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IN SUPREME COURT

Case No. 2020AP2007

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

Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondent-Appellant.

ON REMAND FROM UNITED STATES SUPREME COURT

REMEDIAL BRIEF OF THE STATE PARTIES

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for State of Wisconsin
Labor and Industry Review
Commission and State of Wisconsin
Department of Workforce
Development

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 (CTR)
(608) 957-5218 (CG)
(608) 294-2907 (Fax)
colin.roth@wisdoj.gov
charlie.gibson@wisdoj.gov

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INTRODUCTION

Although this consequential First Amendment case has had its twists and turns (including a trip to the U.S. Supreme Court), civil litigation basics frame this Court's task on remand. Civil cases involve both a liability and a remedy phase. Merely holding someone liable for a legal violation is not enough; a remedy must still be fashioned. Sometimes that remedy is obvious, like in cases involving money damages. But when addressing non-monetary harms, courts must often choose among multiple remedies available for the underlying violation.

Here, that remedial choice falls to this Court. The U.S. Supreme Court resolved liability, holding that Wisconsin violated the First Amendment by exempting only some religious nonprofits from the state's unemployment insurance system. But the Court did not prescribe a particular remedy. Discrimination is cured by restoring equal treatment, which can be accomplished here in one of two ways: either by expanding the statutory exemption to groups like Catholic Charities or else by eliminating it altogether. Because the Constitution mandates neither remedy, the decision turns on what the Legislature likely would have chosen.

Two sources indicate a strong legislative preference for restoring equal treatment by eliminating this discriminatory exemption. First, the Legislature prefers that courts sever invalid statutory provisions, a presumption that applies here given how the unemployment insurance system would function just as well without this exemption. Second, striking the exemption would better advance the Legislature's express desire for broad unemployment insurance coverage. The Legislature could not have been clearer that unemployment represents an "urgent public problem" that "gravely affect[s] the health, morals and welfare of the people of this state."

Wis. Stat. § 108.01(1). And over the past 50 years, the Legislature has consistently expanded the universe of nonprofit employers that must participate in the unemployment system. Enlarging this exemption would reverse that trend, potentially leaving thousands of employees of religiously motivated nonprofits (like certain large healthcare systems) without this "imperative" insurance coverage. Wis. Stat. § 108.01(3).

By striking the exemption, this Court can avoid collateral damage to Wisconsin workers while still curing the discrimination the U.S. Supreme Court identified. It should so hold, thereby bringing this long-running case to a close.

STATEMENT OF THE CASE

I. Wisconsin's unemployment system protects employees, including those of non-profit organizations, while exempting certain religious employers.

In 1932, during the depths of the Great Depression, Wisconsin enacted the first unemployment compensation law in the Nation. *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n*, 2024 WI 13, ¶ 27, 411 Wis. 2d 1, 3 N.W.3d 666 ("*Catholic Charities I*"). The State recognized that unemployment represents "an urgent public problem, gravely affecting the health, morals and welfare of [its] people." Wis. Stat. § 108.01(1). Unemployment's burden falls not just on unemployed workers themselves, but also the State's economy as a whole: unemployed workers face "irregular employment and reduced annual earnings," which in turn causes "farmers, merchants and manufacturers" to face a "decreased demand for their products" that can "paralyze the economic life of the entire state." Wis. Stat. § 108.01(1).

Wisconsin spreads this social cost partly by requiring employers to "financ[e] benefits for [their] own unemployed

workers." *Id.* Most employers make risk-adjusted quarterly contributions to the State's unemployment fund. *See* Wis. Stat. §§ 108.17, 108.18. But non-profit employers have an alternative to the quarterly contribution requirement: they may instead choose to reimburse the State for benefits paid to their own, laid-off employees. *See* Wis. Stat. § 108.151; *cf.* 26 U.S.C. § 3309(a)(2).

Generally, all work for pay is covered by Wisconsin's system. *Catholic Charities I*, 411 Wis. 2d 1, ¶ 30. For covered employees, a layoff usually entitles them to benefits unless they engaged in "misconduct." Wis. Stat. § 108.04(5). When an employee applies for benefits, her employer may object to the claim. *See* Wis. Stat. § 108.09(1). Disputes about whether the employee did, indeed, engage in misconduct are resolved by the Wisconsin Department of Workforce Development, then the Labor and Industry Review Commission, followed by judicial review in state court. Wis. Stat. § 108.09(2r), (4), (6)–(7).

Narrow categories of employers are exempted from the state's unemployment system, meaning their employees receive no state benefits. For instance, employers of seasonal employees and those with fewer than four employees are exempted. Wis. Stat. § 108.02(13)(b), (15)(k)19. Wisconsin also exempts service for certain religious organizations:

> 1. In the employ of a church or convention or association of churches;
>
> 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; or
>
> 3. By a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.

Wis. Stat. § 108.02(15)(h)1.–3.

At issue here is subdivision 2., the exemption for "organization[s] operated primarily for religious purposes" (the "Exemption").

II. This Court read the Exemption not to cover Catholic Charities and found that interpretation to be consistent with the First Amendment.

Petitioners are Catholic Charities Bureau, Inc. and four separately incorporated nonprofit social services organizations, all of whom are affiliated with each other and the Diocese of Superior (collectively, "Catholic Charities"). *Catholic Charities I*, 411 Wis. 2d 1, ¶¶ 7–15. None of them incorporate worship, religious training, or religious teaching into their services, and their employees need not ascribe to the tenets of any religious faith. *Id.* ¶ 16. All of them have long participated in Wisconsin's unemployment insurance system as reimbursable employers, meaning they contribute only the cost of the state benefits paid to their own laid-off employees, not quarterly tax-like payments. *Id.* ¶ 17. (R. 60:38–39; 61:3–7; 67:5–8, 11–12, 15.)

