FILED
11-03-2025
CLERK OF WISCONSIN
SUPREME COURT

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

NON-PARTY AMICUS CURIAE BRIEF OF AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PETITIONERS-RESPONDENTS-PETITIONERS

Matthew M. Fernholz
State Bar No. 1065765
CRAMER MULTHAUF LLP
1601 E. Racine Ave. Ste. 200
Waukesha, WI 53186
(262) 542-4278
mmf@cmlawgroup.com

Geoffrey R. Surtees (*phv pending*)
AMERICAN CENTER FOR LAW & JUSTICE
PO Box 60
New Hope, KY 40052
(502) 827-0951
gsurtees@aclj.org

Counsel for the American Center for Law & Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF INTEREST 4

INTRODUCTION 5

ARGUMENT 6

I. *Espinoza* Bars this Court from Eliminating the Religious Exemption 6

II. The Only Appropriate Remedy is to Grant the CCB A Religious Exemption 10

CONCLUSION 12

FORM AND LENGTH CERTIFICATION 14

CERTIFICATE OF FILING AND SERVICE 15

TABLE OF AUTHORITIES

Cases

Carson v. Makin,
596 U.S. 767 (2022) 4

Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Review Comm'n,
605 U.S. 238 (2025) 4, 5, 8,10

City of Boerne v. Flores,
521 U.S. 507 (1997) 4

Employment Div., Dept. of Human Resources of Ore. v. Smith,
494 U.S. 872, 884 (1990) 9

Espinoza v. Mont. Dep't of Revenue,
591 U.S. 464 (2020) ..... *passim*

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) 4

Locke v. Davey,
540 U.S. 712 (2004) 4

Marbury v. Madison,
5 U.S. 137 (1803) 7

Murphy v. Collier,
587 U.S. 901 (2019) 11

Statutes

Wis. Stat. § 108.02(15)(h)(2) ..... *passim*

STATEMENT OF INTEREST

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of religious liberty. The ACLJ has appeared before the U.S. Supreme Court in many cases advocating for the freedoms of religious groups and individuals, as counsel for a party, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Locke v. Davey*, 540 U.S. 712 (2004), or for amicus, *e.g.*, *Carson v. Makin*, 596 U.S. 767 (2022); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In addition, and of relevance to the case at bar, the ACLJ submitted amicus curiae briefs with the U.S. Supreme Court in *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Review Comm'n*, 605 U.S. 238 (2025), and *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020).

The ACLJ has expertise in the First Amendment's Religion Clauses and Free Speech Clause, reflected in several decades of litigation experience, and the ACLJ respectfully submits that its expertise may benefit this Court in deciding the appropriate remedy in this case. As the ACLJ explains in this brief, the only appropriate remedy, pursuant to Free Exercise decisions of the U.S. Supreme Court, especially *Espinoza*, is to grant Petitioners the religious exemption they seek. A decision by this Court to eliminate the religious exemption of Wis. Stat. §108.02(15)(h)(2) in its entirety would run afoul of *Espinoza* and undermine the U.S. Supreme Court's remand order not to proceed inconsistently with its opinion.

INTRODUCTION

In *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Review*

Comm'n, 605 U.S. 238 (2025), the U.S. Supreme Court held that this Court's application of Wis. Stat. § 108.02(15)(h)(2) to Catholic Charities Bureau ("CCB") and its sub-entities violated the First Amendment: "The Wisconsin Supreme Court's application of § 108.02(15)(h)(2) imposed a denominational preference by differentiating between religions based on theological lines. Because the law's application does not survive strict scrutiny, it cannot stand." 605 U.S. at 241-42. The obvious remedy is to discard this Court's unconstitutional application of the state statute.

The state nevertheless proposes, on remand, that this Court should nullify § 108.02(15)(h)(2) *in its entirety*. But that would be to commit the very same error the U.S. Supreme Court reversed in a *different* case, *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020). There, the Montana Supreme Court invalidated an entire scholarship tax-credit program rather than permit religious schools to participate. *Espinoza* squarely rejected this judicial remedy under the Free Exercise Clause. The logic is straightforward: the *rationale* of the Montana Supreme Court for striking the program was itself constitutionally flawed. Hence, it could not cure a federal constitutional problem.

