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STATE OF WISCONSIN  
IN SUPREME COURT

Case No. 2020AP2007

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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.

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ON REMAND FROM UNITED STATES SUPREME COURT

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**REMEDIAL RESPONSE BRIEF**  
**OF THE STATE PARTIES**

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## INTRODUCTION

Under the U.S. Supreme Court’s well-established precedent, courts have “two remedial alternatives” when curing a discriminatory exception like the one here: either “declare [the discriminatory exception] a nullity” or “extend the coverage” of the exception to those who were improperly excluded. *Sessions v. Morales-Santana*, 582 U.S. 47, 72 (2017). In selecting between the two alternatives, a court’s “ultimate aim is to remedy the constitutional wrong consistent with [legislative] intent, not to provide the complaining parties’ preferred form of relief.” *Off. of United States Tr. v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487, 496 (2024) (addressing federal statute). And when the Court finds discrimination in a state statute, it “generally remands the case, leaving the remedial choice in the hands of state authorities.” *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 427 (2010).

Here, the objective indicators of legislative intent point in one direction: that the legislature would have chosen to strike Wis. Stat. § 108.02(15)(h)2. (the “Exemption”), not expand it. By statute, the Legislature has expressed its preference for broad participation in the unemployment insurance system, including by nonprofit employers. And, by statute, the Legislature has expressed its preference for invalid provisions to be severed from broader statutory schemes. Striking the Exemption would further both legislative aims, as it would sever a provision the U.S. Supreme Court said “must be invalidated” while expanding the protection provided to Wisconsin workers by the state unemployment insurance system. *Cath. Charities Bureau, Inc. v. LIRC*, 605 U.S. 238, 252 (2025) (“*Catholic Charities II*”).

While Catholic Charities occasionally nods to the proper remedial methodology, it fails to identify any objective evidence that the Legislature would have chosen the remedy it desires. So, lacking support for an expansion remedy, it argues instead that the standard methodology does not apply. None of those efforts are persuasive: the default cure for a discriminatory exception is elimination, not expansion; that default remedy does not change where a discrimination claim arises from the First Amendment rather than the Equal Protection Clause; and eliminating the Exemption creates no new constitutional problems.

The scope of the State's proposed remedy here is limited. Eliminating the Exemption will have no effect on the many other exemptions religious organizations enjoy, including from property or income taxes. Even as to the State's unemployment insurance system, churches or ministers of any religious denomination would remain exempt. And for employers that previously qualified for the Exemption, they would not need to pay a tax. They could instead choose, as Catholic Charities has done for decades, to reimburse the State for unemployment benefits—if any—paid to their discharged employees. In the rare case where such an employer discharged an employee for what it saw as religious reasons, the State would defer—consistent with the U.S. Supreme Court's employee-based ministerial exception—to that employer's decision.

## ARGUMENT

### **I. Catholic Charities fails to show that expansion is the preferred, let alone the only, remedy.**

When, like here, “unlawful discrimination infects . . . legislative prescriptions, the Constitution simply calls for *equal treatment*.” *Levin*, 560 U.S. at 426. To restore equal treatment, “two remedial alternatives” are typically available: a court can either “declare [a discriminatory

exception] a nullity” or “extend the coverage” to those who were improperly excluded. *Sessions*, 582 U.S. at 72 (citation omitted). In choosing between the two, the “touchstone . . . is legislative intent,” not “the complaining parties’ preferred form of relief.” *John Q. Hammons*, 602 U.S. at 496. (State Suppl. Br. 14–24.)

Catholic Charities primarily responds by trying to narrow the available remedial options from two to one. It says that expanding the Exemption is the default remedy, the only one the First Amendment permits, and the only one that will give them relief. None of these arguments hold water.

Where the discriminatory provision is an exception to a general rule, the default remedy is to eliminate the exception. Elimination is an available remedy in First Amendment cases just as in equal protection cases, and it would fully remedy the discrimination harm that the U.S. Supreme Court identified.

**A. When the discriminatory provision is an exception to the general rule, the default remedy is to strike the exception.**

Catholic Charities misunderstands how courts choose between eliminating or expanding discriminatory provisions. Catholic Charities contends that a “presumption” favors expanding “favorable treatment” (CCB Suppl. Br. 28), citing the Supreme Court’s observation that “[o]rdinarily . . . ‘extension, rather than nullification, is the proper course.’” *Sessions*, 582 U.S. at 77 (citation omitted).

But—properly understood—that presumption favors expanding general rules rather than their exceptions. When confronted with discriminatory exceptions to general rules, the Court virtually always eliminates the discriminatory exception and thereby expands the general rule, whether that rule grants a benefit or imposes a regulatory burden. Catholic Charities’ cited cases involved discriminatory exceptions to

general financial benefit programs, and so the Court expanded *benefits* by eliminating discriminatory exceptions. In contrast, *Barr v. American Association of Political Consultants*, 591 U.S. 610 (2020) and *Sessions* involved discriminatory exceptions to general regulatory burdens, and so the Court expanded those *burdens* by eliminating discriminatory exceptions. The goal is therefore not to expand “favorable treatment,” but rather to expand the more general financial benefit or regulatory burden, whichever is at issue.

Consider Catholic Charities’ cited cases more closely. (CCB Suppl. Br. 28.) As the Court explained in *Sessions*, “in [that] series of cases involving federal financial assistance benefits, the Court struck discriminatory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended.” *Sessions*, 582 U.S. at 74. For instance, *Califano v. Westcott*, 443 U.S. 76, 79 (1979), involved a general benefits program for dependent children with a deceased parent or unemployed father. But the program excluded children with unemployed mothers. *Id.* at 79–80. The Court invalidated that discriminatory gender-based exception and extended the general benefit accordingly, noting prior cases where “welfare benefits [were] paid to members of an unconstitutionally excluded class.” *Id.* at 90.

Similar cases extended general benefits programs by invalidating discriminatory exceptions. *See Califano v. Goldfarb*, 430 U.S. 199, 201–03 (1977) (general program of survivors’ benefits extended to excluded class); *Jimenez v. Weinberger*, 417 U.S. 628, 630, 634–38 (1974) (general program of disability benefits extended to excluded class); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 529–30, 537–38 (1973) (general program of food stamps extended to excluded class); *Frontiero v. Richardson*, 411 U.S. 677, 678–79, 690–91 (1973) (general program of military spousal benefits extended to excluded class). Since these cases all involved general financial benefit programs, striking discriminatory

exceptions had the coincidental effect of expanding favorable treatment.