Catholic Charities initially sought a determination from the Wisconsin Department of Workforce Development (DWD) that employment with each organization was exempt from coverage under Wis. Stat. § 108.02(15)(h)2. *Catholic Charities I*, 411 Wis. 2d 1, ¶ 18. The Department found that none of the Catholic Charities entities were "operated primarily for religious purposes" and thus denied their requests. *Id.* ¶ 19. The Wisconsin Labor and Industry Review Commission (LIRC) affirmed DWD's determination. *Id.* (For simplicity, this brief will refer to Respondents DWD and LIRC together as the "State.")

After back-and-forth lower court decisions, *id.* ¶¶ 20–21, this Court concluded that Catholic Charities was not entitled to the Exemption. In doing so, it issued two independent holdings: one interpreting the statute, and

another on the statute's compliance with the First Amendment.

First, this Court rejected Catholic Charities' reading of the Exemption. *Id.* ¶¶ 38–57. It held that, to determine whether an employer operates "primarily for religious purposes," the State must consider the organization's "activities and motivations." *Id.* ¶ 46. This Court accepted at "face value" Catholic Charities' assertion that its work is religiously motivated, *id.* ¶ 59, but that alone did not qualify Catholic Charities for the Exemption. This was because Catholic Charities had relied solely on its religious motivation, rather than any distinctively religious activities like "worship services, religious outreach, ceremony, or religious education." *Id.* ¶ 60. Absent such activities, Catholic Charities' work mirrored those of any secular nonprofit providing similar social services: Catholic Charities' religious motivation did not cause the services provided to "differ in any sense." *Id.* ¶ 63. As a statutory matter, then, Catholic Charities did not qualify for the Exemption. *Id.* ¶ 67.

Second, this Court held that reading the Exemption this way complied with the First Amendment. *Id.* ¶¶ 68–107. It noted that "'some degree of involvement' with religion" is inevitable with any "statutory scheme that offers tax exemption to religious entities." *Id.* ¶ 86 (citation omitted). It concluded that, because the Exemption does not ask whether Catholic Charities' "activities are consistent or inconsistent with Catholic doctrine," the Exemption does not excessively entangle the State with religion. *Id.* ¶ 85. This Court also found no violation of church autonomy principles because the Exemption neither "regulate[d] internal church governance nor mandate[d] any activity." *Id.* ¶ 98. Last, it found no denominational discrimination because Catholic Charities did not assert that participating in state unemployment insurance burdened the organizations' religious practices or beliefs. *Id.* ¶ 106.

III. The U.S. Supreme Court reversed, holding that this Court's interpretation and application of the Exemption violated the First Amendment.

The U.S. Supreme Court granted certiorari "to decide whether the Wisconsin Supreme Court's interpretation of [Wis. Stat.] § 108.02(15)(h)(2), as applied to petitioners, violates the First Amendment." *Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 247 (2025) ("*Catholic Charities II*"). In so deciding, the Court did not review whether this Court's reading of the Exemption was correct as a matter of statutory interpretation. Rather, the Court's analysis rested on the Exemption "as interpreted by [the Wisconsin] Supreme Court." *Id.* at 250.[1] Nor did the Court address two of Catholic Charities' First Amendment theories, that the Exemption excessively entangled the State with religion or that it infringed on church autonomy. *Id.* at 246 n.2.

The Court instead issued only a single holding: that the Exemption "facially favors some denominations over others" and "must be invalidated" because it does not satisfy strict scrutiny. *Id.* at 252 (citation omitted). The Court reasoned that by hinging "eligibility . . . on inherently religious choices" about whether to incorporate distinctively religious content into charitable services, the Exemption "grants a denominational preference by explicitly differentiating between religions based on theological practices." *Id.* at 250. This triggered strict scrutiny, but the Court found a "poor fit" between the Exemption and the State's two asserted interests in broad unemployment insurance coverage and avoiding

[1] The U.S. Supreme Court had to accept this Court's interpretation of state law, since "[n]either [the] Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

entanglement with employment decisions touching on religious faith and doctrine. *Id.* at 253–54 (citation omitted). Aside from observing that the Exemption "must be invalidated," the Court said nothing specific about the proper remedy. *Id.* at 252 (citation omitted).

Based solely on this finding of denominational discrimination, the Court reversed this Court's judgment and remanded the case "for further proceedings not inconsistent with [the] opinion." *Id.* at 254.

ARGUMENT

I. Discriminatory benefits provisions can be remedied by either expanding or eliminating the benefit.

A few basic legal principles govern this remand. When a law distributes benefits in a discriminatory way, that constitutional harm must be remedied by restoring equal treatment. To do so, the benefit may be either expanded or eliminated—both remedies restore equality, which is all the Constitution (including the First Amendment) usually requires. Selecting between these two remedies requires evaluating legislative intent, which often boils down to asking whether the discriminatory provision is severable from the broader statutory scheme. If so, the provision should be stricken and the discriminatory benefit eliminated.

A. The remedy for unequal treatment is to restore equal treatment, which can be accomplished in two ways.

A claim that a statute unconstitutionally discriminates by "benefit[ing] one class . . . and exclud[ing] another from [a] benefit" involves both a liability and a remedy phase. *Sessions v. Morales-Santana*, 582 U.S. 47, 72 (2017). A court first determines whether the statute's distribution of benefits is, indeed, discriminatory and unconstitutional. Then, a court

(not necessarily the same court) must decide how to remedy that unconstitutional discrimination.

