No. 2020AP002007

In the Supreme Court of Wisconsin

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 the Supreme Court of the United States
Case No. 24-154

SUPPLEMENTAL RESPONSE BRIEF OF PETITIONERS-RESPONDENTS-PETITIONERS

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INTRODUCTION

Wisconsin puts before this Court a false dichotomy: Should the religious-purposes exemption be expanded so that all kinds of other religious non-profits (who are not even before this Court) can claim it too, or should it strike down the religious-purposes exception *in toto*? In reality, this Court is faced with a far simpler task. The U.S. Supreme Court's opinion makes clear that Catholic Charities brought an *as-applied* challenge and was granted *as-applied* relief. This resolves the remedial question. Striking down a statutory provision *on its face* would be a shockingly broad remedy after finding an as-applied constitutional violation. Instead, the remedy here is simple: grant relief specific to the Plaintiffs by holding that Catholic Charities and its sub-entities are entitled to claim the religious purposes exemption.

Wisconsin's counterarguments fail to grapple with what the U.S. Supreme Court and the Legislature actually said. Wisconsin fixates on irrelevant factual distinctions between this case and *Espinoza*, but the legal analysis is the same: Whether eliminating the exemption "flowed directly from … failure to follow federal law." The State also degrades the concept of religious neutrality, treating it as merely a mandate for "parity"—even if parity would exacerbate other Religion Clause violations. And instead of looking at the Legislature's express statements to both this Court and the U.S. Supreme Court, Wisconsin suggests that a severability presumption should be the central focus of this Court's inquiry into legislative intent. None of these arguments hold up.

And even if the remedial questions were close (they are not), the bevy of constitutional infirmities created or worsened by the State's proposed approach strongly support crafting an as-applied remedy specific to Catholic Charities. Eliminating the religious-purposes exemption—and thus exempting *some* religious groups *but not others* based on how their beliefs dictate the structure of their ministry—would merely exchange one form of denominational discrimination for another, without resolving any of the other constitutional infirmities Catholic Charities previously raised. Worse, it would penalize countless religious non-profits not even before this Court.

The simplest way to resolve this case is to take the Supreme Court at its word and grant Catholic Charities *as-applied* relief. This makes sense of the Supreme Court's entire opinion and avoids the thorny remedial and constitutional issues that Wisconsin tries to thrust this Court into. *See* CCB.Supp.Br.8-10 (identifying ten problems with Wisconsin's remedial argument).

ARGUMENT

I. Wisconsin's arguments are further reason to extend the exemption to Catholic Charities.

The arguments Wisconsin put before this Court are simply further proof that the religious purpose exemption should be extended to Catholic Charities.

A. This is an as-applied challenge, not a facial challenge, and the Supreme Court's ruling does not allow for remedial choice.

To hear Wisconsin tell it, the U.S. Supreme Court held that Section § 108.02(15)(h)(2) violates the First Amendment on its face, holding that the religious exemption has no "valid applications"

and "cannot be validly applied to *anyone*." Wis.Supp.Br.26 n.5 (emphasis added).

Nonsense. The United States Supreme Court repeatedly held, starting from the very beginning of its opinion, that it was deciding an as-applied federal constitutional challenge: "The question here is whether § 108.02(15)(h)(2), *as applied to petitioners* by the Wisconsin Supreme Court, violates the First Amendment." *Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 241 (2025) (emphasis added). Later: "We granted certiorari to decide whether the Wisconsin Supreme Court's interpretation of § 108.02(15)(h)(2), *as applied to petitioners*, violates the First Amendment." *Catholic Charities*, 605 U.S. at 247 (emphasis added). Again: "The Wisconsin Supreme Court's *application* of § 108.02(15)(h)(2) imposed a denominational preference." *Id.* at 241. And again: "[T]he law's *application* does not survive strict scrutiny, it cannot stand." *Id.* at 242. (emphasis added). And yet again: "In short, *as applied to petitioners* by the Wisconsin Supreme Court, Wis. Stat. § 108.02(15)(h)(2) imposes a denominational preference by differentiating between religions." *Id.* at 250 (emphasis added).