In contrast, *Barr* and *Sessions* involved the general rules the opposite of those in *Westcott* and the like—they imposed regulatory burdens rather than granting financial benefits. So, the default approach of eliminating the discriminatory exceptions at issue resulted in expanded regulatory burdens, not expanded benefits.

In *Barr*, Congress had generally banned all robocalls but discriminatorily excepted government debt collection calls. 591 U.S. at 621. Because the general rule imposed a regulatory burden, Justice Kavanaugh clarified the default remedial principle: “the Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits *or burdens* to those previously exempted, rather than nullifying the benefits *or burdens* for all.” *Id.* at 632 (emphasis added). Likewise, in *Sessions*, the general rule burdened unwed fathers and married parents through longer residency requirements. There too preserving the “‘residual policy’—the main rule, not the exception”—favored eliminating the discriminatory exception for unwed women and extending the more burdensome general rule to them. *Sessions*, 582 U.S. at 75 (citation omitted).

Taken together, these cases embody a remedial presumption that favors striking a discriminatory exception and extending the general rule, whether that has the effect of extending financial benefits or regulatory burdens.

The remedial analysis here mirrors that in *Barr* and *Sessions*. The general rule imposes a regulatory burden on employers: participation in the state unemployment insurance system. The preferred remedy is therefore to preserve that general rule by striking the discriminatory Exemption. That has the necessary effect of extending a

burden—participation in the system—to the previously favored class (i.e. those employers that used to qualify for the Exemption), just as in *Barr* and *Sessions*.<sup>1</sup>

**B. First Amendment religious discrimination claims require no different remedy.**

Pointing to the First Amendment’s “guarantee of religious neutrality” (CCB Suppl. Br. 24) and *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), Catholic Charities argues that only an expansion remedy is available in a First Amendment religion case. That is incorrect. The First Amendment’s “guarantee” can be protected by restoring equal treatment either way, and *Espinoza* did not confront the remedial choice presented here.

**1. Catholic Charities prevailed on an equal treatment claim, which allows for both remedies.**

Catholic Charities’ appeal to the First Amendment conflates two very different religion claims. (CCB Suppl. Br. 24–26.) Religious *discrimination* claims are not the same as religious *liberty* claims. *Cf. Ramirez v. Collier*, 595 U.S. 411, 439–41 (2022) (Kavanaugh, J., concurring) (explaining the difference). For remedial purposes, that distinction makes all the difference, because “the nature of the violation determines the scope of the remedy.” *John Q. Hammons*, 602 U.S. at 494. Catholic Charities prevailed on a religious *discrimination* claim, and so the First Amendment requires only “cur[ing] the unequal treatment,” and it does not “tell [a court] which way” to do so. *Barr*, 591 U.S. at 633.

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<sup>1</sup> The general rule could also be considered a benefit to unemployed workers, where eliminating the discriminatory Exemption expands a benefit, as in *Westcott*. But the “benefit” versus “burden” characterization does not ultimately matter; what matters is that the presumptive remedy expands the general rule, not a discriminatory exception to it.

A religious discrimination claim asserts a right to equal treatment, just like any other kind of discrimination claim. When the government privileges one religion over another or secular activity over comparable religious activity, the First Amendment may require the treatment to be equalized. *See, e.g., Larson v. Valente*, 456 U.S. 228, 245 (1982) (“Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions *the very same treatment* given to small, new, or unpopular denominations.” (emphasis added)). And that can be accomplished by either leveling up treatment of the disfavored group or leveling down treatment of the favored group. *See Ramirez*, 595 U.S. at 440 (violations of “bedrock religious equality principle[s]” can be remedied either way) (Kavanaugh, J., concurring); (*see also* State Suppl. Br. 19–20, 22 (discussing *Murphy v. Collier*, 587 U.S. 901 (2019), and *Ill. Repub. Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020))).

By contrast, a religious *liberty* claim asserts a substantive right to engage in religious activity free from a given regulation or prohibition. *See, e.g., Ramirez*, 595 U.S. at 433 (religious liberty right to spiritual advisors during executions). Prevailing on that kind of claim logically leads to only one remedy: a right to engage in the protected activity, free from the challenged regulation or prohibition.

Here, the U.S. Supreme Court only ruled for Catholic Charities on a discrimination claim. The Court found a “paradigmatic form of denominational discrimination” in how the Exemption was not “‘available on an equal basis’ to all denominations.” *Catholic Charities II*, 605 U.S. at 249, 251 (citation omitted). In other words, the Exemption improperly created “‘explicit’ distinction[s] between religious practices.” *Id.* at 251. However Catholic Charities may try to recharacterize it now, that is an equal treatment claim that can be remedied either by eliminating the Exemption or expanding it.

Catholic Charities suggests that religious discrimination and religious liberty claims are somehow the same, arguing that “[r]eligious neutrality ensures a zone of protection for fundamental rights.” (CCB Suppl. Br. 25.) But that would be true only if, leaving aside discrimination, the First Amendment imposed an “independent constitutional barrier[ ]” to subjecting Catholic Charities to the unemployment system. *Barr*, 591 U.S. at 633. Catholic Charities has never shown as much.

And Catholic Charities’ reliance on the word “neutrality” in *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), and *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), takes the term out of context. These Establishment Clause involved a much different question than the one here: when *may* the government accommodate religion through religious exemptions, not when *must* it do so (as Catholic Charities argues here).

As *Walz* explained, the Establishment Clause *allows* religious exemptions aimed at “preserv[ing] the autonomy and freedom of religious bodies while avoiding any semblance of established religion.” 397 U.S. at 672. The two cases referenced “neutrality” to explain why the government can accommodate religious needs by alleviating special burdens: the Religion Clauses work together to keep government “neutral” toward religion by forbidding government sponsorship of religion and protecting religious exercise. *Walz*, 397 U.S. at 672; *Kiryas Joel*, 512 U.S. at 705.