Such discrimination is cured by restoring equality: "when the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment." *Sessions*, 582 U.S. at 73 (citation omitted). That mandate allows either of "two remedial alternatives." *Id.* Option one is to eliminate the benefit: a court may "declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit." *Id.* (citation omitted). Option two is to expand the benefit: a court "may extend the coverage of the statute to include those who are aggrieved by exclusion." *Id.* (citation omitted).

The Constitution is "silent" on whether elimination or expansion is proper. *Sessions*, 582 U.S. at 73 (citation omitted). Rather, "[w]hen unlawful discrimination infects . . . legislative prescriptions, the Constitution simply calls for *equal treatment*." *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 426 (2010). The U.S. Supreme Court has "never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984). Courts thus remain free to cure discrimination through either expansion or elimination.

This remedial choice remains open because "the right to equal treatment . . . is not co-extensive with any substantive rights to the benefits denied the party discriminated against." *Id.* at 739. Although the Constitution bars discrimination, it usually does not entitle everyone to receive the benefit at issue. To illustrate, imagine a discriminatory statute that exempted men but not women from paying Social Security and Medicare taxes. Because the Constitution doesn't entitle anyone to be free from these taxes, it would not require a remedy that expanded the exemption to women.

The choice between these two remedial options is "governed by the legislature's intent, as revealed by the statute at hand." *Sessions*, 582 U.S. at 73; *see also Levin*, 560 U.S. at 427 ("On finding unlawful discrimination, . . . courts may attempt . . . to implement what the legislature would have willed had it been apprised of the constitutional infirmity."). Courts ask "whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation." *Sessions*, 582 U.S. at 75. This requires "'measur[ing] the intensity of commitment to the residual policy'—the main rule, not the exception—'and consider[ing] the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Id.* (citation omitted).

This often boils down to a straightforward severability analysis, especially when dealing with a discrete, discriminatory statutory exemption. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 623–28, 632 (2020). A severability clause expresses a clear legislative preference in favor of eliminating a discriminatory provision, as does the general presumption of severability. So, absent a nonseverability clause and assuming the remaining law can function, courts will normally "sever[ ] the discriminatory exception or classification, and thereby extend[ ] the relevant statutory . . . burdens to those previously exempted, rather than nullifying the benefits or burdens for all." *Id.* at 632.

Sessions shows how discrimination cases like these work—both how the liability and remedial phases are distinct, and how to select among remedial alternatives.

In *Sessions*, the Court first found discrimination liability in federal statutes that imposed different citizenship rules for children born abroad to unwed mothers versus fathers. If an unwed female citizen had resided in the U.S. for more than a year, her foreign-born child automatically

became a citizen; an unwed male citizen, in contrast, needed five years of U.S. residence to transmit citizenship. *Sessions*, 582 U.S. at 51. In essence, women received better treatment than men. Justice Ginsberg, writing for the Court, found that this distinction reflected "stunningly anachronistic" gender-based discrimination. *Id.* at 57–72.

Next, because the case involved federal statutes, the Court addressed the proper remedy. The male plaintiff wanted the beneficial treatment for women extended to him, and the Court acknowledged that oftentimes "extension [of a benefit], rather than nullification, is the proper course." *Id.* at 74 (citation omitted). The Court, however, decided otherwise. It instead eliminated the provision favoring women and thereby "extend[ed] the general rule of longer physical-presence requirements to cover the previously favored group." *Id.* at 74–75.

The Court concluded that legislative intent justified eliminating the special benefit for women. The Court noted how "Congress' recognition of 'the importance of residence in this country as the talisman of dedicated attachment'" favored the "residual policy" of longer residency requirements for unwed men (and also married parents). *Id.* at 75. Extending the shorter period for unwed women would have "render[e]d [that] special treatment . . . the general rule, no longer an exception." *Id.* at 77. Moreover, doing so would have "disrupt[ed] the statutory scheme" by creating an "irrational" distinction between unmarried and married parents, as the latter would still have faced a much longer residency requirement. *Id.* at 75–76.

In short, *Sessions* found unconstitutional discrimination in favor of women and remedied it by ending their favorable treatment. *Id.* at 74–75.

B. Remedial options do not narrow when discrimination violates the First Amendment.

Catholic Charities suggests that the First Amendment demands an idiosyncratic rule: that when discrimination violates the First Amendment (as opposed to the Fifth or Fourteenth Amendments), benefits must always be expanded, never contracted. (Pet. July 10, 2025, Letter at 1–2.) This is wrong. Discrimination under any of these constitutional provisions can be cured in either way.

1. The same remedial logic applies to First, Fifth, and Fourteenth Amendment discrimination claims.

A peculiar remedial rule for the First Amendment would make little sense. Discrimination is discrimination. Whether such a claim arises under the First, Fifth, or Fourteenth Amendments, the "right invoked is that to equal treatment." *Sessions*, 582 U.S. at 73. As Catholic Charities put it here, Wisconsin "violate[d] the requirement of neutrality among religions" by "favoring some religious denominations over others." (Pet. SCOTUS Br. 48, 50.[2]) That invoked the same basic "right . . . to equal treatment," *Sessions*, 582 U.S. at 73, that arises from the First as well as the Fifth and Fourteenth Amendments.

