NO. 24-154

IN THE
Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., ET AL.,

Petitioners,

v.

WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF WORLD FAITH FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DEBORAH J. DEWART
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554

JAMES L. HIRSEN
Counsel of Record
505 S. Villa Real, Ste. 101
Anaheim, CA 92807-3432
(714) 283-8880
james@jameshirsen.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

World Faith Foundation ("WFF") as *amicus curiae*, respectfully urges this Court to reverse the decision of the Wisconsin Supreme Court.

World Faith Foundation is a California religious non-profit, tax-exempt corporation formed on May 2, 2005 to preserve and defend the customs, beliefs, values, and practices of religious faith and speech, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF's founder is James L. Hirsen, who has served as professor of law at Trinity Law School and Biola University in Southern California and is the author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). WFF has filed numerous briefs in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY

In many varied contexts, the government must tread lightly to avoid theological judgments that infringe on religious liberty. The government may venture into forbidden theological territory to assess

---

[1] *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

an organization's eligibility for a religious exemption, as in this case. Are its religious activities sufficiently "religious" to qualify? Where an exclusion is implicated, the government may err in the opposite direction, scrutinizing whether an organization is *too* religious and therefore disqualified.

There is no dispute that Catholic Charities Bureau, Inc. ("CCB") is controlled by a church. But the key issue is whether CCB is "operated primarily for religious purposes," 26 U.S.C. 3309(b)(1)(B), and therefore qualified for exemption under the Federal Unemployment Tax Act. But in assessing CCB's eligibility, what qualifies as a religious *purpose* or a religious *activity*? Who decides these questions? According to the longstanding doctrine of church autonomy, these are theological inquiries the church—not the government—must answer. Instead, some courts have unfortunately allowed the government to become impermissibly entangled in religious questions. The Wisconsin Supreme Court is among them.

CCB's position is that the Labor & Industrial Review Commission ("LIRB") erroneously interpreted the relevant FUTA statute and violated the Religion Clauses. Three primary violations are alleged—church autonomy, excessive entanglement in religious doctrine, and discrimination against CCB for operating through independently incorporated sub-entities. *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n ("CCB")*, 3 N.W.3d 666, 686 (Wisc. 2024).

This Court has long recognized that "[t]he law knows no heresy, and is committed to the support of no dogma. . . ." *Watson v. Jones*, 80 U.S. 679, 728 (1872). Recently the Court has affirmed the corollary principle that the Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly," but "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (internal citations and quotation marks omitted). The Wisconsin Supreme Court violates this key precedent by entangling itself in a church's religious doctrine about the activities it conducts to fulfill its mission. Wisconsin subjects CCB to "discrimination for *doing* what [its] religion commands." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 513 (2020) (Gorsuch, J., concurring).

ARGUMENT

I. WISCONSIN'S INTRUSIVE INQUIRIES INVADE CHURCH AUTONOMY, A LEGAL SANCTUARY THAT PROTECTS RELIGION.

Both Religion Clauses of the First Amendment inform the long-established doctrine of church autonomy. *CCB*, 3 N.W.3d at 685. Church autonomy respects internal church decisions about leadership, governance, doctrines, and dispute resolution, guarding against government interference. *Id.*, citing *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952). But the state court goes astray when it asserts that the two

clauses "are inherently in tension with each other." *CCB*, 3 N.W.3d at 685. The Religion Clauses and the Free Speech Clause all "appear in the *same* sentence of the *same* Amendment," suggesting "complementary purposes, not warring ones." *Bremerton*, 142 S. Ct. at 2426 (emphasis added); *see Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 13, 15 (1947).

The church—not the government—has the right to define its religious mission and identify the specific activities that serve that purpose. "The 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); *CCB*, 3 N.W.3d at 722 (Bradley, J., dissenting). A church's mission and the religious character of its activities are "matters of faith and doctrine," and "any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020); *see CCB*, 3 N.W.3d at 719 (Bradley, J., dissenting).