That general principle says nothing about how to remedy First Amendment discrimination claims. Neither case suggested that such exemptions are constitutionally required, much less addressed remedies for a discrimination claim under the Free Exercise Clause.<sup>2</sup>

**2. *Espinoza* did not expand benefits to remedy discrimination; it held that a state court’s basis for eliminating a benefit program violated federal law.**

*Espinoza* also does not hold that the First Amendment limits remedial options. As the State explained in its opening brief (*see* State Suppl. Br. 22–24), *Espinoza* involved a state court’s striking a statute based on a state constitutional provision that the U.S. Supreme Court determined violated the U.S. Constitution. There was nothing discriminatory about the state statute, and so the expansion-elimination remedy issue never arose.

The key difference with this case is that the statutory program at issue in *Espinoza* did not itself discriminate—it allowed state-funded scholarships to be used at both secular and religious schools. *See Espinoza*, 591 U.S. at 468–69. But by doing so, the program violated a state constitutional

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<sup>2</sup> Neither law review article cited by Catholic Charities changes the result. *See* Mark C. Gillespie, *Level-Up Remedies for Religious Discrimination*, 44 Harv. J.L. & Pub. Pol’y 961 (2021); Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 Yale L.J. 1185, 1196 (1986) (citation omitted). Both articles recognize that the U.S. Supreme Court’s precedent does not demand level-up remedies for unconstitutional statutes. While the authors advocate for a different approach, the Court has not taken them up on their respective suggestions. *See, e.g., Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 633 (2020) (rejecting argument that, for remedial purposes, “a *First Amendment* equal-treatment case is different”).

provision barring state aid to religion, and the state court invalidated the whole statutory program on that basis. *Id.* at 471–72.

At the U.S. Supreme Court, Montana defended against First Amendment liability by highlighting how the scholarship program was already gone. No one was receiving benefits anymore, and so (Montana argued) there was no discrimination. *Id.* at 487–88. But that didn’t work because, as the U.S. Supreme Court held, the state constitutional provision the state court had relied on itself violated the First Amendment. Absent that state constitutional provision, the state court “would have had no basis for” striking the scholarship program. *Id.* at 488.

The remedial choice presented here simply never arose in *Espinoza*, because the statutory program there did not discriminate. Instead, the remedy was simply to reverse Montana’s reliance on an invalid state constitutional provision to eliminate the scholarship program, which left the program intact. Nothing in *Espinoza* suggests that the First Amendment limits a state court’s options when confronted with a state statute that itself discriminates, like the Exemption does.

**C. The “law of remedies” does not require expanding the Exemption.**

Catholic Charities also tries to limit the remedial options here by generally appealing to the “law of remedies.” (CCB Suppl. Br. 26–27.) To be sure, Catholic Charities is entitled to a remedy for the discrimination harm it has suffered. *See, e.g.*, Wis. Const. art. I, § 9. But that does not mean Catholic Charities is entitled to the remedy that it prefers.

The U.S. Supreme Court has repeatedly shown that even when a discrimination claimant prevails, their preference does not dictate the remedy. For instance, in *John Q. Hammons*, Chapter 11 bankruptcy debtors had prevailed in showing that certain fees they paid were discriminatorily high. 602 U.S. at 491–92. But even though they desired a refund remedy, the Court declined to grant it because Congress had already cured the discrimination by restoring fee parity. *Id.* at 497–99. The winner’s choice did not control because “when seeking to remedy an unconstitutional disparity, rather than divining the right answer ourselves *or picking a party’s preferred form of relief* . . . , [courts] generally look to the intent of the Legislature.” *Id.* at 500 (emphasis added).

Likewise, in *Barr*, the victorious plaintiffs “want[ed] to be able to make political robocalls to cell phones, and they [did] not receive[ ] *that* relief.” 591 U.S. at 634. But their First Amendment injury was “fully address[ed]” by eliminating the discriminatory exception for government debt collection robocalls, as this remedy cured the “unequal treatment” at the “heart of their suit.” *Id.*; *see also Sessions*, 582 U.S. at 72–76 (discrimination harm remedied by extending burden to prevailing plaintiff).

Here too, eliminating the Exemption may not give Catholic Charities the remedy it wants, but elimination will “fully address[ ]” its First Amendment injury. *Barr*, 591 U.S. at 634. That is all the law of remedies (and the First Amendment) requires.

Catholic Charities next incorrectly equates a remedy that eliminates the Exemption with overbroad injunctions that benefit non-parties. (CCB Suppl. Br. 27 (citing *Trump v. CASA, Inc.*, 606 U.S. 831, 842 (2025)).) Striking down a statute and injunctions favoring nonparties are two very different things. Whenever a statute is invalidated, it usually is “necessarily true” that “strangers to [the] suit” are affected,

*Barr*, 591 U.S. at 635—indeed, the *Barr* and *Sessions* holdings had that very effect. Nothing in *CASA* or any other case suggests this is improper. What *CASA* frowned upon is federal courts using their equitable power to issue binding injunctions—orders enforceable through contempt proceedings—in favor of nonparties. *CASA*, 606 U.S. at 851 n.11. Striking the Exemption would simply expand the reach of a statute, not subject anyone to a court’s injunction power.

Last, Catholic Charities says elimination would not remedy the “retrospective” discrimination harm it suffered during the years it participated in the state system while other religious organizations were exempt. (CCB Suppl. Br. 27.) But neither would Catholic Charities’ preferred remedy. Expanding the Exemption today to cover Catholic Charities also would do nothing to address past harms. Only money damages could accomplish that, but Catholic Charities has never sought this remedy. Nor could it, since this is a judicial review case under Wis. Stat. § 108.09(7) where money damages are not available. *See Cath. Charities Bureau, Inc. v. LIRC*, 2023 WI App 12, ¶ 18, 406 Wis. 2d 586, 987 N.W.2d 778 (describing available remedies). In any event, “prospective parity [is] sufficient to remedy unconstitutional differences in treatment.” *John Q. Hammons*, 602 U.S. at 500. Eliminating the Exemption would restore equality going forward, and that is enough.

\* \* \*

None of Catholic Charities’ attempts to narrow the remedial options here succeeds. Courts remedy discrimination harms, including under the First Amendment, by restoring equal treatment, and that is usually done by eliminating discriminatory exceptions and thereby preserving general rules. Those basic principles do not alone determine the result here, but they favor eliminating the Exemption, not expanding it.