The same remedial logic covers all these forms of discrimination. They all demand "a mandate of equal treatment" that can be accomplished "by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Sessions*, 582 U.S. at 73. Ironically, Catholic Charities implicitly recognized this two-

[2] *Available at* http://supremecourt.gov/DocketPDF/24/24-154/340257/20250127183640202_CCB%20v%20WI%20Merits%20Brief%20FINAL.pdf.

way ratchet when it asked the U.S. Supreme Court to "rule that the Religion Clauses forbid Wisconsin from selectively denying the religious exemption to Catholic Charities." (Pet. SCOTUS Br. 50.) That open-ended request could be fulfilled by either eliminating the Exemption or expanding it. Either way, the Exemption would no longer be "selectively den[ied]" to Catholic Charities, and the discrimination would be cured.

2. Case law confirms that the First Amendment offers the same remedial alternatives as the Fifth and Fourteenth Amendments.

When courts confront First Amendment discrimination claims, they recognize that two-way remedial logic applies there, too.

In a First Amendment religious discrimination case, *Murphy v. Collier*, 587 U.S. 901, 902 (2019), the Court considered a state prison's policy that allowed Christian or Muslim religious advisers to be present in the execution room but not those of other faiths. Justice Kavanaugh explained that "[i]n an equal-treatment case of this kind, the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward." *Id.* (Kavanaugh, J., concurring). So, the state could either *expand* the privilege—"allow all inmates to have a religious adviser of their religion in the execution room"—or *eliminate* it altogether—allow all faith advisors "only in the viewing room." *Id.* In response to *Murphy*, the state prison selected the latter option: "keeping all ministers out" of the execution room. *Id.* at 915. This "new policy solve[d] the equal-

treatment constitutional issue," as Justice Kavanaugh observed. *Id.* at 913.[3]

Likewise, in a First Amendment speech discrimination case, *Barr v. American Association of Political Consultants, Inc.*, 591 U.S. 610 (2020), the Supreme Court restored equality by eliminating a federal statutory exemption that benefited only some speech.

Barr involved a challenge to a federal statute that banned cellphone robocalls but exempted those aimed at collecting government debt. The plaintiffs wanted to make political robocalls and argued that exempting only debt-collection robocalls unconstitutionally discriminated against their speech. Like *Sessions*, *Barr* first analyzed liability and concluded that this differential treatment violated the First Amendment. *Id.* at 618–21.

And then, again like *Sessions*, *Barr* determined the proper remedy for this discrimination by a federal statute.[4]

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[3] The U.S. Supreme Court later held that the Religious Land Use and Institutionalized Persons Act (RLUIPA) likely entitles death row inmates not just to have a spiritual advisor present in the execution room, but also for the advisor to "lay hands" on the inmate during execution. *See Ramirez v. Collier*, 595 U.S. 411, 433 (2022); *see also Gutierrez v. Saenz*, 141 S. Ct. 127 (2020) (staying execution based on absence of spiritual advisor from execution chamber); *Dunn v. Smith*, 141 S. Ct. 725 (2021) (same result). That simply underscores how a religious discrimination claim like in *Murphy* did not suffice to establish this right; rather, a freestanding legal obligation—RLUIPA—was needed. *Cf. Ramirez*, 595 U.S. at 439–41 (Kavanaugh, J., concurring) (distinguishing between religious discrimination and religious liberty claims). Catholic Charities has never asserted that kind of freestanding right to an unemployment insurance exemption.

[4] Although this discussion came in a plurality opinion joined only by Justices Kavanaugh, Roberts, and Alito, Justices Breyer, Ginsburg, and Kagan joined a separate opinion concurring in this analysis. *Barr v. Am. Ass'n. of Political Consultants,* 591 U.S. 610, 648 (2020).

The plaintiffs obviously wanted an expanded benefit, and so they asked the Court to invalidate the entire robocall ban rather than simply strike the exemption for debt-collection calls. *Id.* at 613–14. But the Court found the general presumption of severability sufficient to strike the discriminatory exemption and thereby preserve the general rule banning robocalls. *Id.* at 630–31.

In doing so, the Court expressly rejected the plaintiffs' plea for a special First Amendment remedial rule. They had argued, like Catholic Charities does here, that "a *First Amendment* equal-treatment case is different" such that "a court should not cure 'a First Amendment violation by outlawing more speech.'" *Id.* at 633 (citation omitted). But the Court observed that whenever it "confronts an equal-treatment constitutional violation, [it] generally applies the same commonsense severability principles" that apply elsewhere. *Id.* at 632. The First Amendment context made no difference: because Congress could enact a "generally applicable" ban on *all* robocalls, the Constitution "[did] not tell [the court] which way to cure the unequal treatment." *Id.* at 633. Severing the debt-collection exemption was therefore the proper way to "cure the unequal treatment." *Id.* at 633–34.

Even though the *Barr* plaintiffs did not get exactly what they wanted, the Court emphasized that they still received a full remedy on their discrimination claim. They sought to "make political robocalls to cell phones, and they [did] not receive[ ] *that* relief." *Id.* at 634. But, just like Catholic Charities here, "the First Amendment complaint at the heart of their suit was unequal treatment." *Id.* Eliminating the unequal treatment "fully addresse[d] that First Amendment injury," even though it left the plaintiffs without the ability to make robocalls themselves. *See also Heckler*, 465 U.S. at 739–40 (discrimination causes "serious non-economic injuries"

that are remedied by restoring "equal treatment," even if benefits are not expanded).