Wisconsin's confusion apparently stems from its misunderstanding of the word "facially" in the U.S. Supreme Court's opinion, when the Court stated that "[t]he Wisconsin Supreme Court's interpretation of § 108.02(h)(15)(2) facially differentiates among religions" and thus "cannot [be] save[d] … from strict scrutiny." *Id.* at 251-52.

But that sentence focuses not on what Catholic Charities did (bring a facial or as-applied challenge) or what the U.S. Supreme Court was doing (finding Wisconsin's treatment of Catholic Charities to be a facial or as-applied violation of the federal Constitution). Instead, the sentence focused on what this Court did, which was to "facially differentiate[] among religions." *Id.* at 251. That this Court's mode of analysis made facial distinctions does not transmute an as-applied federal constitutional challenge into a facial challenge.

Wisconsin's belief that the Court facially invalidated § 108.02(h)(15)(2) also cannot be reconciled with the governing standard for facial federal constitutional challenges. "In First Amendment cases" the question of facial invalidity "is whether 'a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (quoting *Americans for Prosperity Foundation v. Bonta,* 594 U.S. 595, 615 (2021)) (cleaned up). Yet the Supreme Court's opinion in this case said nothing about a "substantial number of applications" of the statute or the statute's "plainly legitimate sweep." Nor did the Court say anything to invoke the more general standard for facial federal constitutional challenges: "establish[ing] that no set of circumstances exists under which the law would be valid," or "that the law lacks a 'plainly legitimate sweep.'" *Moody,* 603 U.S. at 723 (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987) and *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 (2008)) (cleaned up).

If that weren't enough, the Supreme Court's strict scrutiny analysis proves that its holding was as-applied. *See Catholic Charities*, 605 U.S. at 252-54. The Court held that Wisconsin's denominational discrimination failed strict scrutiny in part because Catholic Charities independently "operate[s] [its] own unemployment compensation system for employees, which provides benefits largely 'equivalent' to the state system." *Id.* at 252-53. In light of this Catholic-Charities-specific factor, "the State fail[ed] to explain how the theological lines drawn by § 108.02(15)(h)(2) [were] narrowly tailored to advance [its] asserted interest, *particularly as applied to petitioners*." *Id.* at 252 (emphasis added). If the Supreme Court intended to issue a facial ruling, it would have made no sense to root its analysis in Catholic Charities' particular circumstances—the question, after all, would have been whether there were *any* possible constitutional application of the statute, not whether it could constitutionally be applied to Catholic Charities.

Finally, even before this case reached the U.S. Supreme Court, this Court also correctly treated it as an as-applied case. *See Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 3 N.W.3d 666, 687 (Wis. 2024) (Catholic Charities "brought" "[a]n as-applied challenge"); *id.* at 672 ("We further conclude that the application of § 108.02(15)(h)2 *as applied to the petitioners* does not violate the First Amendment because the petitioners have failed to demonstrate that the statute *as applied to them* is unconstitutional beyond a reasonable doubt." (emphases added)).

It is thus entirely preposterous to claim, as Wisconsin does, that the U.S. Supreme Court held that § 108.02(h)(15)(2) has no "valid

applications" and "cannot be validly applied to anyone." Wis.Supp.Br.26 n.5.

Instead, as the Supreme Court majority and concurrences stressed, this case involves a Catholic-Charities-specific question: Whether Catholic Charities is eligible for the religious-purposes exemption. *See* CCB.Supp.Br.19-20.

As Catholic Charities has reiterated at every stage of this litigation, it is not unconstitutional to exempt religious groups that, for example, proselytize in connection with their charity. Catholic Charities' argument has always been that the exemption may not be *limited* to those groups. And, as Catholic Charities has also consistently argued, it must be included in the exemption too, which is precisely the question the Supreme Court repeatedly emphasized it was addressing. *See id.*

To put it differently, Catholic Charities has always argued that the exemption, as drafted by the Legislature, is constitutionally valid. That necessarily follows from the legal standard for a federal constitutional as-applied challenge, where the plaintiff does not challenge the constitutionality of the statute itself. *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) (as-applied challenge is "to a particular application" of the statute whereas "[a] facial challenge is an attack on [the] statute itself"). The point is that the statute has been "applied" in an "unconstitutional … manner"—to exclude Catholic Charities because of its religious beliefs and exercise. *United States v. Seiwert*, 152 F.4th 854, 860 (7th Cir. 2025);

see Catholic Charities, 605 U.S. at 252 (this Court's restrictive interpretation of the exemption failed strict scrutiny "particularly as applied to petitioners").

