NO. 24-154

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF BY THE HAND CLUB FOR KIDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

By The Hand Club For Kids is an afterschool ministry program affiliated with The Moody Church in Chicago. It cares for vulnerable children's physical and academic needs, all in service of By The Hand's overarching purpose: to show children the love of Jesus Christ and lead them "by the hand" to the abundant and eternal life found through a relationship with Him.

For years, By The Hand enjoyed a statutory exemption from paying unemployment taxes in Illinois—an exemption identically worded to the exemption at issue here. But Illinois abruptly revoked By The Hand's exemption in 2017 without any change in the underlying law. By The Hand spent years in litigation vindicating its existence as a religious organization whose overarching "purpose" is indeed religious.

As a result, By The Hand knows firsthand the entanglement that results when government officials decide to divide the sacred from the secular based on purportedly "neutral" criteria. In reality, as By The Hand can testify, such "neutral" criteria exist only in the eye of the beholder. A subjective test, like the one the Wisconsin Supreme Court adopted in this case, will disproportionately harm religious minorities and unfavorables. The First Amendment demands more.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2.

SUMMARY OF THE ARGUMENT

Government has no business second-guessing a faith organization's "purpose." To do so irrevocably entangles church and state—all at the expense of ministries that live out their faith, at least in part, through social service. But under the Wisconsin Supreme Court's holding below, government actors will inevitably favor religious views and activities with which they are familiar, while excluding those that are unfamiliar or disfavored.

More, if the government divides the sacred from the secular based on the government's idea of what makes up religious activity, then government officials will be in the position of deciding what is "religious" *enough*. And to determine whether any particular organization fits the bill, the government will necessarily have to engage in a far-reaching, obtrusive inquiry that courts have frequently found too burdensome on religious exercise. Under the Wisconsin Supreme Court's directive for evaluating religious tax exemptions, then, both the substance of the government's conclusions and the process it uses to reach them strike at the core of what the First Amendment protects.

There is a better approach. An organization "operated primarily for religious purposes"—the operative statutory text at issue here—is one whose *motives* sincerely reflect a religious belief and whose *activities* flow from that belief. The Wisconsin Supreme Court elided the statute's plain language and used substantive canons to make it mean something else entirely, creating a First Amendment problem where none existed.

In particular, the majority "liberally construed" the statute while "narrowly construing" its exceptions. But as Justice Scalia noted, this canon is nothing more than an excuse for courts to "reach[ ] the result the[y] wish[ ] to achieve." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 586 (1990). This Court should reverse and prohibit government officials from second-guessing whether a religious organization is religious enough for a tax exemption.

ARGUMENT

I. The Wisconsin Supreme Court's test will deeply entangle the state in religious matters—at the expense of religious entities.

The Wisconsin Supreme Court thought that the government can ignore a religious organization's sincere representations about its own purpose and determine "what the nature of the motivations and activities of [that] organization are"—all without running afoul of the First Amendment. Pet.App.40a. Just the opposite is true. "Repeatedly and in many different contexts," this Court has stressed that the government cannot second-guess someone's good-faith characterizations of his religious beliefs. *Emp. Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 887 (1990). By empowering the government to delineate "religious" activities from "secular" ones based solely on those activities' inherent "nature," the Wisconsin Supreme Court's test will do just that, and inevitably enmesh God and Caesar—to the detriment of those simply trying to "live out their faiths in daily life." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022).

A. The Wisconsin Supreme Court's religious test functions as a "denominational preference."

The First Amendment prohibits government from discriminating amongst religions. Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). That "government cannot prefer one religion over another 'has strong historical roots and is often considered one of the most fundamental guarantees of religious freedom.'" Pet.App.102a (Grassl Bradley, J., dissenting) (quoting Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences:* Larson *in Retrospect*, 8 N.Y.C. L. Rev. 53, 54–55 (2005)).