Turning to the lower courts, the Seventh Circuit has also observed that adding religion to the mix does not limit remedial choices. In *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020), the Republican Party argued that Illinois discriminated under the First Amendment by exempting religious practice from COVID regulations but not political gatherings. The court found no First Amendment violation but reasoned that even if it had, the remedy was not necessarily to expand the exemption to political gatherings. Instead, Illinois could have "erase[d] [this] discrepancy in any way that it wishe[d]," including by "return[ing] to a regime in which even religious gatherings [were] subject to" the COVID regulations. *Id.* at 771. Expanding a burden on religious activity would have posed no special remedial problem in *Pritzker*, just like in *Murphy*.

3. *Espinoza* does not restrict First Amendment remedial options.

That leaves the main case on which Catholic Charities has relied: *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020). (Pet. July 10, 2025, Letter at 1.) Catholic Charities misreads *Espinoza* to mean that—despite *Murphy*, *Barr*, and *Pritzker*—benefits must always be expanded in First Amendment discrimination cases. True, *Espinoza* resulted in benefits expansion, but that remedy flowed directly from the lower court's unique error, one that is absent here.

In *Espinoza*, the Montana Supreme Court faced a perceived conflict between two state laws: a state statute creating tuition scholarships for private schools and a state constitutional bar on providing state aid to religious schools (a so-called "no-aid provision"). 591 U.S. at 472. Because the two laws could not co-exist—the statute allowed aid to reach

religious schools, which the no-aid provision prohibited—the state court favored the state constitution by eliminating the entire scholarship program. *Id.*

The U.S. Supreme Court reversed, holding that the Montana Supreme Court erred by missing a *different* conflict: one between the state constitution's no-aid provision and the federal constitution's Free Exercise clause. By barring state aid from reaching religious schools, Montana's constitutional no-aid provision discriminated against religion in violation of the Free Exercise clause. *Id.* at 475–78. Accordingly, the state court "should have 'disregarded' the no-aid provision and decided [the] case conformably to the Constitution of the United States." *Id.* at 488 (alterations and citation omitted).

The proper remedy in *Espinoza* followed from this unique error. *See id.* at 487–88. The Montana Supreme Court had eliminated the scholarship program only because it conflicted with the state constitution. But that conflict vanished when the U.S. Supreme Court held that the state's constitutional provision could not be used to discriminate against religious schools. And without that conflict, the state court "had no basis for terminating the program." *Id.* at 488. In other words, once the state law basis for eliminating the scholarship program disappeared, the only proper remedy was to restore the program (including for religious schools).

Espinoza therefore presented a much different remedial issue than *Sessions* and *Barr*. There, statutes themselves discriminated in allocating benefits, and so the remedy could restore equal treatment through either expansion or elimination of the benefit. But in *Espinoza*, the statutory benefit did not discriminate at all; rather, a state constitutional provision did. Because the statute did not need fixing, the choice between expansion and elimination simply did not arise. Instead, restoring equal treatment required eliminating the constitutional provision that did

discriminate, which naturally restored the state statute absent conflict with the state constitution.

Because this case, like *Sessions* and *Barr*, involves a benefit statute that itself discriminates, both remedial options remain open. *Espinoza*'s unusual analysis has no relevance here.

* * *

Discrimination in a benefits statute can be remedied either by extending the benefit or eliminating it altogether. Both remedies produce equal treatment, which is all the Constitution demands. Choosing between the two requires asking what the legislature likely would have preferred, which often overlaps with a severability analysis. And this remedial choice exists even when discrimination arises under the First Amendment.

II. The U.S. Supreme Court's liability-only holding did not resolve whether the Exemption should be expanded or eliminated.

Although courts can remedy First Amendment benefits discrimination through either expansion or elimination of the benefit, the U.S. Supreme Court declined to pick a remedy here. The choice therefore falls to this Court.

That should be unsurprising, because this case involves a state law. The U.S. Supreme Court usually does not select a remedy in these situations. "[U]pon finding impermissible discrimination in a State's allocation of benefits or burdens," the Court "generally remands the case, leaving the remedial choice in the hands of state authorities." *Levin*, 560 U.S. at 427; *see also Sessions*, 582 U.S. at 73 n.23 ("[U]pon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation."); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152–53 (1980) ("[W]e believe that state judges are

better positioned to choose an appropriate method of remedying the constitutional violation."); *Stanton v. Stanton,* 421 U.S. 7, 17–18 (1975) (choosing discrimination remedy was "an issue of state law to be resolved by the Utah courts"); *Orr v. Orr,* 440 U.S. 268, 283–284 (1979) (same result).

Comparing this case with *Sessions* and *Barr* underscores the difference between how the Court treats federal versus state laws. Those cases confronted federal statutes and therefore addressed two distinct issues: liability and remedy. In both, the Court first found unconstitutional discrimination (*see Sessions*, 582 U.S. at 57–72; *Barr*, 591 U.S. at 618–21), and in both the Court then discussed the proper remedy (*see Sessions*, 582 U.S. at 72–76; *Barr*, 591 U.S. at 621–34). Those liability-plus-remedy holdings left no substantive issues open on remand.

By contrast, when confronted here with a state statute, the Court addressed liability only. The analysis began as it did in *Sessions* and *Barr*. Like there, the Court here found unconstitutional discrimination: by "facially favor[ing] some denominations over others," the Exemption embodies a "paradigmatic form of denominational discrimination" that cannot survive strict scrutiny. *Catholic Charities II*, 605 U.S. at 249, 252. But the Court stopped there. While *Sessions* and *Barr* went on to select a remedy for the discrimination, the Court here did not.

