FILED
11-26-2025
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP2007

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

Petitioners-Respondents-Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondent-Appellant.

ON REMAND FROM UNITED STATES SUPREME COURT

SUPPLEMENTAL BRIEF OF THE STATE PARTIES RESPONDING TO NONPARTIES

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INTRODUCTION

Amici's arguments are no more persuasive than Catholic Charities'.

Several argue that a remedy should be limited to the Exemption's application to Catholic Charities. But the Supreme Court held that the Exemption is unconstitutionally underinclusive on its face. It unfairly favors every religious nonprofit it exempts and unfairly disfavors every religious nonprofit it does not. Such across-the-board discrimination can be cured only by expanding the Exemption or eliminating it entirely.

The main question is whether the Legislature would have preferred a remedy that includes more, or fewer, Wisconsin workers in the unemployment insurance system. The express statutory preference for broad unemployment coverage in Wis. Stat. § 108.01 answers that question. Some amici point to other religious exemptions or other worker-specific unemployment exemptions in chapter 108, but other religious exemptions don't involve the interests presented in this unemployment context, and other unemployment exemptions address types of workers (not entire employers) who don't warrant coverage for specific reasons that are not present here.

Amici also raise several constitutional concerns, but the only arguments not made by Catholic Charities fare no better than those Catholic Charities has already tried.

ARGUMENT

I. Amici cannot avoid the remedial choice here.

A. Under the Supreme Court's holding, the Exemption is facially invalid.

Most amici argue that the Supreme Court invalidated only a single application of the Exemption and left the rest

intact. (Leg. 7–9; WCRIS 7–10; ACLJ 5–6; NCLA 10–13[1]; CLS 7–8.) That premise is wrong. The Court held that the Exemption is unconstitutionally underinclusive, which means *every* application is invalid, not just the single application here to Catholic Charities.

The Court first observed that "[a] law"—not just an application—"that differentiates between religions along theological lines is textbook denominational discrimination." *Cath. Charities Bureau, Inc. v. LIRC*, 605 U.S. 238, 248 (2025) ("*Catholic Charities II*"). On its face, the Exemption is such a law: it "facially differentiates among religions" by drawing a discriminatory "theological line[ ]" between who is eligible and who isn't. *Id.* at 251–52. The Exemption does so by hinging eligibility on "whether an organization participated in worship services, religious outreach, ceremony, or religious education." *Id.* at 245 (quoting *Cath. Charities Bureau, Inc. v. LIRC*, 2024 WI 13, ¶ 60, 411 Wis.2d 1, 3 N.W. 3d 666 ("*Catholic Charities I*")); *see also id.* at 252 (criteria include "worship, proselytization, [and] religious education"). Because these criteria implicate "fundamentally theological choices," using them to "exclude[ ] religious organizations"—not just Catholic Charities—"facially favors some denominations over others." *Id.* at 252.

By drawing this "theological line[ ]," *id.* at 248, the Exemption is unconstitutionally underinclusive. That means it is invalid not just when denied to Catholic Charities, but whenever it is discriminatorily granted *or* denied to anyone. As for hypothetical religious employers who *would* receive the Exemption because they engage in worship, proselytization, or religious education (Leg. 11), that unconstitutionally discriminates precisely because it includes such employers while "exclud[ing]" others like Catholic Charities. *Catholic*

[1] Pincites to this brief reference the CCAP header, not internal numbering.

Charities II, 605 U.S. at 252. Conversely, other religious social services agencies that would *not* qualify for exemption (Leg. 11) are just more examples of groups that unfairly fall on the other side of the line. The Exemption always discriminates, whether it favors or disfavors an employer.

That dynamic explains why "[a] statute that contains a discriminatory classification ... will generally be invalid in all circumstances." *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1382 & n.219 (2005) (collecting cases); *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1335–36 (2000) ("[S]tatutes are familiarly held facially invalid ... when deemed impermissibly discriminatory because too narrowly drawn.").

Indeed, both *Barr v. American Association of Political Consultants, Inc.*, 591 U.S. 610 (2020), and *Sessions v. Morales-Santana*, 582 U.S. 47 (2017), struck entire exceptions (like the Exemption) even when faced just with individual left-out plaintiffs (like Catholic Charities). *Every* member of disfavored classes—children of unwed fathers in *Sessions* and most robocallers in *Barr*—suffered discrimination. And *every* member of the favored classes—children of unwed mothers in *Sessions* and government-debt robocallers in *Barr*—unfairly received preferential treatment. Across-the-board discrimination cannot be cured by an "as-applied" remedy.

