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SUPREME COURT OF WISCONSIN

Case No. 2020AP2007

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

Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW
COMMISSION

Respondent-Co-Appellant

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE
DEVELOPMENT

Respondent-Appellant

**ON REMAND FROM THE SUPREME COURT OF
THE UNITED STATES**

BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY,
REJOYCE IN JESUS MINISTRIES, AND CAMPUS CRUSADE FOR
CHRIST IN SUPPORT OF PETITIONERS-RESPONDENTS-
PETITIONERS

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STATEMENT OF INTEREST

Christian Legal Society (“CLS”) is a national association of Christian attorneys, law students, and law professors committed to religious freedom and the integration of faith and law. CLS has attorney and law student chapters across the nation. Through its Center for Law & Religious Freedom, CLS has advocated for the rights of religious organizations for nearly 50 years.

ReJOYce in Jesus Ministries is a non-profit Christian organization that began in 1974 as a student campus group at Pepperdine University in Los Angeles, California. Since then, ReJOYce in Jesus Ministries has grown considerably and today is a thriving organization with campus outreaches across the nation.

Campus Crusade for Christ (“Cru”) is a worldwide Christian evangelism and discipleship nonprofit organization, focused on helping people know and experience God’s love and plan for their lives. It was founded in 1951 as a campus ministry. Over the last 75 years, Cru has grown to include multiple ministries focused on campuses, cities, athletes, families, providing humanitarian aid, and more.

CLS, ReJOYce in Jesus Ministries, and Cru (“Amici”) filed an *amicus curiae* brief in support of Catholic Charities Bureau, Inc. in the United States Supreme Court. Amici retain a strong interest in this case because the exemption at issue is textually parallel to provisions in federal law and in the laws of more than 40 states. How courts interpret and apply such exemptions has national implications for religious nonprofits that serve the public without regard to religion. Amici urge this Court to preserve the exemption and apply it neutrally, consistent with constitutional principles and longstanding precedent.

INTRODUCTION

After nearly a decade of litigation between Catholic Charities Bureau, Inc., and the State of Wisconsin, the United States Supreme Court issued a unanimous and final ruling in favor of Catholic Charities. It held that this Court's interpretation of Wis. Stat. § 108.02(15)(h)(2) established denominational preferences in violation of the First Amendment. That error led to the improper denial of a tax exemption to Catholic Charities. The Supreme Court unanimously reversed this Court's decision and remanded the case for proceedings consistent with its opinion.

That should have ended the dispute. But it didn't. Rather than comply with the Constitution and the Supreme Court's clear directive, the State now asks this Court to help it sidestep the ruling. This Court should decline that invitation for three reasons. First, the Supreme Court's decision leaves no room for creative reinterpretation. It found problems with *the application of the law*—not with the law itself—and it reversed rather than vacated this Court's unconstitutional judgment, a significant choice on the high court's part. Second, both precedent and foundational principles of separation of powers require this Court to apply the exemption in favor of Catholic Charities. Third, the State's alternative proposal is constitutionally flawed in its own right; compounding one violation of neutrality on top of another. The only lawful and appropriate outcome is to grant Catholic Charities the exemption to which it is entitled.

ARGUMENT

I. The United States Supreme Court Directed This Court To Extend The Exemption, Not Erase It.

A. The Supreme Court's opinion identifies a flawed application, not a flawed statute.

The constitutional defect in this case is interpretive, not textual. This Court believed it could conduct an “objective inquiry” into Catholic Charities’ activities without plunging into “a First Amendment quagmire.” *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm’n*, 2024 WI 13, ¶56. But the interpretive test it adopted effectively conditioned the exemption on serving only co-religionists or proselytizing—conduct the Catholic faith forbids in the context of charitable work. *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 241 (2025).

The statute itself contains no such requirement. The Supreme Court “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.” *Id.* at 247 (emphases added). Throughout its opinion, the Court repeatedly tied the constitutional violation to this Court’s interpretation and application, not to the statute on its face. It held that “[t]he *Wisconsin Supreme Court’s application* of § 108.02(15)(h)(2) imposed a denominational preference by differentiating between religions based on theological lines.” *Id.* at 241-42 (emphasis added); *see also id.* at 250-51 (“Wisconsin’s exemption, *as interpreted by its Supreme Court*, thus grants a denominational preference.” (emphasis added)).