The Wisconsin Supreme Court's construction of a religious tax exemption's scope puts Wisconsin on a collision course with this clear command. The court "exclude[s] some but not all religious institutions" from Wisconsin's tax exemption "on the basis of" explicitly religious "criteria." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008). "[R]eligious institutions that do not perform sufficiently religious acts to satisfy the *court's* subjective conceptions of religiosity will be denied the exemption." Pet.App.103a (Grassl Bradley, J., dissenting) (emphasis added). And the majority's "small[ ] and ill-defined[ ] subset of religious activities"—like "worship services, religious ceremonies, serv[ing] only co-religionists, [and] imbu[ing] program participants with the nonprofit's faith"—will inevitably favor "Protestant[s]" over "Catholicism, Judaism, Islam, Sikhism, Hinduism, Buddhism, Hare Krishna, and the Church of Latter Day Saints, among

others." Pet.App.53a, 104a (Grassl Bradley, J., dissenting). Thus, "[b]y focusing on whether a nonprofit primarily engages in activities that are 'religious in nature,' the majority transforms a broad exemption into a denominational preference." Pet.App.52a–53a (Grassl Bradley, J., dissenting).

This case highlights the resulting discriminatory preference. Catholic Charities Bureau follows Catholic doctrine—in particular, the commands to "engage in charity without limiting their assistance to fellow Catholics" and to not "proselytiz[e] when conducting charitable acts." Pet.App.105a (Grassl Bradley, J., dissenting). For those very reasons, the majority concluded that Catholic Charities' activities were not "religious enough." Pet.App.39a. Yet a Baptist church that does the same charity work but limits its operation to fellow Baptists would, under the majority's test, qualify for the tax exemption. If one religious group gets a tax exemption and another one does not—even though both do the same work with the same motivation—then the First Amendment is violated. Cf. *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953) ("To call the words which one mini[s]ter speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.").

Courts applying the Wisconsin Supreme Court's directive will "compare[ ] [a] nonprofit's activities to an arbitrary list of stereotypical religious activities to determine whether the [nonprofit's] activities are sufficiently religious." Pet.App.104a (Grassl Bradley, J., dissenting). That arbitrary list will inevitably "reflect[ ] a narrow view of what religious practice

looks like" and lead to the government preferring some religious practices over others. Pet.App.105a (Grassl Bradley, J., dissenting). That offends the Religion Clauses and requires correction.

B. The Wisconsin Supreme Court's directive allows governments to decide what is "religious" enough.

In addition to denominational preference, the Wisconsin Supreme Court's ruling requires government officials to evaluate organizations' religiosity. By drawing the line between religious and secular, the majority attempted to create a test that would avoid having lower courts determine whether organizations were "Catholic enough." Pet.App.40a. But the government will *still* have to determine if an organization's activities are "religious enough." That is "not within the judicial function and judicial competence." *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (citation omitted). For at least two reasons, such an inquiry violates the First Amendment.

Subjective judgment. To start, the Wisconsin Supreme Court empowers bureaucrats and courts to make the ("inherently too indeterminate and") subjective judgment about what activities are "religious enough" to qualify for exemption. *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 741 (9th Cir. 2011) (per curiam) (Kleinfeld, J., concurring). The First Amendment takes that judgment squarely out of government actors' hands.

After all, the line between religious and secular is not as easy to draw as the majority suggests. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 336 (1987)

(the "line" between "activities a secular court will consider religious" and not is "hardly a bright one"). Consider a few examples. Is reading the Bible a religious activity or a secular one? What about eating bread and drinking wine? Or smoking peyote? The answer to each depends on *why* the activity is being done, rather than anything inherent about the activity itself. A person could read the Bible to learn more about God (religious) or simply as part of a literature lesson (secular). Someone could eat bread and drink wine as part of either a sacrament (religious) or simply a snack (secular). And someone could smoke peyote as part of a ritual (religious) or for recreational drug use (secular).