That said, the Court did suggest that the Exemption should be eliminated, not expanded. The Court explained that "[t]he Wisconsin Supreme Court's interpretation of [Wis. Stat.] § 108.02(h)(15)(2) *facially* differentiates among religions based on theological choices"[5] and that Wisconsin's

[5] Although the U.S. Supreme Court sometimes called the Exemption invalid "as applied" to Catholic Charities, *Catholic Charities II*, 605 U.S. at 241, 250, 252, that does not mean the

defense "*[could not] save the statute* from strict scrutiny." *Id.* at 251–52 (emphasis added). And the Court also observed that because the statute "grants denominational preferences," it "*must be invalidated*" unless it survives strict scrutiny, which it cannot. *Id.* (emphasis added) (citation omitted). When a court finds a "facial[ ]" defect in a statute that "cannot [be] save[d]" and "must be invalidated," the seemingly obvious remedy is to eliminate the statute, not expand it. *Cf.* Wis. Stat. § 990.001(11) (when a statutory provision is "invalid," that "shall not affect other provisions . . . which can be given effect *without the invalid provision*"); *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 ("If a challenger succeeds in a facial attack on a law, the law is void 'from its beginning to the end.'") (citation omitted). At the very least, this language undermines Catholic Charities' view that the Court meant for the Exemption to be not just preserved but expanded.

Despite these strong hints in favor of elimination, the Court did not issue a holding on the proper remedy. Rather, its holding addressed only the State's discrimination liability:

> When the government distinguishes among religions based on theological differences in their provision of services, it imposes a denominational preference that must satisfy the highest level of judicial scrutiny. Because Wisconsin has transgressed that principle without the tailoring necessary to survive such scrutiny, the judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Catholic Charities II, 605 U.S. at 254.

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provision has some valid applications. A "facially" discriminatory benefits statute—again, how the Court described the Exemption—cannot be validly applied to anyone. All those who receive its benefits do so unfairly, and vice versa.

Catholic Charities is undoubtedly correct that the holding reversed this Court's judgment and must be implemented. (*Cf.* Pet. July 10, 2025, Letter at 1.) But that reversal says nothing about the proper remedy. "While a [U.S. Supreme Court] mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (citation omitted). The mandate's "compass" here extends only to liability and thus leaves this Court "free" as to the remedy. *Id.*

III. The proper remedy here is to eliminate, not expand, the Exemption.

Because the U.S. Supreme Court declined to select a remedy, this Court must do so. Whether using *Barr*'s severability approach or *Sessions*' focus on legislative intent, the result is the same: the Exemption should be stricken, not expanded.

A. The Exemption is severable from the broader unemployment insurance scheme.

The simplest remedial question is the one *Barr* asked: is the discriminatory exemption severable? If so, the proper remedy is to "cure the unequal treatment" by striking it from the broader unemployment insurance scheme. *Barr*, 591 U.S. at 633.

In Wisconsin (as at the federal level), "the default rule . . . is that statutes are severable." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 47 n.15, 393 Wis. 2d 38, 946 N.W.2d 35; *see also State v. Janssen*, 219 Wis. 2d 362, 379, 580 N.W.2d 260, 267 (1998) ("[T]he presumption is in favor of severability."). This presumption is statutory: Wisconsin Stat. § 990.001(11) provides that "[t]he provisions of the statutes are severable" and that "[i]f any provision of the statutes . . . is invalid, such invalidity shall not affect other provisions or

applications which can be given effect without the invalid provision or application."

The Exemption is undoubtedly severable. Chapter 108 contains no specific severability provision, and so the default presumption in Wis. Stat. § 990.001(11) applies. The Legislature intended this provision (like most others) to be severable. Moreover, the broader unemployment insurance scheme can easily be given effect without the Exemption. Virtually any program can function without a particular exemption, and this one is no different. Striking the Exemption will simply mean that more nonprofits will need to participate in the state unemployment insurance system—a result that would strengthen the system, if anything.

As *Barr* recognized, these same "commonsense severability principles" apply even though this case involves an "equal-treatment constitutional violation." 591 U.S. at 632. In such cases, severing a "discriminatory exception" properly "extends the relevant statutory . . . burdens to those previously exempted." *Id.* Here, a burden falls on most Wisconsin employers to participate in the state unemployment insurance system. The Exemption freed certain religious employers from that burden in a discriminatory way, and so severing the provision will restore equality by "extend[ing] the relevant statutory . . . burdens to those previously exempted." 591 U.S. at 632.

Like the disappointed political robocallers in *Barr*, Catholic Charities may not get what it wants most: an exemption. But, as there, severing the Exemption "fully addresses [the] First Amendment injury" of "unequal treatment" that lies at the "heart of [Catholic Charities'] suit." *Id.* at 634.

B. Leaving aside severability, other legislative intent favors striking the exemption.

Even setting aside severability, a closer look at legislative intent also favors eliminating the Exemption. The Legislature's clear, express interest in broad unemployment coverage favors eliminating the Exemption (which would broaden coverage) rather than expanding it (which would narrow coverage). That is especially true given how expanding the Exemption would unfairly advantage religious nonprofits over comparable secular ones.