## II. Catholic Charities fails to show that the U.S. Supreme Court's decision selected a remedy.

The U.S. Supreme Court issued a liability-only decision that did not select either of the two available remedies for First Amendment discrimination. (State Suppl. Br. 24–27.) Instead, the Court held only that the Exemption “imposes a denominational preference . . . without the tailoring necessary to survive [strict] scrutiny.” *Catholic Charities II*, 605 U.S. at 254. Unlike in cases addressing discrimination in *federal* statutes, the Court did not then hold that this discrimination in a *state* statute must be remedied by either expanding or eliminating the Exemption. *Cf. Sessions*, 582 U.S. at 72–76 (addressing discrimination remedy); *Barr*, 591 U.S. at 621–34 (same). The Court thus left that remedial question for this court, as it usually does in cases involving state law. (State Suppl. Br. 24–25 (collecting cases).)

Catholic Charities never identifies a single line in the Court's opinion that indicates otherwise. Instead, it highlights three portions of the decision, none of which dictate a particular remedy.

First, Catholic Charities emphasizes how the Court “reversed” this Court's judgment, but that does not answer the remedial question. (CCB Suppl. Br. 18–19.) To see why, consider other cases in which the Court has reversed state supreme courts on discrimination grounds. For instance, in *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142, 143 (1980), the Missouri Supreme Court had rejected an equal protection challenge to a state death benefit statute that treated men and women differently. Like here, the Court there found discrimination, “reversed” the state court decision, and “remand[ed] the case to that court for further proceedings not inconsistent with [the] opinion.” *Id.* at 153. In doing so, *Wengler* expressly left the remedial question to “state judges” because “[s]tate legislation [was] at issue.” *Id.* at 152–53.

Other cases involving discriminatory state statutes share this pattern: the U.S. Supreme Court “reverses” the state court judgment on liability and then remands the case for state courts to sort out the proper remedy. *See Orr v. Orr*, 440 U.S. 268, 283 (1979) (finding gender-based discrimination and “revers[ing]” state court judgment, which on remand “[left] the state courts free to decide any questions of substantive state law not yet passed upon in this litigation”); *Stanton v. Stanton*, 421 U.S. 7, 18 (1975) (despite “revers[all]” of state court judgment on discrimination grounds, the remedy was “plainly . . . an issue of state law to be resolved by the Utah courts on remand”); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 543 (1942) (“revers[ing]” state court judgment yet concluding remedy was “more appropriately left for adjudication by the Oklahoma court”).

The liability-only effect of these reversals makes sense. A state court decision finding no discrimination liability naturally says nothing about a remedy. When the U.S. Supreme Court then reviews such a decision, it can only “reverse” the no-liability holding because that is all the lower court decided. By declining to also select a remedy, whether expressly (as in *Wengler*, *Orr*, *Stanton*, and *Skinner*) or implicitly (as here), and remanding the case, the Court leaves lower courts “free” as to the unaddressed remedial issue. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (citation omitted).

Reversal also cannot automatically “reinstate[ ]” the circuit court’s decision, as Catholic Charities suggests. (CCB Suppl. Br. 19 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983)<sup>3</sup>.) The state court proceedings here involved two separate questions: one, how should the Exemption be interpreted, and two, whether the Exemption violates the First Amendment. *Cath. Charities Bureau, Inc. v. LIRC*, 2024 WI 13, ¶ 5, 411 Wis. 2d 1, 3 N.W.3d 666 (“*Catholic Charities I*”). The circuit court answered only the first question in Catholic Charities’ favor and did not address First Amendment issues. (See Pet. App. to Opening Br. 088–090 (Tr. of Oct. 22, 2020, Oral Ruling).) This Court rejected the circuit court’s statutory interpretation, a holding that the U.S. Supreme Court left intact. See *Catholic Charities II*, 605 U.S. at 250 (analyzing “Wisconsin’s exemption, as interpreted by its Supreme Court”). Because this Court’s interpretation of the Exemption still controls, the circuit court’s judgment remains erroneous and cannot entitle Catholic Charities to an exemption.

Second, Catholic Charities conspicuously avoids the majority opinion’s analysis and holdings, instead quoting the Court’s descriptions of arguments and holdings from the state court proceedings. (CCB Suppl. Br. 19–20 (citing *Catholic Charities II*, 605 U.S. at 241, 245, 249).) The Court’s description of proceedings below—and in a way that never mentions remedial issues—is not a holding that binds this Court on the proper remedy.

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<sup>3</sup> *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), is irrelevant because it did not concern discrimination liability where multiple remedial options exist. It instead involved a criminal conviction that a lower court had reversed on Fourth Amendment grounds; by reversing the lower court, the only possible result was to reinstate the trial court’s judgment of conviction. *Id.* at 581 n.2. The reversal here, by contrast, does not lead to only one remedial option.

Indeed, even those cherry-picked lines addressed the parties' *statutory interpretation* dispute below, an unreviewed issue with no relevance to the available remedies for the Court's discrimination holding. The Court explained how Catholic Charities had "claimed that [it] qualif[ies]" for the Exemption in state court, *Catholic Charities II*, 605 U.S. at 241, but that referenced the statutory interpretation question the Court did not review. So too the Court explained how the "state trial court . . . held that [Catholic Charities is] entitled to the exemption," noted that the "dispositive question" below (for statutory interpretation purposes) was "whether [Catholic Charities is] 'operated primarily for religious purposes,'" and observed how this Court "deemed [Catholic Charities] ineligible for the exemption." *Id.* at 245, 249.

If the Court had granted certiorari and reversed on that statutory interpretation question, Catholic Charities would undoubtedly be entitled to an exemption. But the Court did not, because it could not. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (U.S. Supreme Court cannot "place a construction on a state statute different from the one rendered by the highest court of the State"). The Court had to accept that the Exemption "as interpreted by [this] Court" does not cover Catholic Charities, and so the Court instead asked whether this result "violates the First Amendment." *Catholic Charities II*, 605 U.S. at 241. That is a very different question, and answering it leads to a different set of possible remedies—namely, expansion or elimination.

Third, Catholic Charities cobbles together stray passages from concurring opinions, each representing the views of a single Justice. (CCB Suppl. Br. 20.) The "fight" that Justice Jackson discussed was over how to interpret the parallel federal exemption in 26 U.S.C. § 3309(b)(1)(B), an unresolved issue that again has nothing to do with the remedies available for discrimination liability. *Catholic Charities II*, 605 U.S. at 270–79. As for Justice Thomas, he

would have found liability on a *different* First Amendment theory—church autonomy—in addition to denominational discrimination. *Id.* at 255–70. Perhaps church autonomy liability might have entitled Catholic Charities to an exemption, but the majority expressly “[did] not reach” that theory. *Id.* at 246 n.2.