Yet the Wisconsin Supreme Court would not classify any of these activities as religious. It instead instructs lower courts to ignore the most important context—namely, the motivating belief underlying the conduct—and figure out whether an activity is "inherently" religious. Divorced from context, there's nothing "inherently" religious about reading a book, drinking wine, or smoking peyote. Only the motivating reasons show these activities for what they are: religious exercise. By empowering the government to decide what activities are inherently "religious," the Wisconsin Supreme Court "risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description." *Masterpiece Cakeshop* v. *Colo. C.R. Comm'n*, 584 U.S. 617, 652–53 (2018) (Gorsuch, J., concurring).

In addition, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious

establishment." *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977). That's why the First Amendment leaves it to the individual "alone … to define the nature of his religious commitments … not a bureaucrat or judge." *Masterpiece Cakeshop*, 584 U.S. at 653 (Gorsuch, J., concurring). Across all areas of law, determining "what is a 'religious' belief or practice is more often than not a difficult and delicate task," putting "resolution of that question" beyond "judicial perception of the particular belief or practice in question." *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

Nor is it even "*appropriate*" for courts to tell someone that "a wedding cake is just like any other—without regard to the religious significance … faith may attach to it," or "to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap." *Masterpiece Cakeshop*, 584 U.S. at 653 (Gorsuch, J., concurring) (emphasis added). Neither is it appropriate for a court to deny a tax exemption to a religious organization simply because the court thinks the organization's charitable activities are not religious but "primarily … secular." Pet.App.30a.

Inquisitive process. To reach these subjective judgments, government officials would have to engage in a highly intrusive inquiry to determine if an organization is predominantly "religious" rather than secular. By refusing to defer to a religious organization's sincere motivations, governments will have to pour over countless documents and details and classify everything as "secular" or "religious," tally up the totals, then see whether the organization comes out ahead as "religious enough." In other contexts, this invasive inquiry has been characterized as antithetical to the First Amendment. *E.g.*,

Duquesne Univ. of the Holy Spirit v. *NLRB*, 947 F.3d 824, 835 (D.C. Cir. 2020) (holding it unconstitutional for the government to "troll[ ] through the [school's] beliefs …, making determinations about its religious mission and whether certain [employees] contribute to that mission") (citation omitted). So too here: not only would the government's "conclusions" "impinge on rights guaranteed by the Religion Clauses," but so would "the very process of inquiry leading to [those] findings and conclusions." *NLRB* v. *Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979).

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Courts "bear no license to declare what is or should be 'orthodox' when it comes to religious beliefs, or whether an adherent has 'correctly perceived' the commands of his religion." *Masterpiece Cakeshop*, 584 U.S. at 651 (Gorsuch, J., concurring) (first quoting *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943); then quoting *Thomas*, 450 U.S. at 716). Instead, courts "look beyond the formality of written words and afford legal protection to *any* sincere act of faith." *Ibid.* By not deferring to Catholic Charities' representations of its faith, the Wisconsin Supreme Court gravely erred. This Court should correct its course.

C. Even religious organizations with unquestionably religious activities can fail the Wisconsin Supreme Court's view of what is "religious."

By The Hand has experienced firsthand how the Wisconsin Supreme Court's dim view of religious activity will play out in real life. The ministry's many years entangled in litigation over whether its

activities were religiously motivated underscore the importance of the issue.

By the Hand, a ministry of The Moody Church in Chicago, is a Christ-centered, nonprofit afterschool program. In many ways, By The Hand looks like any other afterschool program. Ministering to children in high-risk, inner-city neighborhoods, By The Hand provides hot meals, medical care, and academic rotations designed to help children with their reading and homework.

But given its distinctly religious nature, By The Hand differs from other afterschool programs in critical ways: its primary goal is to lead children "by the hand" to a relationship with Jesus Christ. To accomplish that goal, By The Hand gives each participating child a Bible and presents the Gospel message on the very first day of programming. It also holds Bible studies, chapel services, and times of worship, preaching, prayer, and Scripture memorization. To teach children about the Christian faith, By The Hand uses an explicitly evangelistic curriculum and plays only Christian music during programming.