Eliminating the religious-purposes exemption would be an improper response to Catholic Charities' successful as-applied challenge. When such a challenge succeeds, the "act is unconstitutional as applied to [the] plaintiff's specific activities even though it may be capable of valid application to others." *Surita v. Hyde*, 665 F.3d 860, 875 (7th Cir. 2011). Yet Wisconsin's proposed "remedy" would eliminate the religious-purposes exemption for everyone. *Cf. United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477-78 (1995) ("facial" remedies should be limited to "the occasional case" because "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants"); *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) ("classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy'").

Wisconsin nonetheless finds it significant that the U.S. Supreme Court said the religious purposes exemption "must be *invalidated*" and "cannot [be] save[d] … from strict scrutiny." *Catholic Charities*, 605 U.S. at 252; *see* Wis.Supp.Br.25-26. But that is perfectly consistent with an as-applied ruling. *See, e.g.*, *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018) ("a successful as-applied challenge invalidates … the particular application of the law" to the plaintiff). It is another way of saying that this Court's interpretation of the religious-purposes exemption cannot

lawfully be applied to Catholic Charities. As the Supreme Court put it, because "the law's *application*" in this way "d[id] not survive strict scrutiny, it c[ould not] stand." *Catholic Charities*, 605 U.S. at 242.

This being an as-applied case, Catholic Charities is entitled to an as-applied remedy. *See Nat'l Treasury Emps. Union*, 513 U.S. at 478 (detailing the "narrower remedy" appropriate in an as-applied case). Catholic Charities proved that its exclusion from the religious-purposes exemption is unconstitutional, *see Catholic Charities*, 605 U.S. at 252 (exclusion of some religious groups failed strict scrutiny "particularly as applied to petitioners"), so the appropriate remedy is to eliminate that exclusion by *including* Catholic Charities.

Wisconsin speculates that exempting Catholic Charities means Catholic hospitals in the State might soon claim an exemption too. Wis.Supp.Br.31-33. But again, an as-applied ruling provides relief *only to the plaintiff*, not other parties, *Italian Colors Rest.*, 878 F.3d at 1175, and a ruling for Catholic Charities does not prove that differently situated organizations are entitled to the same relief. Indeed, the Supreme Court's tailored-to-Catholic-Charities strict scrutiny analysis confirms as much. *Catholic Charities*, 605 U.S. at 252-53. Regardless, even if a Catholic hospital were to claim (and were ultimately granted) an exemption—which Wisconsin hasn't shown is likely—Catholic institutions have a theological "obligation to provide unemployment benefits … springing from the fundamental principle of the moral order in this sphere." Pope

Saint John Paul II, *Laborem Exercens* (1981). So Wisconsin's speculation is not only unfounded, but immaterial.

A remedy tailored to Catholic Charities is also consistent with longstanding principles of constitutional avoidance. When this Court "can reasonably adopt a saving construction of a statute to avoid a constitutional conflict, [it] do[es] so." *In re Commitment of Hager*, 911 N.W.2d 17, 30 (Wis. 2018). Catholic Charities' as-applied remedy—an injunction permitting it to claim the religious exemption—allows this Court to implement the U.S. Supreme Court's mandate, to keep the exemption as the Legislature drafted it, and to avoid the myriad constitutional problems that would result from deleting it. *See* CCB.Supp.Br.32-41. Wisconsin's remedy, by stark contrast, is much stronger medicine; it asks this Court to interpret the exemption to be facially unconstitutional in every possible application and to strike it from the statute—disrupting a carefully crafted statutory scheme for an untold number of employers who are not even before this Court. Wisconsin would kill the patient to defeat the disease. *Cf. Nat'l Treasury Emps. Union*, 513 U.S. at 478 (limiting relief to the parties to "avoid[] unnecessary adjudication of constitutional issues" and to avoid "tamper[ing] with the text of the statute").