The U.S. Supreme Court addressed only discrimination liability, which necessarily leaves the remedial question open for this Court to answer.

### **III. Objective indicators of legislative intent favor eliminating the Exemption, not expanding it.**

That remedial question should be answered by eliminating the Exemption, a result supported by the available legislative intent. (State Suppl. Br. 27–33.) The Legislature would have preferred severing invalid provisions and, by statute, has expressly favored broad unemployment insurance coverage: that preference is reflected in how nonprofit participation in the system has increased over the past 50 years.

Catholic Charities has little to say about this “touchstone” inquiry into legislative intent, *John Q. Hammons*, 602 U.S. at 495, having placed most of its eggs in other baskets. And what it does say rests not on objective evidence of legislative intent but rather unreliable inferences from an amicus brief and federal case law. (CCB Suppl. Br. 28–31.)

#### **A. Severability favors striking the Exemption.**

The default remedy for “equal-treatment constitutional violation[s]” like these is to strike discriminatory exemptions where they are severable from the broader statutory scheme. *Barr*, 591 U.S. at 632; *see supra* Argument I.B. This is consistent with the Legislature’s express preference for invalid provisions to be severed where the remaining

statutory scheme can function. (State Suppl. Br. 27–28; Wis. Stat. § 990.001(11).) Catholic Charities never addresses how the statutory presumption of severability itself represents legislative intent that favors striking the Exemption.

**B. Catholic Charities offers no textual indications of legislative intent favoring an expanded Exemption.**

Other sources of legislative intent also favor striking the Exemption. The Legislature has expressed, by statute, a strong interest in broad unemployment coverage. And the Legislature has repeatedly chosen to expand—again, by statute—nonprofit participation in the system. Moreover, the Wisconsin Constitution provides a backdrop that disfavors privileging religious nonprofits over comparable secular ones. (See State Suppl. Br. 29–33.)

Lacking any contrary support, Catholic Charities first points to an amicus brief that purports to convey the current Legislature’s preference for expanding the Exemption. (CCB Suppl. Br. 28–29.) That brief is irrelevant, for two reasons.

First, what the Legislature might want today is not the question—it is what the *enacting* Legislature “would have willed had it been apprised of the constitutional infirmity.” *John Q. Hammons*, 602 U.S. at 495; *cf. Acosta v. City of Costa Mesa*, 718 F.3d 800, 817 n.10 (9th Cir. 2013) (severability analysis looks to enacting legislature not “*post hoc* litigating positions”). That explains why the State’s account relies primarily on the statutory unemployment scheme when the Exemption was created. Of course, the current Legislature may still play a role: if it disagrees with whatever remedy this Court selects, it can express that view by passing a law that reaches the opposite result.

Second, the amicus brief does not even reflect the voice of the current Legislature. Generally, “the legislature’s intent is expressed in . . . statutory language,” which represents “enacted law,” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Only enacted law has “overcome the crucible of bicameralism and presentment.” *Evers v. Marklein*, 2025 WI 36, ¶ 93, 417 Wis. 2d 453, 22 N.W.3d 789 (R. Bradley, J., dissenting). Neither house voted to approve this brief, nor even a joint legislative committee or any legislative committee whatsoever (as far as the State can tell). Instead, the brief was apparently authored pursuant to a general legal services contract approved by a single legislator, the Assembly Speaker.<sup>4</sup> An amicus brief offered during litigation, apparently approved by only one or two legislators, offers no insight on what the Legislature would have chosen when it enacted the Exemption.

Catholic Charities also cites *Welsh v. United States*, 398 U.S. 333 (1970) and *Walz*, but it never explains why federal judicial decisions indicate what Wisconsin’s state legislature would have preferred. (CCB Suppl. Br. 29–30.) Moreover, neither case has anything to do with unemployment insurance, and so they say nothing about the Legislature’s “commitment to the more broadly applicable rule” here: participation in the state unemployment insurance system. (CCB Suppl. Br. 29 (quoting *John Q. Hammons*, 602 U.S. at 496).)

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<sup>4</sup> See Letter from Ryan J. Walsh, Partner, Eimer Stahl LLP, to Tyler Ellisen, General Counsel, Office of Assembly Speaker Robin Vos and Jessie Augustyn, Outside Counsel, Office of Senate Majority Leader Devin LeMahieu (Apr. 21, 2025), <https://cms.stateaffairs.com/wp-content/uploads/2025/10/251013Stahl.pdf>. This version of the contract also contains a blank signature line for the “Wisconsin State Senate”—but even if another legislator ultimately signed there, two signatories is not meaningfully different from one.

As for Justice Harlan's concurrence in *Welsh*, it discussed the Nation's tradition of exempting conscientious objectors from compelled participation in the armed forces. 398 U.S. at 365–66. Historical exemptions from military service support no inferences about Catholic Charities' obligation to reimburse the state for unemployment benefits paid to its discharged employees.

And although *Walz* is at least a tax exemption case, it still provides no support for expanding this insurance exemption. For starters, this case does not necessarily involve a tax at all. Nonprofits like Catholic Charities can, rather than pay a tax, elect to reimburse the state for benefits (if any) paid to their discharged employees, as Catholic Charities has done for decades. *See* Wis. Stat. § 108.151; (R.61:3–7; 67:5).

Furthermore, *Walz* addressed the specific historical tradition of exemption from “federal income taxes” and “real estate tax[es].” 397 U.S. at 676–77. That specific exemption tradition does not extend to *all* forms of “tax burdens,” as Catholic Charities suggests. (CCB Suppl. Br. 30.) Religious institutions are subject to all kinds of other taxes and cost-imposing regulatory programs, and so there is no uniform tradition that supports an inference of exemption here. *See, e.g.,* Internal Revenue Serv., Pub. 1828, Tax Guide for Churches & Religious Organizations, 19–22 (2015), <https://www.irs.gov/pub/irs-pdf/p1828.pdf> (explaining how churches and religious organizations are subject to the federal unrelated business income tax and Social Security and Medicare (FICA) taxes); 26 U.S.C. § 4980H(a), (c)(2) (imposing federal Affordable Care Act mandate and taxes on “large employers,” defined in a way that does not exclude religious organizations); Wis. Stat. §§ 102.04, 102.07 (for workers compensation purposes, religious organizations and their employees not excluded from covered “employers” and “employees”).