B. This Court correctly interpreted and applied the Exemption.

Some amici suggest that the remedial choice can be avoided by simply reinterpreting the Exemption. But this is just an expansion remedy in disguise. The Legislature says a different Exemption would be constitutional "so long as" it used a motivation-and-activities test that "avoid[s] imposing denominational preferences." (Leg. 12.) And ACLJ goes further, arguing that *Espinoza v. Montana Department of*

Revenue, 591 U.S. 464 (2020), requires the Court to "conform its interpretation" of the Exemption to the First Amendment. (ACLJ 8; *see also* CLS 7–9.)

The Legislature's argument fails because it requires prying apart this Court's *interpretation* from its *application* of the Exemption. (Leg. 8 (distinguishing two parts of *Catholic Charities I*).) These are two sides of the same coin, and both remain undisturbed as a statutory interpretation matter.

The Legislature admits that the Supreme Court "did *not* reverse" this Court's interpretation of the Exemption. (Leg. 8.) That interpretation is not a contentless motive-and-activities test that can be reconceived now. Rather, the interpretation that "remains precedential" (Leg. 8) is a test that hinges on religious activity like "worship services," "pastoral counseling," "customary church ceremonies," and "education in . . . doctrine." *Catholic Charities I*, 411 Wis.2d 1, ¶ 55 (citation omitted). The Court did not hold that this Court misapplied that test either: it accepted that Catholic Charities could not "satisfy[ ] those criteria." *Catholic Charities II*, 605 U.S. at 249.

Because the Exemption hinges on these religious activities, it draws a "theological line[ ]" that violates the First Amendment. *Id.* at 252. That does not mean this Court misinterpreted or misapplied the Exemption; it just means the Exemption is unconstitutionally underinclusive.

ACLJ goes even further, arguing that the "constitutional wrong" here "was not [the Exemption] as such, but this Court's interpretation and application of the [E]xemption to [Catholic Charities]." (ACLJ 8; *see also* CLS 7.) But those two things are inseparable, too.

From a federal court's perspective, there is no daylight between this Court's interpretation of the Exemption and the Exemption itself. Federal courts do not second guess whether state courts have properly interpreted their state's statutes.

See Johnson v. Fankell, 520 U.S. 911, 916 (1997). So, when the Supreme Court rested its analysis on the "[E]xemption, as interpreted by [this] Court," *Catholic Charities II*, 605 U.S. at 250, it was acknowledging this federalism principle—the Exemption (a state law) was what this Court (a state court) said it was.

This explains why *Espinoza* does not, as ACLJ argues, require this Court to reinterpret the Exemption. (ACLJ 6–10.) This Court did not err in interpreting the Exemption, whereas the state court in *Espinoza* did err by using an invalid state law to invalidate the scholarship program at issue. *Espinoza*'s reversal of that distinct state court error means nothing for the unreviewed interpretive work this Court has already done.

Nor does *Espinoza* otherwise bar eliminating the Exemption. (LDS 8–9.) The only commonality between the cases is a superficial one: the elimination of a state program. But the reasons for elimination fundamentally differ. Here, elimination *cures* discriminatory treatment by treating all religious nonprofits the same, whereas elimination in *Espinoza* was itself *caused* by an invalid state constitutional provision that itself discriminated against religion.

C. Eliminating the Exemption is not "legislating."

Two amici argue that elimination would violate the separation of powers by supposedly using "legislative powers" to "create new legal obligations for the general public." (NCLA 14; *see also* CLS 11.)

If that were true, courts could *never* eliminate discriminatory exceptions. This judicial remedy always extends the general rule to at least some nonparties in ways that legislatures have neither "considered nor approved." (NCLA 14.) In *Barr*, for example, judicially eliminating the exception for government-debt-collection robocalls legally

affected nonparties differently than Congress's original underinclusive exception. But that result was permissible in *Barr*, and so too here—both elimination remedies fall well within the judiciary's power to eliminate discrimination.

And amici's argument goes both ways. Both remedies—expansion and elimination—change nonparties' legal obligations in ways legislatures have neither "considered [or] approved." (NCLA 14.) The Legislature did not approve an expanded Exemption either, which would render new parties eligible that were not before. There is no good reason why expansion remedies, but not elimination remedies, could have this result.

D. Tax cases are no different.

Finally, two amici misread *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931), as "conclusively" demonstrating that Catholic Charities must receive an exemption. (NCLA 18–19; *see also* LDS 10–11.)

First, *Bennett* involved claims for retrospective relief that are absent here. 284 U.S. at 240. Moreover, the Supreme Court later observed that *Bennett* itself "illustrate[s]" how states "retain[ ] flexibility" regarding discriminatory taxes: they can either "collect back taxes" from those unfairly favored or else "refund[ ]" payments to discrimination victims. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39–41 (1990). Discriminatory tax provisions—just like any others—can be remedied either way.

