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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

**PETITIONERS-RESPONDENTS-PETITIONERS’
RESPONSE TO AMICUS BRIEFS**

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INTRODUCTION

Amici's strong (and one-sided) showing demonstrates just how aggressive Wisconsin's remedial proposal is. Rather than implement the U.S. Supreme Court's straightforward mandate, the State demands that this Court issue a sweeping facial decree, striking down a duly-enacted statutory religious exemption. The State insists on this radical course of action not because there is any defect in the exemption itself, but rather because the State prefers the misapplication of it that the U.S. Supreme Court already rejected.

But striking down the statute to exclude Catholic Charities again would invite another reversal at the U.S. Supreme Court. As amici explain, Wisconsin's proposed "remedy" would not remedy anything. Instead, it would: defy the U.S. Supreme Court's as-applied ruling, which leaves no room for a facial remedy; split with *Espinoza*, which rejected an identical gambit by another state supreme court; ignore the Wisconsin Legislature's intent; and violate the First Amendment several times over.

Fortunately, this Court has a much simpler path in front of it. All the Court need do is recognize (as it already has) that this is an as-applied case and affirm the Circuit Court's finding that Catholic Charities is exempt. That approach risks no further review, complies with the First Amendment, and allows this Court to move on from this protracted litigation.¹

¹ Should the Court not extend the tax exemption to Catholic Charities, Catholic Charities respectfully requests that the Court immediately stay its ruling pending the filing and disposition of a petition for certiorari to the U.S. Supreme Court. 28 U.S.C. § 2101(f).

ARGUMENT

I. As amici show, Catholic Charities is entitled to the religious-purposes exemption.

A. The Supreme Court’s decision grants Catholic Charities an as-applied victory.

Amici correctly point out that the U.S. Supreme Court issued an as-applied ruling, concluding that this Court discriminated along denominational lines in denying Catholic Charities a religious exemption. *See* Leg.Br.7-9; Religious.Orgs.Br.5-6; ACLJ.Br.8; CLS.Br.7-8. Over and over, the Supreme Court explained that it was addressing and ruling on an as-applied challenge. *See* Leg.Br.7-8. And as amici observe, when the Supreme Court turned to explaining why this Court’s analysis violated the First Amendment, it looked to the part of the opinion in which this Court *applied* its statutory interpretation to Catholic Charities. *See* Leg.Br.8-9 (analyzing Supreme Court’s treatment of Parts III-B and III-C of this Court’s opinion). Because this Court had rendered Catholic Charities “ineligible for the exemption” based on its “inherently religious choices,” this Court’s analysis of Catholic Charities’ “eligibility” could not stand. *Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 250 (2025).

A facial remedy—such as deleting a duly-enacted exemption—is no way to implement an as-applied ruling, as amici correctly assert. *See* Leg.Br.9; Council.Br.9; ACLJ.Br.11. Such a broad remedy would be appropriate only if the exemption could not validly be applied to anyone under any circumstance. *See* Leg.Br.10; Council.Br.10. But that is not true here; the exemption may properly cover any number of different religious employers, such as a

church-run “worship center” or “seminary” (and, of course, Catholic Charities). Leg.Br.11. “[S]o long as this Court’s motivations-and-activities test is applied neutrally, the exemption will operate lawfully.” Leg.Br.6. And because “the State’s proffered remedy” is “indistinguishable from what would follow a successful facial challenge,” it is “appropriate only for a claim that was never made.” NCLA.Br.8.

Unsurprisingly, as amici stress, state law also recognizes that a facial remedy is the wrong response to an as-applied ruling. *See* Council.Br.8-10. Wisconsin’s severability statute provides that “if the *application of* [a Wisconsin statute] *to any person or circumstance* is invalid, such invalidity shall not affect *other* provisions or *applications* which can be given effect.” Wis. Stat. § 990.001(11) (emphasis added). Striking down the religious-purposes exemption would contradict that statutory command, allowing one unconstitutional misapplication of the law to fell the whole thing. *Id.*; *see* Council.Br.8-10.

Finally, as amici affirm, the U.S. Supreme Court *reversed* this Court’s determination of “petitioners’ eligibility for the exemption.” *Catholic Charities*, 605 U.S. at 250; *see* CLS.Br.9. Reversal happens when “the decision below” is “absolutely wrong.” CLS.Br.9 (quoting *The Supreme Court’s Style Guide* § 10.5 (Jack Metzler ed., 2016)). The mandate on remand leaves no flexibility to declare anew that Catholic Charities is “ineligible for the exemption,” *Catholic Charities*, 605 U.S. at 249—let alone by even broader means than before. *See* CLS.Br.9.