Accepting that invitation also runs the risk of a second reversal at the U.S. Supreme Court. On numerous occasions over the past decade, the Court has granted review to vacate or reverse a lower court decision a second time in the same case. *See, e.g.*, *Thornell v. Jones*, 602 U.S. 154 (2024); *Sturgeon v. Frost*, 587 U.S. 28 (2019); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019); *Encino*

Motorcars, LLC v. Navarro, 584 U.S. 79 (2018); *Flowers v. Mississippi*, 588 U.S. 284 (2019); *Moore v. Texas*, 586 U.S. 133 (2019); *Thryv, Inc v. Click-To-Call Techs., LP*, 590 U.S. 45 (2020); *Office of the U.S. Tr. v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487 (2024); *Republic of Hungary v. Simon*, 604 U.S. 115 (2025); *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219 (2025). This Court should seek to avoid joining that list.

B. Wisconsin fails to distinguish *Espinoza*.

As Catholic Charities has explained, *Espinoza*—whose "analysis" Wisconsin casts as "unusual," Wis.Supp.Br.24—is controlling here. *See* CCB.Supp.Br.21-23. There, the U.S. Supreme Court rejected a state court's attempt to deny religious groups a benefit by wholesale invalidating a state scholarship program. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 487-89 (2020). As the Court explained, the "elimination of the program flowed directly from [the state court's] failure to follow the dictates of federal law"—namely, its decision to apply "a state law provision that expressly discriminate[d] on the basis of religious status." *Id.* at 487-88. So too here, eliminating the religious-purposes exemption would flow directly from this Court's failure to follow federal law, namely, its First-Amendment-violating interpretation of a facially neutral exemption. CCB.Supp.Br.22-23.

Wisconsin's only response is to invoke legally irrelevant differences between the law in *Espinoza* and the exemption here. In *Espinoza*, Wisconsin points out, the constitutional error stemmed from applying a separate state law—the discriminatory no-aid provision—to invalidate the program, whereas here, the constitutional error was read into the statutory exemption itself.

Wis.Supp.Br.23-24. But under *Espinoza*, the relevant question is not whether the discrimination was intrinsic or extrinsic to the statute, but whether invalidating the program would "flow[] directly[]" from the "failure to follow the dictates of federal law" that the Supreme Court identified. *Espinoza*, 591 U.S. at 488.

Here, it plainly would. Absent this Court's unlawful construction of the religious-purposes exemption, there could not possibly be any grounds for invalidating it. As in *Espinoza*, a state legislature "created the" religious exemption and "never chose to end it, for policy or other reasons"; instead, Wisconsin asks "a court" to "eliminate[]" it, "and not based on some innocuous principle of state law." *Id.* at 487. And even though "[t]he final step in [Wisconsin's] line of reasoning [would] eliminate[]" the exemption entirely, that does not fix the constitutional infirmity. *Id.* at 487. Instead, Wisconsin's—and this Court's—"error of federal law occurred at the beginning." *Id.*; *see* CCB.Supp.Br.22 (nullifying the statute would flow directly from the denominational discrimination that violated the First Amendment). *Espinoza* thus controls.

C. The First Amendment's Religion Clauses require neutrality, not parity.

Wisconsin argues that this Court has remedial choice because "[d]iscrimination is discrimination," and "[a] peculiar remedial rule for the First Amendment would make little sense." Wis.Supp.Br.18. This is wrong. As the U.S. Supreme Court explained in both *Walz* and *Kiryas Joel*, "[o]ur cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Bd.*

of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994); *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970) ("benevolent neutrality"); *see* CCB.Supp.Br.25. In other words, religious neutrality is not synonymous with mere "equal treatment." As Catholic Charities explained in its first supplemental brief, "[r]eligious neutrality ensures a zone of protection for fundamental rights." CCB.Supp.Br.25-26. Leveling down—and thus creating a host of related problems under the Religion Clauses—cannot pass for actual religious neutrality.