So too here. The constitutional problem the Supreme Court identified in *Catholic Charities* was not a *facial* defect in § 108.02(15)(h)(2) as enacted by the Wisconsin Legislature but rather this Court's *interpretation* and *application* of that provision to CCB in a way that, according to the U.S. Supreme Court, discriminated among religious organizations on theological grounds. With this Court's *rationale* for excluding CCB now constitutionally off the table, there is no longer a problem to solve. CCB is entitled to the exemption. The

appropriate remedy is therefore to apply § 108.02(15)(h)(2) to Petitioners in a manner consistent with the First Amendment—not to nullify the Legislature's religious exemption altogether.

This Court should correct its prior ruling by extending the benefit to Petitioners consistent with the Supreme Court's ruling, preserving the Legislature's policy choices unless and until the Legislature decides otherwise. Anything less (refusing to extend) or more (wiping out the provision) would be inconsistent with both *Espinoza* and the Supreme Court's explicit framing of the issue in *Catholic Charities Bureau* as one of unconstitutional application of the exemption.

ARGUMENT

I. *Espinoza* Bars this Court from Eliminating the Religious Exemption.

In *Espinoza*, the Montana Legislature established a scholarship program providing tuition assistance to parents sending their children to private schools through a tax credit mechanism for donors to scholarship-granting organizations. 591 U.S. at 468–69. The legislature, however, mandated that the program be administered consistent with Article X, Section 6, of the Montana Constitution—a "no-aid" provision prohibiting government aid to religious schools. *Id*. at 469–70. When petitioners "sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program." *Id*. at 468. The state contended no constitutional violation occurred because the state court had leveled down by eliminating the program entirely.

The U.S. Supreme Court reversed. Rejecting Justice Ginsberg's dissent that the Montana Supreme Court simply chose to "put all private school parents in the same boat" by invalidating the scholarship

program, *id*. at 519, the Court observed: "The Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law." *Id*. at 487.

In other words, because the constitutional defect addressed in *Espinoza* was not the scholarship program as such, but the Montana Supreme Court's application of the state constitution's "no-aid" provision, there was no reason for the court (rather than the legislature) to level down by eliminating the program. The correct remedy, according to *Espinoza*, was to disregard the no-aid provision, apply the First Amendment, and grant Plaintiffs their right to participate in the program. As the Court explained:

> When the [Montana Supreme] Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, "one of those cases" in which application of the no-aid provision "would violate the Free Exercise Clause," the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program.

Id. at 487–88.

Reaffirming the foundational principle that "[t]he Supremacy Clause provides that 'the Judges in every State shall be bound' by the Federal Constitution," the Court admonished the Montana Supreme Court, stating that "it should have 'disregard[ed]' the no-aid provision and decided this case 'conformably to the [C]onstitution' of the United States." *Id*. at 488 (quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 178 (1803)).

The logic of *Espinoza* applies with full force here. The constitutional wrong identified by the U.S. Supreme Court in this case was not § 108.02(15)(h)(2) as such, but this Court's interpretation and application of the exemption to CCB. Indeed, the question addressed by the U.S. Supreme Court in *Catholic Charities* was not whether § 108.02(15)(h)(2) is facially unconstitutional, but "whether the Wisconsin Supreme Court's *interpretation* of § 108.02(15)(h)(2), *as applied* to petitioners, violates the First Amendment." *Id*. at 247 (emphasis added). In answering that question, the Court made it clear that it was "[t]he Wisconsin Supreme Court's *interpretation* of § 108.02(15)(h)(2) [that] facially differentiates among religions based on theological choices"—not the text of the religious exemption itself. *Id*. at 251 (emphasis added).