B. *Espinoza* rejects Wisconsin’s proposed “remedy.”

As amici correctly assert, the U.S. Supreme Court’s decision in *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), forecloses Wisconsin’s proposed “remedy.” See Religious.Orgs.Br.8-9; ACLJ.Br.5-10. In fact, as amici stress, eliminating the tax benefit here would be even *more* problematic than it was in *Espinoza*. See Religious.Orgs.Br.9. After all, the scholarship program that the state court chose to invalidate in *Espinoza* had benefited both religious *and secular* groups alike, yet the Court still set aside the invalidation. See Religious.Orgs.Br.9. Here, Wisconsin asks the Court for something even more aggressive: to “limit[] the ability of a class of religious organizations to achieve a tax benefit—while preserving that benefit for comparable secular organizations.” Religious.Orgs.Br.9 (emphasis omitted). That result would raise the prospect of religious targeting and non-neutrality. See *infra* at 15-17; Religious.Orgs.Br.9.

Contrast what Wisconsin seeks here with what the U.S. Supreme Court did in *Espinoza*. As amici point out, ACLJ.Br.11-12, *Espinoza* restored the *status quo ante* established by the state legislature—it held that the scholarship program must continue, since the state court had invalidated it pursuant to a mistaken understanding of the First Amendment. *Espinoza*, 591 U.S. at 487-88 & n.4. Here, Wisconsin asks this Court to do the opposite, invalidating part of a law duly enacted by the Legislature—and precisely *because* this Court applied it in a way that violated the First Amendment. That gets it exactly backwards. See ACLJ.Br.7-9, 11-12.

Indeed, as amici point out, *Espinoza*'s application is especially clear in an as-applied case like this one. ACLJ.Br.7-8. In *Espinoza*, the constitutional problem was not inherent to the scholarship program itself. Instead, it stemmed from a separate provision of state law—a “no-aid provision”—that discriminated based on religion. ACLJ.Br.7. The U.S. Supreme Court held that it was inappropriate to rely on an invalid state law to eliminate a valid scholarship program. *Espinoza*, 591 U.S. at 487-88. So too here, there is no constitutional problem with the religious-purposes exemption itself, just with the way that this Court *applied* it to Catholic Charities. ACLJ.Br.8-9. *Espinoza* therefore controls.

C. The First Amendment and remedial principles alike require extending an exemption to Catholic Charities.

The First Amendment “protects a substantive right; it does not simply mandate equal treatment.” Leg.Br.12. And, as amici convincingly explain, when the government “denies a benefit to an otherwise qualified organization on religiously discriminatory grounds,” the Supreme Court consistently enjoins “the discrimination, not the benefit.” NCLA.Br.13 (citing *Widmar*, *Lamb’s Chapel*, and *Rosenberger*). This was further confirmed by the Legislature’s amicus brief, which noted that the Supreme Court’s decisions in *Lukumi*, *Larson*, and *Fowler* followed the same pattern—remedying “religious discrimination by removing undue burdens on religious exercise, not by imposing those burdens on everyone else.” Leg.Br.12. Indeed, “[t]he AG cannot point to a single binding Supreme Court precedent supporting its choice-of-remedies principle in this context.” Leg.Br.13. Amici thus confirm that the default

when a Free Exercise right is violated is extension of the benefit to the unconstitutionally burdened party, not denial of the benefit to others.

What is more, amici properly distinguish the judicial role from that of the legislature. ACLJ.Br.11; NCLA.Br.9. While the Legislature may be able to revise the State's unemployment compensation exemptions within constitutional limits, the judiciary's function is much narrower. Indeed, it would violate the separation of powers for this Court to rewrite Wisconsin law in response to a finding that the law—as applied in one case—is unconstitutional. NCLA.Br.9-11; CLS.Br.11 (similar). This also, as amici note, distinguishes Justice Kavanaugh's concurrence in *Murphy v. Collier*, which lodged the choice of remedies squarely with the state government, not with the courts. ACLJ.Br.11; *see also* CLS.Br.11 (“judicial authority does not extend to rewriting statutes”).