II. Amici don't identify persuasive legislative intent favoring expansion.

Amici present four legislative intent arguments that supposedly favor expansion. None is persuasive.

First, some amici assume that merely by enacting the Exemption, the Legislature indicated a preference for

expanding it. (WCRIS 11–12; Leg. 14; ACLJ 9.) That would mean remedial choices never arise when facing discriminatory exceptions, since the exceptions themselves would always indicate a legislative preference for expansion.

But the opposite presumption applies: legislatures typically have a stronger interest in preserving the "main rule, not the exception," and so "striking the discriminatory exception" is the default. *Sessions*, 582 U.S. at 75.[2] No guessing is needed here about the Legislature's "intensity of commitment" to the "main rule." *Id.* The Legislature expressed its vigorous support of the "main rule" in Wis. Stat. § 108.01, which announces an overriding preference for broad unemployment coverage.

Second, some amici purport to identify a legislative preference for expansion by citing *other* religious exemptions from property taxes (Wis. Stat. §§ 70.11(4)(a)1., (11)), sales/use taxes (Wis. Stat. § 77.54(9a)(f)), antidiscrimination law (Wis. Stat. § 111.337(2)(am)), and other regulations (Wis. Stat. §§ 157.11(10), 563.11, 961.115). (Leg. 15; WCRIS 12–13; CLS 11.)

But those exemptions have nothing to do with unemployment insurance, and so they don't speak to how the Legislature would have balanced the competing interests here. Each of these exemptions involves its own "main rule," and the Legislature has a different "intensity of commitment" to each one. *Sessions*, 582 U.S. at 75. For instance, the Legislature is less committed to the cemetery regulations in

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[2] One amicus cites cases where the main rule provided access to funding or facilities, with discriminatory exceptions for religious groups. The Court "did not agonize" over the remedies there (NCLA 17) precisely because the default remedy eliminates discriminatory exceptions. Others similarly cite cases where discriminatory treatment of certain religious groups was invalidated (Leg. 12–13; LDS 10); these also bolster the default approach of eliminating discriminatory exceptions.

Wis. Stat. § 157.11 than to employers' participation in the unemployment insurance system, given how the cemetery provision contains no analog to Wis. Stat. § 108.01. That cemetery exemption thus indicates nothing about how the Legislature would have weighed the very different interests presented here.

Third, one amicus cites certain secular exemptions in Wis. Stat. ch. 108, asserting they reflect a general "intent to prevent overapplication of the unemployment tax." (Leg. 15.)[3] But those narrow exceptions do not override the broad preference for coverage stated in Wis. Stat. § 108.01. Moreover, they exempt limited types of *employees*, not entire *employers*. *See generally* Wis. Stat. § 108.02(15)(f)–(kt). So, none suggest that the Legislature would favor exempting Catholic Charities-like employers entirely, leaving all their employees outside the system, regardless of the work they do.

And the specific types of work exempted involve unrelated contexts. Exempt direct sellers and court reporters function like self-employed independent contractors (Wis. Stat. §§ 108.02(15)(k)15.–16.); discharged prison employees are already supported by the prison (Wis. Stat. § 108.02(15)(kt)); and student summer camp employees are ineligible for benefits once they return to school, so there is no good reason to tax their employers (Wis. Stat. § 108.02(15)(k)21.). Those exemptions reflect the specific legislative goal of exempting work outside ordinary employer-employee relationships that, for one reason or another, does not merit employer-provided benefits. Because those unique

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[3] One amicus misreads *Missionaries of Our Lady of La Salette v. Michalski*, 15 Wis.2d 593, 598, 113 N.W.2d 427 (1962) as reflecting the Legislature expanding a religious property tax exemption in response to an incorrect court decision. (Leg. 15–16.) But that expansion merely reflected "a recognition by the legislature that the [subject property] was not previously exempt," *Michalski,* 15 Wis.2d at 598, not a reaction to a court decision.

considerations are absent here, these exemptions do not cover work "comparable" to what ordinary employees do at Catholic Charities-like nonprofits. (*Contra* LDS 9.)[4]

Fourth, one amicus asserts that eliminating the Exemption would "jeopardize federal funding" under the Federal Unemployment Tax Act (FUTA). (CLS 11.) But FUTA sets a coverage floor, not a ceiling. Under 26 U.S.C. § 3304(a)(6), states must cover most nonprofit employment, but they may exclude employment under 26 U.S.C. § 3309 (which contains FUTA's parallel to the Exemption). States may, however, choose to cover *more* nonprofit employment than FUTA requires. *See Emp. Div. v. Rogue Valley Youth for Christ*, 770 P.2d 588, 591 (1989) ("[N]othing in FUTA prohibits [a state] from taxing even excluded organizations."). Eliminating the Exemption would do just that, as FUTA allows.