Because the constitutional wrong to be remedied in this case does not lie with § 108.02(15)(h)(2), but with how this Court interpreted and applied it, the proper course of action on remand is for this Court to now conform its interpretation and application of the statute according to the First Amendment principles articulated by the U.S. Supreme Court. Following that course to its logical conclusion yields only one appropriate remedy: to apply the statute in a religiously neutral way so as to exempt CCB. To strike down the exemption in its entirety would not remedy what the U.S. Supreme Court held to be a First Amendment violation: "as applied to petitioners by the Wisconsin Supreme Court, Wis. Stat. § 108.02(15)(h)(2) imposes a denominational preference by differentiating between religions based on theological choices." *Id*. at 250.

In *Espinoza*, the Court emphasized that the Montana Legislature created the scholarship program and did not "cho[ose] to end it, for policy or other reasons." So too here: the Wisconsin Legislature enacted §

108.02(15)(h)(2), not this Court. The exemption exists because the Legislature affirmatively chose to include it as part of the statutory framework governing unemployment compensation. Abolishing the exemption would therefore represent a judicial policy choice that the Legislature did not make—effectively rewriting the statute to exclude religious organizations from a benefit the elected representatives deliberately provided.

Such judicial elimination would perpetuate, rather than remedy, the original constitutional harm in this case. The injury Petitioners suffered stems from their exclusion from unemployment benefits. Striking down that exemption would not cure this exclusion; it would entrench it. Petitioners would still be denied the statutory protection, only now they would be excluded by judicial decree rather than by the challenged provision alone. This approach transforms a constitutional violation into a permanent deprivation, leaving Petitioners worse off than if the Legislature had simply enacted a constitutional statute in the first place. In fact, such a remedy—eliminating the religious exemption but keeping in place a host of secular ones—would raise yet another Free Exercise problem. *See, e.g.*, *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990) ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.").

This case is, if anything, more straightforward than *Espinoza*. As explained, the Montana Supreme Court in *Espinoza* purported to remedy the injury by striking down the entire scholarship program rather than simply rejecting the invitation to apply the state constitutional no-aid provision to exclude religious schools from an otherwise generally

available benefit. The Montana court chose the most drastic option—eliminating the program for everyone—rather than the obvious solution of allowing religious schools to participate on equal terms in accordance with the First Amendment.

Here, the remedial path forward is even clearer because there is no state constitutional or statutory provision driving the exclusion of religious organizations like CCB. Montana had its Blaine Amendment—a state constitutional provision explicitly prohibiting aid to religious schools—that created tension with federal constitutional requirements. Wisconsin has no such provision at play. There is no Wisconsin constitutional no-aid clause to interpret, no competing statutory mandate to reconcile, and no state law obstacle requiring this Court to choose between state and federal constitutional commands. The problem to be remedied lies solely with how this Court interpreted and applied the text of § 108.02(15)(h)(2) itself.

II. The Only Appropriate Remedy is to Grant the CCB a Religious Exemption.

The U.S. Supreme Court's decision in this case has clarified the controlling First Amendment principles governing this case. In doing so, the Supreme Court corrected this Court's prior understanding of core principles governing the Religion Clauses. The Supreme Court made clear that applying state law in a fashion that "imposes a denominational preference by differentiating between religions based on theological choices," is inconsistent with the Religion Clauses and cannot stand. *Cath. Charities Bureau*, 605 U.S. at 250. That principle now governs how Wisconsin's religious exemption must be interpreted and applied to CCB's request for an exemption.

Given the U.S. Supreme Court's authoritative and binding guidance, the only logical remedy is to apply the statute to CCB in a manner that does not offend the Federal Constitution. The statute itself remains valid; what was constitutionally defective was this Court's restrictive *interpretation* that imposed unconstitutional conditions on religious organizations seeking to invoke the exemption. With the Supreme Court having supplied the correct constitutional framework, this Court can and must now apply § 108.02(15)(h)(2) consistent with those principles. There is no need to strike down the exemption, no need to deprive all religious organizations of the benefit the Legislature conferred, and no need to engage in dramatic remedial surgery on Wisconsin's unemployment compensation scheme.