The State incorrectly suggests otherwise. Its supplemental brief strongly implies that the opinion described the statute itself as facially flawed. Resp.'s Br. at 25 n.5 (relying on the Court's use of the phrase "facially differentiates" to suggest that the "facial" problem existed in the statute itself). The State misreads the opinion of the nation's highest court. In the sentence it cites, the subject is "The Wisconsin Supreme Court's interpretation"—not the statute: "*The Wisconsin Supreme Court's interpretation* of § 108.02(15)(h)(2) facially differentiates among religions based on theological choices." *Cath. Charities*, 605 U.S. at 251 (emphasis added).

Although the opinion once references the statute as "granting denominational preferences" without restating "as interpreted," the opinion elsewhere clarifies that the Court's holding turns on the interpretation and application of the statute. *Compare id.* at 252 ("Because § 108.02(15)(h)(2) 'grants denominational preferences of the sort consistently and firmly deprecated in our precedents,' it [must withstand strict scrutiny].") *with id.* at 242 ("Because the law's *application* does not survive strict scrutiny, it cannot stand." (emphasis added)).

The Court further underscored the interpretive nature of the defect by noting that textually parallel exemptions exist in federal law and in at least 40 other states. *Id.* at 242 & n.1. The State identified no jurisdiction that employs a test like this Court's "objective inquiry." *Id.* The upshot is clear: the problem lies with this Court's test, not the statutory text.

Because the defect is interpretive, the remedy is straightforward. This Court should construe the exemption consistently with the Supreme

Court's reasoning and the canon of constitutional avoidance. *See Panzer v. Doyle*, 2004 WI 52, ¶56 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.") (citations omitted).

B. The only appropriate remedy is expansion.

The Supreme Court's disposition leaves no ambiguity: it unanimously *reversed* this Court's judgment. *Cath. Charities*, 605 U.S. at 254. That procedural choice is significant. The Court reverses a judgment only when it finds the decision below to be "absolutely wrong"; it vacates when the judgment is "less than absolutely wrong." *The Supreme Court's Style Guide* § 10.5 (Jack Metzler ed., 2016). Here, the Court's unanimous reversal signals a categorical rejection of this Court's prior outcome, as well as its underlying statutory interpretation.

The opinion confirms as much. Although the Court acknowledged that "there may be hard calls to make in policing" denominational neutrality, it emphasized that "this is not one." *Cath. Charities*, 605 U.S. at 254. That framing leaves no room for further factual development or reconsideration. The Court did not merely disagree with this Court's reasoning—it invalidated the result and endorsed the opposite result.

Accordingly, the only appropriate course on remand is to apply the exemption to Catholic Charities. The Supreme Court's mandate does not invite this Court to revisit the merits or entertain alternative remedies. It requires this Court to correct its prior error by extending the exemption to the petitioners who were wrongly excluded.

II. Precedent and Institutional Principles Counsel Against The State's Proposal.

A. Leveling up is the preferred approach.

The State's proposed remedy—striking the exemption—contravenes settled remedial principles and invites an unwarranted intrusion into legislative prerogatives. When a statute unconstitutionally singles out a group for disfavored treatment, “the preferred rule in the typical case is to extend favorable treatment.” *Sessions v. Morales-Santana*, 582 U.S. 47, 77 (2017) (citing *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979)). Leveling down is reserved for cases where the legislature would have chosen to preserve a general rule over a favored exception. *Sessions*, 582 U.S. at 76-77.

This case presents no such dilemma. Catholic Charities seeks inclusion within an existing exempt class, not the creation of a new benefit. Extending the exemption here is discrete and consistent with legislative design.

Sessions provides a strong example of an atypical case. In *Sessions*, our courts considered a challenge to a statute that established a general rule and singled out one group for *avored* treatment. *Id.* at 51. The Supreme Court held that Congress would have preferred to preserve “the general rule” over the favorable exception, so it eliminated the exception. *Id.* at 76-77. In trimming the exemption to preserve the general rule, the Court noted that the remedial question was a “vexing problem.” *Id.* at 77 n.28.