Turning to “settled remedial principles,” CLS.Br.10, amici confirm that the normal course when a court is confronted with remedial choice is to extend the benefit, that is, “level up.” As *Sessions* explained, “the preferred rule in the typical case is to extend favorable treatment.” CLS.Br.10 (quoting *Sessions v. Morales-Santana*, 582 U.S. 47, 77 (2017)). In *Sessions*, the Court recognized that the facts were anomalous—the law singled out “one group for *avored* treatment”; thus, the Court concluded that “Congress would have preferred to preserve ‘the general rule’ over the favorable exception, so it eliminated the exception.” CLS.Br.10; *see also* NCLA.Br.12. As amici explain, that is not the case here. Catholic Charities was not singled out for *avored* treatment; instead, the

general rule (allowing exemptions for religious organizations) was extended to others but denied to Catholic Charities. CLS.Br.10. This approach—extending the benefit—is the norm and has been applied in numerous contexts. Religious.Orgs.Br.10-11 (surveying contexts).

Amici also point out that in the tax context specifically, “the United States Supreme Court has held that the only permissible judicial remedy for discriminatory state taxation—like the discrimination suffered by the Charities in this case—is to make the favorable tax treatment available to the successful plaintiff.” NCLA.Br.14; Religious.Orgs.Br.11 (similar). Indeed, as amici explain, *Iowa-Des Moines National Bank v. Bennett* acknowledged that “equal treatment” could be attained by leveling up or leveling down, but held that “a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law” is entitled to the favorable tax treatment, as that taxpayer “cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid.” NCLA.Br.14-15 (quoting 284 U.S. 239, 247 (1931)). *Bennett* thus further confirms that extending favorable tax treatment to Catholic Charities is required by binding Supreme Court precedent.

Thus, whether framed as extending the general rule, leveling up, or extending an unconstitutionally denied benefit, here well-settled First Amendment and remedial principles confirm that this Court should extend the facially constitutional religious-purposes exemption to Catholic Charities.

D. Legislative intent favors recognizing the exemption.

As amici explain, this Court need not reach any question of legislative intent because the Supreme Court's as-applied holding doesn't give this Court remedial choice. *E.g.*, Leg.Br.7-9, 13-16. Nevertheless, legislative intent points in the same direction. It confirms that the Legislature would have preferred to extend the exemption to Catholic Charities rather than strike the exemption entirely. *See* Leg.Br.13-16.

First, as the Legislature's amicus brief explains, the text of the religious exemption confirms that it can be constitutionally applied in a myriad of circumstances. Leg.Br.10-12, 13-14. Nothing in "the language the legislature actually adopted and the executive actually signed" suggests that the Legislature's preference would be to strike these plainly constitutional applications of the religious exemption. Leg.Br.10-12, 13-14.

Second, amici demonstrate how legislative history shows "a consistent intent to prevent overapplication of the unemployment tax." Leg.Br.15 (noting how the religious exemption "remained a fixture of Wisconsin law for nearly a century, even as the statute has been amended more than thirty times"). And, as amici show, the Legislature's repeated creation of new exemptions from the unemployment tax is evidence the Legislature does not have a monolithic interest in broad coverage, instead expanding or contracting coverage over time to address other important interests—like its long-standing, demonstrated interest in protecting religious exercise. Leg.Br.14-15.

Third, as amici explain, the carefully crafted statutory religious exemption and the “broad array” of other statutory religious exemptions “exhibit a strong legislative preference for a judicial remedy that preserves” the religious-purposes exemption at issue here. Council.Br.12-13 (citing seven examples of exemptions for religiously affiliated non-profits).

II. As amici show, Wisconsin’s approach would trigger additional constitutional problems.

Amici confirm that striking the religious-purposes exemption would spawn a host of new constitutional violations. Rather than careen into another unconstitutional ditch, this Court should take the road more traveled by extending the exemption to Catholic Charities.

A. Striking the religious-purposes exemption would violate the church autonomy doctrine.

As the Wisconsin Catholic Conference’s amicus brief details, even though Catholic Charities may be a “separate legal entit[y],” “[t]here’s only one Catholic Church, and a diocesan charity is part of it—regardless of whether its lay employees serve in ministry or its precise corporate structure.” WCC.Br.15-17 (citing *Catholic Charities*, 605 U.S. at 255 (Thomas, J., concurring) (“[A]lthough Catholic Charities and its subentities are separately incorporated from the Diocese of Superior, they are, as a matter of church law, simply an arm of the Diocese.”)). As enacted by the Legislature, the combination of “subsection (h)(1)[] [and] subsection (h)(2) respects religious institutions’ ‘right to define their internal governance

structures,’ by making eligibility for the religious-employer exemption agnostic to corporate structure.” WCC.Br.16 (quoting *Catholic Charities*, 605 U.S. at 255 (Thomas, J., concurring)).