Respondents invoke Justice Kavanaugh's concurrence in *Murphy v. Collier*—that "the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward." 587 U.S. 901, 902 (2019) (Kavanaugh, J., concurring in grant of application for stay). That reliance is misplaced. No one doubts the Wisconsin Legislature may revise the State's unemployment-compensation exemptions so long as constitutional limits are satisfied. But for this Court to "amend" those exemptions, by way of a judicial remedy, conflicts with *Espinoza*. Addressing Justice Sotomayor's concern that the Montana Supreme Court would need to "order the State to recreate" a scholarship program that "no longer exists," the *Espinoza* majority again emphasized it was "the Montana Supreme Court that eliminated the program," not the Legislature. 591 U.S. at 488 n.4. The Court said its ruling merely restored "the status quo established by the Montana Legislature before the [Montana Supreme] Court's error of federal law,"

expressly declining to opine on "any alterations the Legislature may choose to make in the future." *Id.*

The same rationale applies here. Nullifying the religious exemption to correct the Court's prior "error of federal law" would not reinstate the status quo as established by the Wisconsin legislature at the time Petitioners sought their exemption; it would upend it. Any alterations to Wisconsin's unemployment-compensation exemptions lie with the Legislature, not this Court. In *Murphy*, it was the offending governmental agency that leveled down to address its unconstitutional policy, not a court of law.

Should this Court follow the Montana Supreme Court's path in *Espinoza* by striking down the religious exemption entirely, the fate of that decision in the hands of the U.S. Supreme Court would be entirely predictable. Just as the Supreme Court reversed Montana's decision to eliminate the scholarship program rather than remedy the constitutional violation, it would undoubtedly reverse a decision here that eliminates the religious exemption rather than simply applying it in a constitutionally permissible manner. The Supreme Court in *Espinoza* made clear that an unconstitutional rationale cannot support a remedy for that unconstitutionality. Such a remedy compounds the constitutional injury rather than curing it. This Court should not repeat the Montana Supreme Court's mistake.

CONCLUSION

The fundamental purpose of any judicial remedy is to redress an injury. Section § 108.02(15)(h)(2) has not injured Plaintiffs. The source of Petitioners' injury is how Respondents applied the religious exemption to Petitioners—an application affirmed by this Court but unanimously

rejected by the U.S. Supreme Court as violating the First Amendment. Just as the elimination of the scholarship program did not redress the First Amendment injury in *Espinoza*, eliminating the religious exemption would not do so here. The Court should grant CCB and its sub-entities the religious exemption they seek, applying § 108.02(15)(h)(2) in a religiously neutral fashion that conforms to the U.S. Constitution as authoritatively construed by the U.S. Supreme Court in this very case.

Dated this 3rd day of November 2025.

Respectfully submitted,

Electronically signed by Matthew M. Fernholz
Matthew M. Fernholz (Bar No. 1065765)
CRAMER MULTHAUF LLP
1601 E. Racine Ave., Suite 200
Waukesha, WI 53186
(262) 542-4278
mmf@cmlawgroup.com

Electronically signed by Geoffrey R. Surtees
(*phv pending*)
AMERICAN CENTER FOR LAW & JUSTICE
PO Box 60
New Hope, KY 40052
(502) 827-0951
gsurtees@aclj.org

Counsel for the American Center for Law & Justice

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 produced with a proportional serif font. The length of this brief is 2,454 words.

Dated this 3rd day of November 2025.

Electronically signed by Matthew M. Fernholz
Matthew M. Fernholz
SBN: 1065765

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 3, 2025, I electronically filed this brief using the Wisconsin Appellate Court Electronic Filing System, which accomplishes electronic notice and service for all parties.

Dated this 3rd day of November 2025.

Electronically signed by Matthew M. Fernholz
Matthew M. Fernholz
SBN: 1065765