This case presents no such vexing issues. This Court is not asked to extend the benefits of one favored group to all other groups, as the Supreme Court was asked to do in *Sessions*. Instead, Catholic Charities

has asked to be included in the broader group of religious organizations and houses of worship receiving a statutory exemption. The impact of extending favorable treatment in this case is far more discrete than the impact of taking the same approach in *Sessions*.

B. Legislative intent and separation of powers counsel in favor of extension.

Legislative intent confirms that leveling up is the correct outcome. The exemption is part of a broader statutory framework that protects religious organizations, including exemptions for schools, camps, and clergy housing. *See* Wis. Stat. §§ 70.11, 77.54, 108.02. Eliminating the exemption would disrupt that scheme and undermine Wisconsin's alignment with the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311. States must maintain FUTA compliance to receive federal grants for unemployment programs. *See* 29 U.S.C. § 49d(b); 42 U.S.C. § 501; *California v. Grace Brethren Church*, 457 U.S. 393, 398 (1982). The Supreme Court noted that Wisconsin's exemption is "textually parallel" to its federal counterpart. *Cath. Charities*, 605 U.S. at 242. Striking the exemption would jeopardize federal funding and contravene legislative policy.

Finally, absent necessity, judicial authority does not extend to rewriting statutes. The Wisconsin Constitution vests legislative power in the Legislature. Wis. Const. art. IV, § 1; *see Evers v. Marklein*, 2024 WI 31, ¶12 ("The legislative power encompasses the ability to determine whether there shall be a law, its scope, and its limitations.") (citations omitted). Excising the exemption would usurp that prerogative and impose sweeping consequences on religious organizations that have relied on the exemption for decades. The only institutionally proper

remedy—consistent with precedent, legislative intent, and the Supreme Court’s unanimous mandate—is to extend the exemption to Catholic Charities without dismantling the statutory framework.

III. Striking The Exemption Risks Swapping One Constitutional Violation For Another.

The State’s proposal to eliminate the exemption would not restore constitutional compliance. Instead, it would create a new violation under the Free Exercise Clause. Laws must be both neutral toward religion and generally applicable to avoid strict scrutiny. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990). The principle of neutrality forbids government action that reflects hostility toward religion, whether overt or subtle. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993). Courts assess neutrality by examining “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body.” *Id.* at 540.

Those factors weigh heavily against the State’s proposal. For more than a decade, the State has resisted Catholic Charities’ inclusion in the exemption and defended a test that conditioned eligibility on proselytizing—conduct the Catholic faith forbids. *Cath. Charities*, 605 U.S. at 241, 249-50. The Supreme Court unanimously rejected that test, describing this case as “not one” of the “hard calls” to be made in policing denominational neutrality. *Id.* at 254.

On remand, the State now seeks to abolish the exemption entirely rather than comply with the Court’s directive to apply it evenhandedly.

That sequence of events strongly suggests impermissible hostility toward religion. *See Lukumi*, 508 U.S. at 540.

Wholesale invalidation would also magnify the harm. It would replace discrimination against one faith with discrimination against many, stripping longstanding protections from religious organizations that have relied on the exemption for decades. The only constitutionally consistent course is to apply the exemption to Catholic Charities and similarly situated organizations.

CONCLUSION

For ten years, Catholic Charities has fought to receive a tax exemption to which it is clearly entitled. The State has battled every step of the way to prevent Catholic Charities from the benefit of that tax exemption. The United States Supreme Court conferred upon Catholic Charities a unanimous victory, and it noted that the case was not particularly close.

And yet, the State continues to resist the outcome required by the First Amendment. Its proposed remedy defies the Supreme Court's unanimous decision. It contravenes judicial precedent. It usurps the role of the legislature. And it likely threatens federal funding for Wisconsin's unemployment program. In so doing, it would invite additional litigation. This Court should reject the State's invitation to discard the exemption

and instead apply the statute as written and as constitutionally construed.

Dated this 6th 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. §§ 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,180 words.

Dated this 6th day of November 2025.

Electronically signed by Joseph Olson
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 6, 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 6th day of November 2025.

Electronically signed by Joseph Olson
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