Third, Catholic Charities says that exempting it would be “easily administered.” (CCB Suppl. Br. 31.) Maybe so, but Catholic Charities elides two other “disruptions” that its preferred remedy would cause. *Sessions*, 582 U.S. at 75.

One, Catholic Charities ignores how expanding the Exemption would not stop with it. Other religiously motivated nonprofits would become eligible for exemption too, potentially resulting in tens of thousands of Wisconsin workers losing their state insurance coverage with no promise of a private backup. (State Suppl. Br. 31–32, 32 n.6.) Even though Catholic Charities provides some private coverage to its employees (CCB Suppl. Br. 14), no law would obligate it or other newly exempt employers (like religiously affiliated hospitals) to do so.

And two, expanding the Exemption to religiously motivated nonprofits would unfairly privilege them over their comparable secular counterparts who do the same work but would still have to participate in the state system. (State Suppl. Br. 32–33); *cf.* Wis. Const. art. I, § 8 (forbidding “any preference . . . given by law to any religious establishments”).

Taken together, Catholic Charities’ non-textual arguments do not overcome the statutory indicators of legislative intent. The remedy here should favor broader, not narrower, coverage for Wisconsin employees. The only way to accomplish that is to eliminate the Exemption, not expand it.

#### **IV. Catholic Charities’ imagined constitutional violations do not require expanding the Exemption.**

Catholic Charities also tries to evade the ordinary remedial framework by asserting that eliminating the Exemption would cause various other constitutional violations. (CCB Suppl. Br. 32–41.) But none of its four arguments stick.

It attempts to revive a church autonomy theory that no court has accepted. It cites entanglement, but the U.S. Supreme Court already held that the Exemption cannot be justified by avoiding state entanglement with religious unemployment decisions. It offers a new flavor of a discrimination claim—that eliminating the Exemption would discriminate in favor of secular employers. But eliminating the Exemption would treat charitable and secular nonprofits equally, and other secular exemptions address meaningfully different employment relationships. And there is zero evidence of animus here to support a “religious targeting” theory.

**A. No court has endorsed Catholic Charities’ church autonomy theory.**

Catholic Charities first recycles its original merits argument that eliminating the Exemption would violate church autonomy principles, but it correctly concedes that the U.S. Supreme Court “did not reach” this issue. (CCB Suppl. Br. 33 n.5); *see Catholic Charities II*, 605 U.S. at 246 n.2.

This Court rejected Catholic Charities’ autonomy argument the first time around, *Catholic Charities I*, 411 Wis. 2d 1, ¶¶ 95–100, and nothing in Justice Sotomayor’s majority opinion justifies revisiting this Court’s (correct) decision.<sup>5</sup> Only Justice Thomas agreed with Catholic Charities’ position, *Catholic Charities II*, 605 U.S. at 255–70, and other Justices expressed either skepticism or uninterest in the theory. *See Catholic Charities Oral Arg. Tr.* 17:14–21 (Justice Barrett noting distinction between “telling a church what to do or interfering in its internal affairs and incentiviz[ing] the

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<sup>5</sup> *See also* Brief for Respondents at 47–55 (further rebutting church autonomy argument), *available at* [https://www.supremecourt.gov/DocketPDF/24/24-154/348779/20250226160847325\\_24-154%20Brief%20for%20Respondent.pdf](https://www.supremecourt.gov/DocketPDF/24/24-154/348779/20250226160847325_24-154%20Brief%20for%20Respondent.pdf).

church to do certain things”), 29:13–30:5 (Justice Kagan observing how church autonomy theory is “not the most obvious thing that stands out about what the Wisconsin court has done here”).

Nothing about the autonomy argument changes if the Exemption is eliminated. Catholic Charities would remain in the same position as before: without an exemption, subject to the unemployment system, and facing the same incentives (minor, at most) to alter its corporate form. There is thus no reason to suspect the Court would change its mind if Catholic Charities again sought review.<sup>6</sup>

**B. Eliminating the Exemption will not excessively entangle the State with religion because it will defer to certain religious employment decisions.**

Catholic Charities also raises a brand-new argument that it has never presented before: that it has a substantive right to an exemption because subjecting it to the unemployment system excessively entangles the State with religion. (CCB Suppl. Br. 35–37.) Until now, Catholic Charities has focused on discrimination-type theories and a distinct entanglement argument about the intrusiveness of State inquiries into whether Catholic Charities is operated for a “religious purpose.” *Catholic Charities II*, 605 U.S. at 246. Now, for the first time in almost a decade of litigation, Catholic Charities suggests that all its employment decisions are constitutionally immune from review.

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<sup>6</sup> The State does not ask the Court to invalidate the exemption for churches under Wis. Stat. § 108.02(15)(h)1., and so Catholic Charities’ arguments on this point are misplaced. (CCB Suppl. Br. 35.)

Leaving aside how Catholic Charities has forfeited this argument by never raising it,<sup>7</sup> the U.S. Supreme Court rejected it. The State had defended the Exemption as serving anti-entanglement interests, since “misconduct disputes could often force the state to decide whether employees complied with religious doctrine.” *Catholic Charities II*, 605 U.S. at 253 (citation omitted). Recall that when an employer discharges an employee for “misconduct,” the employee is not entitled to unemployment benefits.<sup>8</sup> Resolving misconduct disputes could thus entangle the State with religious questions when employment standards turn on religious doctrine. To be clear, the State never argued that these factors *required* it to enact the Exemption, but rather that they *allowed* it to do so.

But the Court disagreed that anti-entanglement interests justify how the Exemption covers entire organizations. Because the Exemption is not “limited to employees who are in fact tasked with inculcating religious doctrine” and instead “functions at an organizational level, covering both the janitor and the priest in equal measure,” it was not “closely fitted” to an “anti-entanglement interest.” *Id.* at 253–54 (citation omitted). In other words, because religious

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<sup>7</sup> As explained more below, neither side forfeited remedial arguments because the remedy issue did not arise until now; merits arguments like this one, however, should have been raised at the merits stage.