To maximize every opportunity to share Christian principles and values with kids, By The Hand requires every employee to be Christian and affirm their salvation in Christ as a condition of employment. Each employee must sign the ministry's statement of faith, certify that they regularly attended a Bible-believing church, and agree to adhere to biblical standards of living. Relatedly, each staff member and volunteer for the ministry must be willing to lead Bible study and chapel, serve as positive Christian role models, and pray with and disciple children in the faith.

Like Wisconsin, Illinois requires employers to pay a tax to support state unemployment agencies—unless that employer is an "organization … which is operated primarily for religious purposes." 820 Ill. Comp. Stat. Ann. 405/211.3(A). For 16 years, the Illinois Department of Employment Security interpreted this provision to exempt By The Hand from paying unemployment taxes. But in 2017, without any change in the underlying law, the Department reversed course. Like the Wisconsin Supreme Court, the Department insisted that By The Hand should have to pay into the system because the children in the ministry's care spent "the majority of their time" receiving free meals, free academic support, and free medical care. *By The Hand Club for Kids, NFP, Inc.* v. *Dep't of Emp. Sec.*, 188 N.E.3d 1196, 1203 (Ill. App. Ct. 2020). To the Department, these were secular activities, not religious ones, no matter By The Hand's motivation.

The Department's approach mirrored the Wisconsin Supreme Court's here. It asserted that By The Hand's "main activities" were "to teach children, to feed them, to help them with homework, to help them read, [and] to care for their medical needs." Br. of Pl.-Appellee at 10, *By The Hand Club for Kids, NFP, Inc.* v. *Dep't of Emp. Sec.*, 188 N.E.3d 1196 (Ill. App. Ct. 2020) (No. 1-18-1768). Those activities were, the Department concluded, "nonreligious in nature." *Ibid.* And the Department rejected By The Hand's contention that these activities served the ministry's evangelistic mission by insisting that the "operation of an after school program is not necessary for evangelism." *Ibid.* The Department also suggested that By The Hand should have just operated with volunteers instead of hiring paid staff.

By The Hand spent years in the administrative process—and then in the courts—trying to vindicate its statutory exemption. Even after an initial victory at the Illinois Circuit Court in 2018, By The Hand still had to defend against other unemployment claims in the administrative process while the appeal of that victory pended. In these other matters, the Department refused to recognize By The Hand as exempt, so By The Hand was forced to devote significant personnel, time, and financial resources to the Department's continued adverse actions. Although By The Hand ultimately prevailed in the Appellate Court of Illinois in December 2020, it did so only after much cost to the ministry.

By The Hand's experience also shows how the Wisconsin Supreme Court's approach incentivizes the government to "play with the level of generality" to reach a desired outcome. *Masterpiece Cakeshop*, 584 U.S. at 651 (Gorsuch, J., concurring). In By The Hand's case, the Department zoomed out and focused only on the ministry's provision of meals and medical care to kids, ignoring altogether the religious motivation and context in which these activities occurred.

At some level, the same could be said of most other religious organizations. If government officials can classify By The Hand's activities as predominantly secular, they can do the same with virtually any other religious organization largely engaged in charitable works. That's certainly true for Catholic Charities here.

II. The Wisconsin Supreme Court's analysis is fundamentally atextual.

Apart from its constitutional infirmities, the Wisconsin Supreme Court's approach suffers from severe interpretive problems. To reach its conclusion, the Wisconsin Supreme Court departed from virtually every interpretive method this Court has instructed courts to use when approaching statutes. The result was to violate Catholic Charities' Free Exercise rights.

Start with the most basic. As this Court has said in case after case, when interpreting a statute, courts must first "start with the text." *Campos-Chaves* v. *Garland*, 144 S. Ct. 1637, 1647 (2024). Though the majority paid lip service to the statute's operative text, it immediately pivoted to substantive canons. See *Rudisill* v. *McDonough*, 601 U.S. 294, 315 (2024) (Kavanaugh, J., concurring) ("A substantive canon is a judicial *presumption* in favor of or against a particular substantive outcome." (emphasis added)); see also *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring).