These additional constitutional infirmities also distinguish Wisconsin's cases. As Justice Kavanaugh explained in his solo concurrence in *Murphy v. Collier*, *no one* was permitted to be in the death chamber—either as a religious (or secular) "advisor" for the inmate. *Ramirez v. Collier,* 595 U.S. 411, 439-41 (2022) (Kavanaugh, J., concurring). The same is not true here; as Catholic Charities has explained, Wisconsin's approach would leave a wide swath of secular and religious exemptions still in place. CCB.Supp.Br.38-39. Similarly, in *Barr*, eliminating *all exceptions* and banning *all* robocalls did not create any new First Amendment problems. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 633 (2020) ("severing the government-debt exception does not raise any other constitutional problems," while finding no "other independent constitutional barriers"). So too in *Pritzker*, where both remedial options *remedied* the constitutional harm alleged: either the 50-person cap on in-person gathering would be applied equally to everyone, or the "free-exercise activities" exemption would be extended to include the plaintiffs. Either way, the government

would actually "erase that discrepancy" and cure the constitutional infirmity. *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 771 (7th Cir. 2020).

Here, as explained further in Section II and in Catholic Charities' first supplemental brief, eliminating the religious purposes exemption exacerbates Wisconsin's neutrality problem, ignores other independent constitutional violations, and creates even more constitutional infirmities. This easily distinguishes Wisconsin's cases and confirms that leveling down is not permitted when substantive Religion Clause protections, including religious neutrality, are at stake.

D. Legislative intent mandates extension of the exemption to Catholic Charities.

Even if this Court had to confront the false dichotomy Wisconsin proposes (it doesn't), Wisconsin is wrong to suggest that a presumption of severability somehow resolves the central question of legislative intent. *See* Wis.Supp.Br.27 (if the exemption is severable, it should be stricken). And Wisconsin is unsuccessful in attempting to rebut the strong evidence that the Legislature's intention is to include Catholic Charities within scope of the religious-purposes exemption.

Legislative intent, not severability, is the "touchstone" for remedial decision making. *John Q. Hammons,* 602 U.S. at 495. The "key question" is "what the legislature would have willed had it been apprised of the constitutional infirmity." *Id.* Severability is simply a clue as to intent. *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017) ("The choice between these outcomes is governed by the legislature's intent."); *Welsh v. United States*, 398 U.S. 333,

364-65 (1970) (Harlan, J., concurring) (explaining that a severability clause helps to define "the boundaries of permissible choice" and that, regardless, "it is, of course, necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation").

This focus on legislative intent also helps explain the approach the United States Supreme Court took in both *Barr* and *Murphy*. In *Barr*, the Court noted that severing the exception made sense because "Congress added an unconstitutional amendment to a prior law." *Barr*, 591 U.S. at 630. The Court thus "treated the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *Id*. The touchstone was thus, again, legislative intent. Similarly, Justice Kavanaugh in *Murphy* framed the question not as one of judicial remediation, but as deference to "the State" going forward. *Murphy v. Collier*, 587 U.S. 901, 913 (2019) (Kavanaugh, J., concurring). The exemption scheme in this case was enacted by the Legislature; determining the appropriate path forward thus requires deference to the Legislature's intent (subject to the First Amendment).

To determine legislative intent, as Catholic Charities has already explained, the Court need not look far: The Legislature told this Court and the U.S. Supreme Court that its intent is to *extend* the exemption to Catholic Charities. CCB.Supp.Br.28-29. Wisconsin, however, whistles past the graveyard, focusing instead on the Legislature's supposedly strong commitment to "broad unemployment coverage." Wis.Supp.Br.29. But even this argument fails on

its own terms: Wisconsin ignores the *forty* other forms of employment explicitly exempted from the Unemployment Compensation Act. CCB.Supp.Br.38; *Catholic Charities*, 605 U.S. at 253 (citing Wis. Stat. §§ 108.02(15)(f)-(kt)). The Act includes exemptions for insurance agents and solicitors, real estate agents, newspaper sellers, court reporters, consumer product sellers, domestic and agricultural laborers, certain elected or appointed political officials, members of the Wisconsin national guard in a military capacity, inmates of a custodial or penal institution, students, student nurses, hospital interns, nonresident aliens, AmeriCorps program participants, golf caddies, maritime service providers, all employers with fewer than four employees, and *many* others. Wisconsin also ignores the broadly worded religious exemption itself—which covers churches, ministers, and church-controlled religious organizations operated primarily for religious purposes. Wis. Stat. § 108.02(15)(h). If Wisconsin's interests in applying the unemployment tax to religious employers were so all-encompassing, why then did it provide for so many different exemptions, and why did it draft such a broad religious exemption? Wisconsin has no response.

