also bars laws that "discriminate[] against some or all religious beliefs." *Lukumi*, 508 U.S. at 532. Where the government treats any comparable activity more favorably than religious exercise, the law is neither neutral nor generally applicable. See *Tandon*, 593 U.S. at 62. In other words, the government must treat a religious entity at least as well as any comparable entity, religious or secular—it is "no answer that a State treats some comparable secular business or other activity as poorly or even less favorably than the religious exercise at issue," *ibid.*, and it is no answer that it treats other religious exercise better. Cf. Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. Ct. Rev. 1, 49-51 (1990). Where it fails to provide equitable treatment, the government must justify imposing burdens on one religious group rather than a favored secular or religious

group. *Tandon*, 593 U.S. at 62-63; *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 29 (2020) (Kavanaugh, J., concurring). This inquiry requires looking not just at 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 534-535.

Applying these principles, this Court has found that "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." *Lukumi*, 508 U.S. at 533 (citing *Fowler*, 345 U.S. at 69-70); 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). In *Sherbert* v. *Verner*, this Court held that "[t]he unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination" resulting from South Carolina's favorable treatment of Sunday worshippers and unfavorable treatment of Saturday worshippers. 374 U.S. 398, 406 (1963). And in *Lukumi*, this Court noted that the challenged regulation, among its many deficiencies, was also problematic because it favored kosher slaughter over Santería sacrifice. 508 U.S. at 536. Put simply, "[t]he government must be neutral when it comes to competition between sects," including when administering religious exemptions. *Zorach*, 343 U.S. at 314; cf. *Cutter*, 544 U.S. at 720 (RLUIPA must be "administered neutrally among different faiths").

2. Wisconsin transgressed this prohibition on denominational favoritism in two ways.

First, it denied Catholic Charities an exemption precisely because Catholic Charities provides services in a manner consistent with the Church's teachings, and therefore in a manner different from what Wisconsin judged to be "typical" religious activities. Pet.App.26a; see also Pet.App.79a (Grassl Bradley, J., dissenting) ("The majority actually inquires whether Catholic Charities' activities are stereotypically religious."). As a result, religious communities with beliefs that prohibit them from providing charity in such a manner cannot receive an exemption. *E.g.*, Jewish Coal. for Religious Liberty Cert.Br.8-10; ISKCON Cert.Br.15-16.

Catholic teaching prohibits Catholic Charities from "impos[ing] the Church's faith upon others" in the provision of charity. *Deus Caritas Est* ¶ 31(c); see also *Apostolorum Successores* ¶ 196 (instructing not to "misus[e] works of charity for purposes of proselytism"). And it indicates that charity must be exercised "in an impartial manner towards" "members of other religions." *Apostolorum Successores* ¶ 208. See also *supra* 9-11. Yet, when evaluating whether Catholic Charities had a religious purpose, Wisconsin looked for activities directly at odds with these teachings:

- "[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.

In other words, for Wisconsin, a religious organization is religious only if it proselytizes when it provides charity, limits its charity and employment to only co-religionists, or engages in religious worship when providing charity. The net result is a test that weighs against religious traditions that ask believers to care for the poor without strings attached. Wisconsin law thus makes the kind of "explicit and deliberate distinctions between different religious organizations" forbidden by the Religion Clauses. *Larson*, 456 U.S. at 246 n.23.

Second, Wisconsin's rule also violates the bedrock principle of neutrality among religions by discriminating against religious groups with more complex polities. Consistent with the Catholic teaching on subsidiarity, the Diocese of Superior operates Petitioners as separately incorporated ministries that carry out Christ's command to help the needy. See *Compendium of the Social Doctrine of the Church* ¶ 187. But if Catholic Charities were not separately incorporated, it would be exempt. Pet.App.166a ("the result in this case would likely be different if [Catholic Charities] and its sub-entities 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, 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 informed polity violates the Religion Clauses' rule against discrimination among

religions. Cf. *Fulton*, 593 U.S. at 528-531 (treating separately incorporated Catholic Social Services as part of Archdiocese).

3. Because Wisconsin's interpretation of this religious exemption doubly violates the requirement of neutrality among religions, the State cannot hope (and indeed hasn't really tried) to satisfy strict scrutiny.[7] As this Court has explained, "a government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. * * * Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546) (citation omitted).

Here, Wisconsin has no legitimate interest, much less a compelling one, in discriminating among religious groups based on their beliefs about how to provide charity or how to organize themselves. The only theoretical interest Wisconsin has ever raised throughout the course of this litigation is its general interest in ensuring that workers can receive unemployment compensation. See, *e.g.*, Respondents' Br. at 39, *Catholic Charities Bureau, Inc.* v. *Labor & Indus. Rev. Comm'n*, No. 2020AP002007 (Wis. June 7, 2023) ("Wisconsin has a compelling interest in providing broad unemployment insurance access to workers[.]"). But Wisconsin's unemployment insurance law is vastly underinclusive with respect to that interest, exempting myriad forms of "employment." Wis. Stat.

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[7] Strict scrutiny is not available as a defense to church autonomy or entanglement violations of the Religion Clauses.

§ 108.02(15)(f)-(kt) (listing over 40 different exemptions from coverage). This includes, of course, religious entities that are similarly situated with Catholic Charities and that are exempt because of their church structure. A governmental interest is not compelling "when [a law] leaves appreciable damage to that supposedly vital interest" unaddressed. *Lukumi*, 508 U.S. at 547.

And those "supposedly vital interests" must be measured specifically with respect to Catholic Charities' claimed exemption. As this Court explained in *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, the Free Exercise Clause requires examining with "particularity" the effect of the claimed religious exemption, even where "paramount" interests are at stake. 546 U.S. 418, 431 (2006) (discussing *Yoder*, 406 U.S. at 213, 221). See also *Holt*, 574 U.S. at 363 (government must demonstrate compelling interest "'to the person'—the particular claimant").

Here, Wisconsin has made no such examination. Indeed, all parties agree that the Church's unemployment compensation system provides equal benefits to workers while being "more efficient[]." Pet.App.149a, 448a-449a, 478a. Just as Wisconsin in *Yoder* could not show any harm that would result from giving the Amish an exemption from the compulsory education laws, so Wisconsin cannot show any harm from giving Catholic Charities a tax exemption.

Wisconsin's law is also not narrowly tailored, and for similar reasons: A law that is "underinclusive in substantial respects" demonstrates an "absence of narrow tailoring" that "suffices to establish [its] invalidity." *Lukumi*, 508 U.S. at 546; see also *Reed* v. *Town of Gilbert*, 576 U.S. 155, 172 (2015) (underinclusiveness

doomed narrow tailoring). Nor is denying Catholic Charities a religious accommodation the least restrictive means of advancing the state's interest—numerous other states are able to advance their identical interests without infringing on sincere religious exercise. See Pet.16-20 (collecting cases).

In short, by denying Catholic Charities an exemption based on how it has organized itself and how it has chosen to engage in its ministry—two decisions rooted in its Catholic beliefs—the Wisconsin Supreme Court violated both Religion Clauses by favoring some religious denominations over others without a compelling justification.

* * *

Wisconsin's crabbed understanding of religion is as unwise as it is unnecessary. The diversity of religious beliefs and religious institutions in this country can only thrive where governments affirmatively seek to accommodate different religious beliefs. Government interference with church governance, the entanglement of church and state, or government discrimination among religions would take us back to a pre-First Amendment era that was marked by interreligious strife and hostility. But that Pandora's box need not be reopened. The Court should instead rule that the Religion Clauses forbid Wisconsin from selectively denying the religious exemption to Catholic Charities.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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