For instance, "[t]o mask its policy-driven reasoning, the majority employ[ed] the shibboleth that remedial statutes are liberally construed and exemptions are narrowly construed." Pet.App.86a (Grassl Bradley, J., dissenting). That maxim is "long-discredited," for it "pawns judicial activism off as legitimate, textual interpretation." *Ibid.* (citing *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 12 (2014) (stating that the remedial statute canon is not "a substitute for a conclusion grounded in the statute's text and structure")). Its "trigger … is hopelessly vague"—for what "exactly is a 'remedial' statute?"—and it is

"premised on … mistaken ideas." *Keen* v. *Helson*, 930 F.3d 799, 805 (6th Cir. 2019) (Thapar, J.). Jurists across the country have castigated this canon as "the last redoubt of losing causes," the very final tool a judge should reach for—if at all—"in the interpretive process." *Ibid.* (quoting *Dir., Off. of Workers' Comp. Programs, Dep't of Labor* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995)). That it was the majority's *first* tool here is telling.

Moreover, the Wisconsin Supreme Court ignored that the Wisconsin legislature already included safeguards to protect from the very gamesmanship that the court thought necessitated ignoring the statute's plain text. Not only does a religious organization have to be "operated primarily for religious purposes" to qualify for the exemption, but it must also be "operated, supervised, controlled or principally supported by a church or convention or association of churches." Wis. Stat. 108.02(15)(h).

The Wisconsin Supreme Court should have resorted instead to constitutional avoidance. That canon counsels "resolv[ing] difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" "absent … a clear expression of Congress' intent." *Cath. Bishop*, 440 U.S. at 507. Applying that canon here would have avoided the very Free Exercise problems that the Wisconsin Supreme Court's holding created. And unlike the remedial canon, constitutional avoidance at least "push[es] a statute in a direction that better accommodates constitutional values," rather than toward the judiciary's policy preferences. Amy Coney Barrett, *Substantive Canons & Faithful Agency*, 90 B.U. L. Rev. 109, 181 (2010).

Better yet for the Wisconsin Supreme Court to have "turn[ed] first to one, cardinal canon before all others": "[w]hen the words of a statute are unambiguous … judicial inquiry is complete." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992) (cleaned up). The substantive canons are "in significant tension with textualism insofar as they instruct a court to adopt something other than the statute's most natural reading." *Nebraska*, 143 S. Ct. at 2377 (Barrett, J., concurring) (cleaned up).

That tension is on full display here. There's nothing ambiguous about the statute's language. Cf. *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 207 (2012) (Roberts, C.J., dissenting) ("[A] provision can be construed 'liberally' as opposed to 'strictly' *only* when there is some ambiguity to construe." (emphasis added)). As the Wisconsin Supreme Court recognized, the statute's "key words" have discernible meanings. Rather than give those meanings full effect, the majority instead "consider[ed] first the *consequences*." Pet.App.21a. In doing so, the majority "load[ed] the dice for … a particular result in order to serve a value that the [majority chose] to specially protect." *Nebraska*, 143 S. Ct. at 2377 (Barrett, J., concurring) (quoting Antonin Scalia, A Matter of Interpretation 27 (1997)). That was wrong and created a constitutional problem.

There's more. Again resisting the statute's plain text, the majority used legislative history to "override the law's clear meaning." Pet.App.89a (Grassl Bradley, J., dissenting). But "[l]egislative history is not the law." *Ibid.* And this "Court has recognized that inquiries into legislative motives are a hazardous matter." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 253 (2022) (citation omitted).

"The Judiciary's role is to neutrally interpret … statutes, not to put a thumb on the scale in favor of or against any particular" policy preference. *Rudisill*, 601 U.S. at 318 (Kavanaugh, J., concurring). The Wisconsin Supreme Court failed to do that here and gave the statute an atextual construction that puts it in direct conflict with the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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