The law's forty exemptions eviscerate Wisconsin's claim that the Legislature was so "committed to broad unemployment insurance coverage" that it would prefer this Court judicially rewrite a duly enacted law instead of simply extending the existing exemption to Catholic Charities—the presumptive remedy in as-applied

challenges. Wis.Supp.Br.29; *see supra* Section I.A.[1] And this is doubly so when the scope of the *religious* exemption advances important First Amendment principles, like avoiding religious entanglement, while exceptions for golf caddies, real estate agents, and many others are simply matters of *convenience.* It would be passing strange to suggest the Legislature is deeply concerned with ensuring that Catholic Charities pays into the state's program even when everyone agrees that exempting Catholic Charities would allow it to join another (better) unemployment compensation system, while the Legislature is fine permitting broad exemptions for countless other categories of employees—including domestic laborers and nonresident aliens—for whom there are unlikely to be any alternative avenues for obtaining unemployment protection. *See* CCB.Supp.Br.39.

Wisconsin's workability arguments similarly fail to land. *See* Wis.Supp.Br.32-33. First, the State claims extending the exemption to Catholic Charities would "disrupt" the unemployment exemption scheme, but it provides no evidence (or even a plausible argument) to support this claim. The State simply asserts that the unemployment scheme *could* function "*without* the Exemption" so

[1] Wisconsin is also wrong to suggest that assessing legislative intent should start by looking at the intensity of the legislature's commitment to providing broad unemployment insurance coverage. Here, as in *Welsh*, the "residual policy" is the religious exemption. *Welsh*, 398 U.S. at 365 (assessing the "intensity of commitment to the residual policy" and concluding that "policy of exempting religious conscientious objectors is one of longstanding tradition in this country"). This, (again, as in *Welsh*) is the policy that would apply to Catholic Charities if it were included within the scope of the exemption. *See id.* The legislature's strong commitment to accommodating religious exercise, CCB.Supp.Br.29-30, thus favors *extending* the residual policy (*i.e.,* the exemption) to Catholic Charities rather than eliminating it for everyone.

"elimination is especially proper." *Id.* at 32. Putting this *non sequitur* aside, the heart of Wisconsin's workability argument is that recognizing a religious exemption for Catholic Charities would mean some religious non-profits would be exempt while similar secular non-profits would have to pay into the system. Wis.Supp.Br.33. Tellingly, Wisconsin barely even pretends this raises any constitutional or practical problems. *Id.* (preemptively conceding that "[m]aybe" the First Amendment allows this).

There is good reason for Wisconsin's hedge: the United States Supreme Court has repeatedly held that accommodating religious exercise *does not* violate the Establishment Clause. As the Supreme Court has explained, "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S.136, 144-45 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971) ("[I]t is hardly impermissible for Congress to attempt to accommodate free exercise values."). Indeed, the Supreme Court's unanimous decision in *Cutter v. Wilkinson* upholding RLUIPA, which protects the religious exercise of prisoners, similarly confirms this point. Justice Ginsburg, writing for a unanimous Court, explained that RLUIPA "qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005). If the law were otherwise, "all manner of religious accommodations would fall." *Id.*

at 724. In short, "[r]eligious accommodations … need not come packaged with benefits to secular entities," nor is there any "requirement that legislative protections for fundamental rights march in lockstep." *Id.* (cleaned up).

Recognizing the weakness of this argument, Wisconsin finally resorts to pure speculation, claiming "[t]here is no reason to suspect" the Legislature would have wanted to exempt certain religious non-profits but not secular non-profits. Wis.Supp.Br.33. But this simply brings us back to the question we started with: What did the Legislature intend? Instead of addressing any actual "disrupt[ion]," Wisconsin just argues in circles.