<sup>8</sup> “Misconduct” is defined as “conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer’s interests, or of an employee’s duties and obligations to his or her employer.” Wis. Stat. § 108.04(5).

organizations employ janitors and other workers with little or no connection to religious doctrine, anti-entanglement concerns do not justify exempting entire organizations.

This reasoning necessarily defeats Catholic Charities' new constitutional argument. Because none of Catholic Charities' employees are tasked with inculcating religious doctrine, *Catholic Charities I*, 411 Wis. 2d, ¶ 16, the entire organization is not entitled to an exemption on anti-entanglement grounds. That is especially true given how Catholic Charities has participated in the state system for decades but has never identified even a single example of a religious dispute with the State over unemployment insurance benefits.

That said, the State agrees that it is constitutionally required to defer to certain individual employment decisions made by religious nonprofits, in a way that mirrors the employee-by-employee analysis the U.S. Supreme Court uses when applying the ministerial exception from federal antidiscrimination laws. *Cf. Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746–47, 749–54 (2020). At least two scenarios could require this disentangling approach.

In one, the employer and employee might disagree about whether violating a religious work rule rises to the level of “misconduct.” Consider an employer that discharges an employee for violating a work rule the employer considers to be religious. If the employee seeks unemployment benefits and argues that violating the religious work rule did not represent misconduct, the State likely would have to accept the employer's contrary view.<sup>9</sup> As the U.S. Supreme Court has

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<sup>9</sup> This would be the opposite approach from an older case like *St. Pius X Parish Corp. v. Murray*, 557 A.2d 1214, 1217–18 (R.I. 1989), where a state workforce agency found (and the court agreed) that an employee's violation of a religious work rule was not misconduct and rejected the employer's contrary argument.

long observed, “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” *Hernandez v. Comm’r of Internal Rev.*, 490 U.S. 680, 699 (1989); *see also Our Lady*, 591 U.S. at 737 (“The First Amendment protects the right of religious institutions ‘to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” (citation omitted)).

In another scenario, a dispute might arise over what exactly a religious work rule requires. Imagine an employer discharges an employee for violating a religious work rule, and the employee argues that his conduct did not, in fact, violate the rule. Here, again, the First Amendment would likely require the State to defer to the employer’s view of what its religious work rule requires. Just as the State cannot second-guess whether violating an employer’s religious work rule is “misconduct,” so too it cannot second-guess an employer’s understanding of the exact conduct its religious work rules require.

Deference in such scenarios would significantly reduce any state involvement with the religious practices of nonprofits participating in the unemployment insurance system. But this deference should not extend to entire organizations, because, as the U.S. Supreme Court observed, reviewing many employment decisions does not entangle the State with religion.

With this deference in mind, it is worth again emphasizing how little the State’s proposed remedy would affect religious organizations. Eliminating the Exemption would not affect any other tax exemption that they may enjoy, such as income or property tax exemptions. Churches and ministers would remain exempt under Wis. Stat. § 108.02(15)(h)1. and 3. And non-exempt religious organizations would not even need to pay an unemployment

insurance tax; reimbursements for benefits are all that's at stake. Especially when paired with deference to certain religiously driven employment decisions, participating in the unemployment system is no more burdensome than existing duties these organizations have to pay FICA taxes, comply with Affordable Care Act mandates, or participate in the workers compensation system. None of these obligations excessively entangle the State with religion.

**C. Eliminating the Exemption will not unconstitutionally favor secular employers over comparable religious employers.**

Unlike the denominational discrimination claim it previously made in this case—that giving some religiously-affiliated employers an exemption from the unemployment program but not others unconstitutionally discriminates—Catholic Charities newly asserts a religious vs. secular discrimination claim. It argues that if the unemployment system exempts any employment with a secular employer, it automatically must exempt employment with a religious employer. (CCB Suppl. B. 38–40.) Catholic Charities never made this merits argument until now and thus has forfeited it.

And it's for good reason that Catholic Charities did not pursue this new kind of discrimination claim before: (1) a lack of exemption would not stem from Catholic Charities' religious status; (2) Catholic Charities does not assert a religious objection to participating in the unemployment system; (3) Catholic Charities' scheme would discriminate against secular nonprofit employers doing the same work; and (4) employment with Catholic Charities is not similarly situated to the types of employment exempted from the law's coverage.

First, Catholic Charities cannot show that it would be disadvantaged vis-à-vis secular groups “solely because of [its] religious character.” *Carson v. Makin*, 596 U.S. 767, 780 (2022). Catholic Charities is not like the religious schools in *Carson*, who were excluded from state funding precisely because of their religious nature, *id.*, the employee in *Kennedy v. Bremerton School District*, 597 U.S. 507, 526 (2022), whose prayer was prohibited “at least in part because of [its] religious character,” or the challengers in *Tandon v. Newsom*, 593 U.S. 61, 63 (2021), who couldn’t practice “at-home religious exercise” under a COVID-19 regulation. Here, under an unemployment system without the Exemption, Catholic Charities would be subject to participation by default, like virtually all Wisconsin employers. Its ineligibility for an exemption would not turn on its religious status.

Second, Catholic Charities is not seeking an exemption based on a religious objection to a regulation’s requirements. It is thus unlike the plaintiff in *Fulton v. City of Philadelphia*, 593 U.S. 522, 527 (2021), where an adoption agency sought exemption from an antidiscrimination policy based on “its religious beliefs about marriage,” and the denial pressured the agency to abandon its faith practices in order to participate in the adoption system. Nor is it like the *Tandon* plaintiffs, where a COVID-era ban on gatherings would have limited their in-home religious exercise. *Tandon*, 593 U.S. at 63. Here, Catholic Charities has never articulated a religious objection to reimbursing the State for unemployment benefits paid to its employees. There can therefore be no inference that Catholic Charities is being unfairly denied a religious exemption—it is not seeking a “religious” exemption at all. It instead suggests that its religious affiliation entitles it to exemption so long as secular exemptions exist, but that is a counterintuitive claim the U.S. Supreme Court has never recognized.

Third, Catholic Charities' position would discriminate against secular nonprofits, because Catholic Charities essentially argues that it is entitled to favorable treatment "because of [its] religious character." *Carson*, 596 U.S. at 780 (citation omitted). That would mean that secular nonprofits doing the same social services work would have to participate in the state system only because they are secular. Again, that kind of special favor to religion raises serious constitutional concerns. *See Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring) (noting Establishment Clause problems).