If this Court were to follow Wisconsin’s lead and excise the religious-purposes exemption, it would interfere with that right and “require regulators and the courts to intrude upon religious teaching as to which church-affiliated ministries are part of the church itself, and which are not.” WCC.Br.16. “The First Amendment guards against such indirect coercion of the internal governance of religious institutions, and forbids such forays into matters of church government.” WCC.Br.16 (cleaned up).²

B. Striking the religious-purposes exemption would entangle the State in religious affairs.

As amici explain, “[r]equiring faith-based institutions to participate in the [unemployment insurance] system” would also constitute “an invitation to entanglement, both for taxation and for awarding benefits.” Council.Br.16. Absent an exemption, the government will be drawn into “monitor[ing] and audit[ing] ... religious organizations” to evaluate their hiring and firing decisions. Council.Br.16 (quoting *Rojas v. Fitch*, 928 F. Supp. 155, 165 (D.R.I. 1996)). Such entanglement would contravene this Court’s warning against “any investigation or surveillance into the practices of a

² This would also avoid another instance of textbook denominational discrimination. “Were another denomination to ‘provide charitable services in a similar manner,’ but provide those services from within the church’s corporate structure, it would qualify for the religious-employer exemption under subsection (h)(1).” WCC.Br.15 (quoting *Catholic Charities*, 605 U.S. at 253). But because of the Diocese’s application of the Church’s teaching of subsidiarity, Catholic Charities Bureau “wouldn’t qualify for the exemption under subsection (h)(1) if this Court accepted the State’s invitation to judicially excise subsection (h)(2).” WCC.Br.15.

religious institution.” Council.Br.15 (quoting *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶ 48, 398 Wis.2d 92, 961 N.W.2d 635).

C. Striking the religious-purposes exemption would render the Unemployment Compensation Act neither neutral nor generally applicable.

Amici correctly note that, if this Court nullifies the religious-purposes exemption, it will render the whole Unemployment Compensation Act unconstitutional. See Religious.Orgs.Br.14; ACLJ.Br.9. Wisconsin’s “leveling-down proposal directly collides” with the Supreme Court’s instruction that laws “trigger strict scrutiny ... whenever they treat *any* comparable secular activity more favorably than religious exercise.” Religious.Orgs.Br.14 (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021)); see ACLJ.Br.9 (“[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.” (citing *Employment Division v. Smith*, 494 U.S. 872, 884 (1990))). The effect will be the denial of the exemption for “a whole class of religious organizations,” while some secular organizations will still be exempt. Religious.Orgs.Br.14. Such disparate treatment “squarely violates *Tandon*.” Religious.Orgs.Br.14.

Comparability is “judged against the asserted government interest that justifies the regulation at issue.” Religious.Orgs.Br.14 (quoting *Tandon*, 593 U.S. at 63). The U.S. Supreme Court has held that Wisconsin’s interest here “is to ensure that Wisconsinites who lose their jobs receive unemployment benefits.” Religious.Orgs.Br.14-15 (citing *Catholic Charities*, 605 U.S. at 252).

“Measured against that interest, there is no difference between religious organizations and secular organizations.” Religious.Orgs.Br.15.

Myopically looking at secular exemptions alone would not change the result. For example, some of the exemptions may account for duplicative coverage that some types of employees get from other sources. But as amici note, Catholic Charities itself provides alternative coverage that is *better* than Wisconsin’s program, offering identical coverage with faster payouts. See WCC.Br.11-12.

Nor does the Establishment Clause impact this analysis. “[T]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, ... subject to unique disabilities.” Religious.Orgs.Br.7 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990)). Holding otherwise “would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.” Religious.Orgs.Br.7 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995)). Instead, “the First Amendment ... gives special solicitude to the rights of religious organizations.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

D. Striking the religious-purposes exemption would result in religious targeting.

Amici correctly describe how, long before this Court ever knew about this case, Wisconsin spent the better part of a decade fighting “Catholic Charities’ inclusion in the exemption and defend[ing] a test that” was discriminatory. CLS.Br.12. Now, “rather

than comply with the [U.S. Supreme Court's] directive to apply [the exemption] evenhandedly," Wisconsin "seeks to abolish [it] entirely." CLS.Br.12. Taken together, that decade-plus course of conduct "is essentially targeting a class of religious entities for an additional tax burden." Religious.Orgs.Br.12. And the fact that Wisconsin is "[i]ntentionally doing so" despite the Supreme Court's direct intervention is even more problematic. Religious.Orgs.Br.12. "Such targeting triggers strict scrutiny." Religious.Orgs.Br.13.

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 26th 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 2,927 words.

Dated this 26th day of November, 2025.

Electronically signed by:
Kyle H. Torvinen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 26, 2025, I electronically filed with the Court the above supplemental brief using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Electronically signed by:

Kyle H. Torvinen