II. Wisconsin ignores the other constitutional infirmities of its refusal to extend the exemption to Catholic Charities.

While Wisconsin invites this Court to adopt its late-concocted "remedy," it fails to address the multitude of constitutional problems this remedy would create or exacerbate. In Wisconsin's view, the only "First Amendment problem" this Court needs to watch out for is whether a provision "establish[es] a denominational preference." Wis.Supp.Br.34 (cleaned up). Hardly. As Catholic Charities has already explained, eliminating just one aspect of the religious exemption here would open a Pandora's box of additional constitutional infirmities. The prohibition on denominational discrimination is just one of the First Amendment's commands. *Catholic Charities*, 605 U.S. at 247. The remedy this Court imposes must also comply with the Religion Clauses' protections for church autonomy and religious neutrality, and against government entanglement, and the Free Exercise Clause's requirements of general applicability and neutrality. It would make no sense to impose a

remedy here that simply kicks the constitutional question back up to the United States Supreme Court.

As described in Catholic Charities' first supplemental brief, every one of those constitutional protections poses a problem for Wisconsin's remedial theory. CCB.Supp.Br. 32-41. *First*, the remedy violates church autonomy by severing Catholic Charities from the Diocese of Superior, with the Diocese exempt while Catholic Charities is not, thus penalizing Catholic Charities' compliance with the Catholic principle of subsidiarity. *See* CCB.Supp.Br. 33-35, 33 n.5 (citing *Catholic Charities*, 605 U.S. at 255-70 (Thomas, J., concurring) (agreeing with Catholic Charities' church-autonomy arguments)).

Second, the remedy violates basic principles of church-state entanglement, because eliminating the religious-purposes exemption would pressure Catholic Charities to reincorporate with the Diocese (which, again, is exempt) or otherwise face state interference with employment actions that are required "by … religious creeds," resulting in inquiries "into the good faith of the position asserted by [Catholic Charities'] clergy-administrators." *Id.* at 37 (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)). Worse, Wisconsin conceded before the U.S. Supreme Court that the religious-purposes "avoids entangling the state with unemployment eligibility decisions that implicate questions about an employee's distinctively religious activity." Resp. Br. 21-22, *Catholic Charities*, 605 U.S. 238 (No. 24-154). Eliminating the religious-purposes exemption *entirely* will thus require Wisconsin to engage

in what the State has conceded are "entangling … unemployment eligibility decisions." *Id.*; CCB.Supp.Br.36-37.

Third, the remedy violates the Free Exercise Clause because the Act would then deny Catholic Charities an exemption while exempting "secular conduct that undermines the government's asserted interests in a similar way," rendering the Act not generally applicable. *Id.* at 38 (quoting *Fulton*, 593 U.S. at 534).

And *fourth*, Wisconsin's remedy would violate First Amendment religious neutrality, as its whack-a-mole maneuvers to deny Catholic Charities an exemption raise much "more than a 'slight suspicion' that the State is 'subtl[y] depart[ing] from neutrality.'" *Id.* at 41 (alterations in original) (quoting *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018)).

Wisconsin addresses only one of these problems, and superficially at that, claiming that the record in this case "[l]ack[s] any evidence of animus." Wis.Supp.Br.35. Even if that were true, religious targeting claims do not require a showing of animus. *See* CCB.Supp.Br.41 n.7. And suggesting the record here is devoid of evidence of targeting would be quite the claim, given that the U.S. Supreme Court has already said Wisconsin's litigation position resulted in "textbook denominational discrimination." *Catholic Charities*, 605 U.S. at 248. In reality, Wisconsin has already discriminated against Catholic Charities, and its continued refusal to provide Catholic Charities an exemption while simultaneously handing them out to numerous secular entities evidences a lack of

neutrality. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (regulating religious activity while excluding similar secular activity renders law not neutral).

This Court can avoid similar discrimination, and a host of other constitutional problems, by simply affirming the Douglas County Circuit Court and directing entry of an as-applied injunction that Catholic Charities is entitled to claim the religious purposes exemption.

CONCLUSION

The judgment of the Douglas County Circuit Court should be affirmed and the exemption extended to Catholic Charities.

Respectfully submitted,

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Dated this 3rd day of November, 2025.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,961 words.

Dated this 3rd day of November, 2025.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 3, 2025, I electronically filed with the Court the above supplemental brief. I also served a true and correct copy of both via email upon:

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