Fourth, Catholic Charities makes no effort to demonstrate that employment with its organization is similarly situated to the very limited types of employment exempted from Wisconsin's unemployment system. Those exemptions reflect the needs of specific types of employees for benefits, and Catholic Charities fails to explain how its employment relationships present similar concerns.

For example, several exemptions cover independent contractors who do not receive ordinary employment benefits and thus naturally ought not receive unemployment insurance coverage either. *See, e.g.*, Wis. Stat. § 108.02(15)(k)3. (golf caddies), 4. (door-to-door newspaper salespeople), 6. (insurance agents paid solely by commission), 18. (taxi drivers). Others cover students and elected or appointed government officials, who have a lesser expectation in continual employment than ordinary workers. *See, e.g.*, Wis. Stat. § 108.02(15)(f)1. (elected public officials), (f)3. (elected judges), (j)2. (student nurses). A few aim at avoiding duplicating coverage that employees receive elsewhere. *See* Wis. Stat. § 108.02(15)(k)5. (railroad employment covered by federal insurance program), 9. (individuals covered by other state's unemployment program). And still others cover small or short-season agricultural employees and temporary

nonresident aliens, who again do not expect permanent employment. *See, e.g.*, Wis. Stat. § 108.02(15)(k)1., (j)6.

Catholic Charities makes no effort to analogize its employment relationships to the employment relationships addressed in these exemptions. Nor could it, since it enters ordinary employment relationships with workers who can legitimately expect regular employment with ordinary benefits. These secular exemptions serve particular purposes that generally exempting Catholic Charities would not further. Because there is no apples-to-apples comparison between work for Catholic Charities and exempt secular employment, there is no basis for a discrimination claim.<sup>10</sup>

**D. There is zero evidence of animus to support a religious targeting claim.**

Last, Catholic Charities imagines that the State’s good faith litigation positions somehow reflect “animus” toward it. (CCB Suppl. Br. 40–41.) And that includes not just the State’s remedial position here, but apparently its merits arguments “[a]t every turn” in this litigation. (CCB Suppl. Br. 41.)

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<sup>10</sup> In a footnote, Catholic Charities suggests that eliminating the Exemption would create a new form of religious discrimination, in that Wis. Stat. § 108.02(15)(h)1. and 3. would still exempt churches and ministers. (CCB Suppl. Br. 38 n.6.) But Catholic Charities does not develop this vague argument, and it is unclear why these remaining exemptions would somehow “officially prefer one religious denomination over another” given that all denominations can use them. (CCB Suppl. Br. 38 n.6.) Moreover, limiting an exemption to churches is not unique—many other religious exemptions do the same, and the U.S. Supreme Court has never questioned this kind of line-drawing. *See, e.g.*, 26 U.S.C. §§ 508(c)(1)(A), 6033(a)(3)(A)(iii), 7611 (granting special tax treatment to “churches” and the “exclusively religious activities” of “religious order[s]”); 29 U.S.C. § 1002(33)(A) (ERISA exemption for plans “established and maintained . . . by a church or by a convention or association of churches”).

It is hard to see how Catholic Charities can level this broad accusation and not charge this Court with bad faith too. After all, the State's merits position initially prevailed before this Court. If that position somehow intrinsically reflects animus, then, by agreeing with the State, this Court would be just as guilty. But that cannot be true. Just as this Court could accept the State's merits arguments in good faith, so too the State could offer them in good faith.

That leaves the State's remedial position, which again cannot constitute animus. Eliminating the Exemption accomplishes two important, legitimate goals: it both (1) restores equal treatment and (2) avoids the collateral damage to Wisconsin workers caused by Catholic Charities' preferred remedy, which would exempt all nonprofits operated by churches and motivated by religion. A remedy that furthers the Legislature's express policy preference for broader unemployment insurance coverage reflects no animus toward Catholic Charities. That is especially true given how the State is prepared to defer to religiously based employment decisions that Catholic Charities and other nonprofits might make.

And this case is nothing like either *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617, 638 (2018) or *Church of Lukumi Bablu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). In *Masterpiece Cakeshop*, the government had evidenced "a clear and impermissible hostility toward . . . sincere religious beliefs," partly through express comments "disparag[ing] . . . religion." 584 U.S. at 634–35. And in *Lukumi*, the targeting of certain religious practices was inexplicable for any reason other than "the suppression of religion," as evidenced partly by "significant hostility" expressed by government officials. 508 U.S. at 541–42. Unlike those cases, the U.S. Supreme Court's opinion here said nothing whatsoever about the State's supposed animus.

**V. The State did not forfeit its remedial argument because the issue did not arise until now.**

The State has not, as Catholic Charities suggests, forfeited its answer to the unanswered remedial question because no Wisconsin court has yet needed to ask it. (CCB Suppl. Br. 31–32.)

“Issues that arise anew on remand are generally within the scope of the remand,” and a party cannot waive its opportunity to address those new issues. *Sullivan v. Flora, Inc.*, 63 F.4th 1130, 1139 (7th Cir. 2023) (citation omitted). It is not at all uncommon for unresolved remedy issues to be sorted out following a remand. *See, e.g., Quinn v. City of Boston*, 325 F.3d 18, 38 (1st Cir. 2003) (in a discrimination case, leaving remedy for lower court to decide); *E. Jefferson Coal. for Leadership & Dev. v. Par. of Jefferson*, 926 F.2d 487, 492 (5th Cir. 1991) (same, in redistricting case).

That is what must happen here. Because neither the circuit court, the court of appeals, nor this Court invalidated the Exemption, none of them (nor the parties, for that matter) needed to address the remedy issue. The issue now “arise[s] anew on remand,” *Sullivan*, 63 F.4th at 1139, and so no one has forfeited any corresponding arguments.

\* \* \*

None of Catholic Charities’ “ten reasons” justifies its preferred remedy. (CCB Suppl. Br. 8.) Under the U.S. Supreme Court’s long-used remedial methodology, the objective indicators of legislative intent favor eliminating the Exemption, which would both protect Wisconsin workers and cure the discrimination the Exemption causes.

## CONCLUSION

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

Dated this 3rd day of November 2025.

Respectfully submitted,

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### **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 8857 words.

### **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 3rd day of November 2025.

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