1. The Legislature is committed to broad unemployment insurance coverage.

Begin with assessing the Legislature's "intensity of commitment" to "the main rule, not the exception." *Sessions*, 582 U.S. at 75. Starting here makes sense because expanding an exemption narrows the main rule and perhaps eliminates it entirely. In *Sessions*, the main rule was five-year residency terms for unwed men and married parents, with a discriminatory exemption for women. Expanding the exemption to unwed men would have confined the main rule's reach. Likewise, in *Barr*, the main rule was a ban on robocalls, with a discriminatory exemption for certain debt-collection calls—expanding the exemption to all robocalls would have obviously eliminated the general ban.

Preserving a statutory scheme's default rule is an important legislative interest, and it often justifies a remedy that preserves the default rule by eliminating an exemption. So, in *Sessions*, Congress's "recognition of 'the importance of residence in this country as the talisman of dedicated attachment,'" 582 U.S. at 75 (citation omitted), favored preserving the general rule of a longer residency requirement by eliminating the exemption for unwed women. And in *Barr*, Congress's "continuing interest in protecting consumer privacy" favored preserving the general robocall ban by

eliminating the exemption for debt collectors. 591 U.S. at 622, 630–31.

Here, the Legislature's interest in broad unemployment insurance coverage, including for nonprofit employees, is at least as strong as Congress's preference for longer residency requirements and a robocall ban.

For one, the Legislature prefaced Chapter 108 with a ringing public policy declaration about the importance of unemployment insurance. Unemployment is "an urgent public problem, gravely affecting the health, morals and welfare of the people of this state" that affects not just "unemployed worker[s] and [their] families," but also "farmers, merchants and manufacturers" in a way that "tends partially to paralyze the economic life of the entire state." Wis. Stat. § 108.01(1). To mitigate this "urgent" problem, "[e]ach employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers." *Id.* This task is "an imperative public need." Wis. Stat. § 108.01(3). The Legislature could not have been clearer about its preference: broader, not narrower, unemployment insurance coverage.

Statutory history confirms that the Legislature's preference for broad coverage extends to nonprofits too. When the Legislature first created an unemployment insurance program, nonprofits had to participate like most everyone else. *See generally* 1931 Special Session Laws ch. 20. That changed for a time when, between 1935 and 1971, all nonprofits were exempted. *See* 1935 Wis. Act 272, § 1 (creating exemption for nonprofit organizations); 1961 Wis. Act 12, § 1 (amending provision to cover all organizations exempted by section 501(c)(3) of the Internal Revenue Code).

But the Legislature reversed course in 1971, when it significantly expanded insurance coverage by exempting only a few types of nonprofits, including the religious nonprofits

addressed today by Wis. Stat. § 108.02(15)(h)2. *See* 1971 Wis. Act 53, § 6. This came in response to a 1970 change in federal law that incentivized broader state coverage; the corresponding U.S. Senate report noted that although nonprofits generally are "not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees." S. Rep. No. 91–752, at 14. A nonprofit exemption for private primary and secondary schools also temporarily survived this 1971 expansion, but in 1976, the Legislature eliminated that exemption, too (again in response to a federal law change). *See* 1975 Wis. Act 343, § 1; *see also California v. Grace Brethren Church*, 457 U.S. 393, 396 (1982) (noting how states "amended their corresponding state programs" after 1976 to "maintain compliance with" federal law).

In short, ever since 1971, the Legislature has demonstrated its preference for expanding—not contracting—nonprofit employers' participation in the unemployment insurance system.

Expanding the Exemption would conflict with the Legislature's clear preference. Consider just how far the Exemption, if kept, would need to reach to satisfy the U.S. Supreme Court's logic. The State could no longer "exclude religious organizations" based on their decisions not to perform "worship, proselytization, or religious education when performing charitable work." *Catholic Charities II*, 605 U.S. at 252. Absent that, the sole legitimate criterion for eligibility seems to be religious motivation—if the State cannot search for objective indicia of religious purpose, that leaves only subjective motives. Such a broad exemption would inevitably cover many more nonprofits than just Catholic Charities. Seemingly any nonprofit that asserts a religious motivation would become eligible, including most

prominently the religiously affiliated hospitals and clinics that employ thousands of workers (if not more) in Wisconsin.[6]

Such a significant expansion would conflict with both expressions of legislative intent discussed above. The Legislature's effort to address the "urgent public problem" of unemployment would be hampered, Wis. Stat. § 108.01(1), as many workers would lose unemployment insurance coverage. Moreover, narrowing coverage would reverse the consistent pattern since 1971 of expanding nonprofits' participation in the unemployment insurance system. Taken together, this at least matches the legislative intent that justified eliminating the discriminatory exemptions in both *Sessions* and *Barr*.

2. Expanding the Exemption would disrupt the broader statutory scheme.

Consider next the "potential for 'disruption of the statutory scheme'" posed by expanding the Exemption. *Sessions*, 582 U.S. at 75. This simply reverses severability's examination of the broader unemployment insurance scheme *without* the Exemption. Because expanding the Exemption would disrupt a scheme that would function just as well without it, elimination is especially proper.

Sessions again provides an instructive example. There, the Court observed how extending the shorter residency term for unwed women to unwed men would have solved one kind of discrimination but created another. Doing so would have treated unwed men and women equally, but *married* parents (who still faced the longer residency term) would then have

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[6] *See, e.g.*, *About SSM Health*, SSM Health, https://www.ssmhealth.com/resources/about (last visited Oct. 20, 2025) (describing SSM Health, which employs around 55,000 people in Wisconsin, Illinois, Missouri, and Oklahoma, as a "Catholic, not-for-profit" institution that, "[t]hrough [its] exceptional health care service . . . reveal[s] the healing presence of God").

received "[d]isadvantageous treatment" vis-à-vis unwed parents. *Id.* By instead eliminating the favorable treatment for unwed women, the Court preserved equal treatment of all parents and avoided trading one form of discrimination for another. *Id.* at 75–76.