III. Eliminating the Exemption would not create other constitutional infirmities.

Amici also argue that eliminating the Exemption would create other types of constitutional violations. These assertions are also unpersuasive.

First, some argue that doing so would entangle the state with religion and interfere with church autonomy. (WCRIS 14–16; WCC 15–16.) But this Court rightly rejected

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[4] This also explains why *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 969–70, 980 (S.D. Iowa 2019), *aff'd*, 5 F.4th 855 (8th Cir. 2021), is off-point. (LDS 11 n.4.) The remedy there extended restrictions to more religious student groups but left comparable fraternal groups unrestricted. That continued to single out religious groups for second-class treatment, whereas eliminating the Exemption here would treat religious nonprofits just like their secular counterparts.

these theories, and the Supreme Court expressly declined to adopt them. (State Suppl. Resp. Br. 31–36.)

Second, one argues that doing so would discriminate in favor of secular groups. (*Compare* LDS 6–8, 11–16, *with* State Resp. Br. 36–39.) That argument rests on an aggressive "most-favored nation" theory (LDS 13) that would entitle religious groups to exemptions whenever a single secular exemption exists. But *Tandon v. Newsom*, 593 U.S. 61, 62 (2021), does not go that far: it held only that religious exemptions must be granted where the religious and secular activities in question are actually "comparable." Here, the specific *employee*-level exceptions in chapter 108 are nothing like the *employer*-level exemption Catholic Charities seeks.

Third, one argues that doing so would represent religious targeting (CLS 12–13), but the State explained why that is wrong (State Suppl. Br. 35; State Suppl. Resp. Br. 39–40.)

Finally, one develops an argument that Catholic Charities pursued before but has essentially abandoned[5]: that elimination would cause denominational discrimination based on "corporate structure," in that Catholic Charities "wouldn't qualify for the [church] exemption under [Wis. Stat. § 108.02(15)(h)1.]" because the Church "houses its charitable services in separate 'nonprofit organization[s].'" (WCC 15 (citation omitted).)

The Supreme Court avoided Catholic Charities' distinct corporate-structure discrimination theory, instead holding

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[5] *Compare* CCB Suppl. Br. 38 n.6, *with Catholic Charities I*, 411 Wis.2d 1, ¶ 78 (noting argument that Exemption "discriminat[es] 'against religious entities with a more complex polity'") (citation omitted); Brief for Petitioners at 18, 47–48 (same), *available at* https://www.supremecourt.gov/DocketPDF/24/24-154/340257/20250127183640202_CCB%20v%20WI%20Merits%20Brief%20FINAL.pdf.

that the Exemption's use of activities that vary by denomination violates the First Amendment. *See Catholic Charities II*, 605 U.S. at 249–52. That silence is unsurprising.

It is unproblematic if "'secular criteria' ... 'happen to have a "disparate impact" upon different religious organizations.'" *Catholic Charities II*, 605 U.S. at 250 (citation omitted). Corporations are "creatures of state law," *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991) (citation omitted), and corporate structuring decisions are driven by secular factors like taxation, limited liability, governance, and the like. While certain corporate structures may dovetail with religious doctrine (WCC 9), they arise from state law and were thus unavailable to the Catholic Church for most of its history. These choices therefore cannot be considered "theological" ones shielded from all disparate impacts.

Moreover, the Court's precedents recognize that religious exemptions can permissibly cover activity closer to the core of religious practice while excluding that on the periphery. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 753–54 (2020) (limiting ministerial exemption to employees "at the very core of the mission" of religious schools); Br. of Prof. Christopher Lund, *available at* https://www.supremecourt.gov/DocketPDF/24/24-154/341563/20250131210200149_Brief%20-%20Final%20Version.pdf.

But this discrimination theory would bar legislatures from limiting religious exemptions to the organizations closest to the core of religious exercise: churches and houses of worship. Many religious exemptions extend only that far. *See*, *e.g.*, 29 U.S.C. § 1002 (limiting ERISA exemption to plans "established and maintained ... by a church or by a convention or association of churches"); 26 U.S.C. § 6033(a)(3)(A)(i) & (iii) (exempting from IRS annual filing requirements "churches, their integrated auxiliaries, and conventions or associations of churches"); Wis. Stat. § 70.337(5) (exemption

for "church[es]" for fee associated with tax exemption report). The Supreme Court has never forced legislatures to make all-or-nothing choices, and nothing suggests it is prepared to do so now.

Dated this 26th 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 3,000 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 26th day of November 2025.

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