Expanding the Exemption would, like in *Sessions*, trade one form of discrimination for another. Again, to comply with the U.S. Supreme Court's decision, an expanded Exemption would have to cover nonprofits that are simply motivated by religious beliefs (like certain hospitals), even if they have no distinctively religious activity. Meanwhile, comparable *secular* nonprofits doing the same work (like hospitals with no religious affiliation) would still have to participate in the state system, solely because they lacked a religious motivation for their work.

Maybe the First Amendment's Establishment Clause allows the government to treat religious nonprofits more favorably than their secular counterparts, maybe not. *Cf. Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring) (noting Establishment Clause problems arise when a benefit is denied to someone "because they do not practice . . . any [religion] at all").

But the question here is whether the Legislature would have preferred this unequal result. There is no reason to suspect as much. Especially given how Article I, § 18 of the Wisconsin Constitution forbids "any preference . . . given by law to any religious establishments," more likely the Legislature would have favored treating comparable secular and religious nonprofits equally.

3. Catholic Charities' counterarguments do not justify expanding the Exemption.

Catholic Charities has offered two main counterarguments for expanding the Exemption, neither of which persuades.

First, an elimination remedy supposedly could not stop at the Exemption; instead, "Wisconsin's entire unemployment tax regime" would need to go, too. (Pet. July 10, 2025, Letter at 2.) But nothing in the State's position requires that "absurd result." (*Id.*) Eliminating the Exemption cures the discrimination caused by exempting one religious charity but not another based on their different "theological practices." *Catholic Charities II*, 605 U.S. at 250. The U.S. Supreme Court did not hold that any of Wisconsin's other exemptions creates this kind of "denominational preference," *id.*, and so a complete remedy can (and should) stop at eliminating the Exemption.

To be sure, the Court mentioned "Wisconsin's exemption regime more broadly," but only when measuring the Exemption's "fit" under strict scrutiny. *Catholic Charities II*, 605 U.S. at 252–54. That broader regime undermined Wisconsin's asserted interest in wide unemployment insurance coverage because some other employment is exempted too. *See id.* at 253 (citing Wis. Stat. § 108.02(15)(f)–(kt)). And because the Exemption covers entire organizations "without differentiating between employees actually involved in religious works, for whom [an] anti-entanglement concern is relevant, and other staff," *id.*, the provision does not precisely serve anti-entanglement interests either.

Nothing in that analysis casts doubt on the "exemption regime more broadly." *Id.* at 254. Simply put, only provisions that "establish[ ] a denominational preference" pose First Amendment problems that might require a remedy. *Id.*

at 248. Since the Court found no denominational preferences apart from the Exemption, there is only one harm here that requires a remedy: the one cured by eliminating this single provision.

Second, Catholic Charities mischaracterizes an elimination remedy as "itself a form of illegal targeting of religion," vaguely referencing the State's "studied course of action over a decade of litigation." (Pet. July 10, 2025, Letter at 2.) Nothing in the record supports this spurious accusation. The State has simply defended its application of a state statute (which was correct, as a statutory interpretation matter) throughout this case. Litigation alone, particularly in defense of a statute's constitutionality, cannot evidence "clear and impermissible hostility" towards Catholic Charities. *Cf. Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 634 (2018). Not once during this litigation has the State expressed animus like that in *Masterpiece Cakeshop*, where officials had "describe[d] a man's faith as 'one of the most despicable pieces of rhetoric that people can use.'" *Id.* Rather, the State has consistently offered good-faith defenses of its position, defenses that initially prevailed before this Court.

Catholic Charities' attack ultimately proves too much. Lacking any evidence of animus, their position apparently boils down to this: whenever a state remedies discrimination by eliminating a benefit rather than expanding it, that itself reflects invidious discrimination. But if that were true, states would *always* have to expand benefits. And we know they do not, since "[h]ow equality is accomplished . . . is a matter on which the Constitution is silent." *Sessions*, 582 U.S. at 73. Put differently, if Catholic Charities is right, then Justice Ginsberg in *Sessions* also reflected "clear and impermissible hostility" toward women by eliminating their favorable treatment. That absurd inference is obviously incorrect.

* * *

The proper remedy here is to restore equal treatment by striking Wis. Stat. § 108.02(15)(h)2. The Exemption is plainly severable, and eliminating it would advance the Legislature's express, consistent preference in favor of broader unemployment insurance coverage, including for nonprofits. This remedy, although it means Catholic Charities would remain subject to the state unemployment insurance system, "fully addresses [the] First Amendment injury" that lies "at the heart of [this] suit." *Barr*, 591 U.S. at 634.

CONCLUSION

This Court should implement the U.S. Supreme Court's mandate by striking Wis. Stat. § 108.02(15)(h)2.

Dated this 20th day of October 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Colin T. Roth
COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for State of Wisconsin
Labor and Industry Review
Commission and State of Wisconsin
Department of Workforce
Development

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 (CTR)
(608) 957-5218 (CG)
(608) 294-2907 (Fax)
colin.roth@wisdoj.gov
charlie.gibson@wisdoj.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,765 words.

Dated this 20th day of October 2025.

Electronically signed by:

Colin T. Roth
COLIN T. ROTH
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of October 2025.

Electronically signed by:

Colin T. Roth
COLIN T. ROTH
Assistant Attorney General