A. The Wisconsin Supreme Court improperly exalts form over substance to determine whether CCB's activities are sufficiently religious.

It is the sole prerogative of a church to determine the form and organization of its affairs. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976) ("reorganization of the Diocese involves a matter of internal church government, an issue at the

core of ecclesiastical affairs"). CCB, a church-controlled entity, has created numerous separately incorporated sub-entities to operate programs to assist the community with the challenges of aging, disabilities, children with special needs, poverty, and disaster relief. *CCB*, 3 N.W.3d at 672.

The Wisconsin Supreme Court denies "adopt[ing] a rigid formula for deciding whether an organization is operated primarily for religious purposes." *CCB*, 3 N.W.3d at 681, citing *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 190 (2012). But that is exactly what it does, exalting form over substance and rigidly penalizing CCB for incorporating subsidiaries instead of conducting identical activities directly under the church umbrella. Although correctly observing that "it is the motivation and activities of the non-profit that determine its tax-exempt status, not its corporate structure" (*CCB*, 3 N.W.3d at 689), the court relies on that very structure to deny exemption.

B. Church autonomy protects a church's internal decisions about the nature of its mission and motives.

CCB is controlled by a *church*. That key fact weighs in its favor and suggests the statute is constitutionally questionable—at least as applied here. The statute requires that a service must be "operated primarily for religious purposes" to qualify for exemption. As the Wisconsin Supreme Court admits, CCB's "statement of philosophy indicates that it has 'since 1917 been providing services to the poor and disadvantaged as an expression of the social

ministry of the Catholic Church in the Diocese of Superior' and that its '*purpose* . . . is to be *an effective sign of the charity of Christ*.'" *CCB*, 3 N.W.3d at 672 (emphasis added). It is difficult to fathom a more *religious* statement of purpose. As the Diocese asserts, "their charitable works are carried out to operationalize Catholic principles." *Id*. at 671. Indeed, the Christian movement from its inception has sought to hear and respond to the cry of the poor. The Catholic Church's love for the poor is inspired by Scripture, the poverty of Jesus, and of His particular concern for their welfare. In His inaugural sermon, Jesus cites Isaiah 61:1-2, "The spirit of the Lord is upon me, because he has anointed me to bring good news to the poor."

The court complains that "[s]ole reliance on self-professed motivation would essentially render an organization's mere assertion of a religious motive dispositive." *CCB*, 3 N.W.3d at 679. But that is exactly what church autonomy demands. The church's definition of its mission—its "mere assertion"—*is* dispositive. "Courts are not arbiters of scriptural interpretation" and may not determine who "more correctly perceive[s] the commands" of a particular faith tradition. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981).

Wisconsin draws a sharp line between "the purpose of the church in operating the organization" and "the purpose of the nonprofit organization"—the church-created sub-entity—and then examines which one "drive[s] the analysis" of religious purpose within the meaning of the statute. *CCB*, 3 N.W.3d at 675. Following the court of appeals' approach, the

Wisconsin Supreme Court reasons that "focusing on the stated motivations and the organization's activities allows the reviewing body to conduct an objective, neutral review that is 'highly fact-sensitive' without examining religious doctrine or tenets." *Id.* at 674; *see Catholic Charities Bureau, Inc. v. State Labor & Indus. Review Comm'n*, 987 N.W.2d 778, 798 (Wisc. Ct. App. 2023).

Wisconsin's hair-splitting approach defies church autonomy, which mandates that courts "accept a *religious* entity's good faith representations that *religious* beliefs motivate an operation and the operation furthers a *religious* mission." *CCB*, 3 N.W.3d at 700 (Bradley, J., dissenting) (emphasis added). The *church* operates CCB and its sub-entities. It is error to bypass the *church*'s stated motivation and instead subjectively second-guess the motivations of the sub-entities. This is like "ask[ing] a car why it is being operated rather than asking the driver." *Ibid.* The Wisconsin Supreme Court concludes that "any religiously affiliated organization would always be exempt" if the court looked only to the church's purpose. *CCB*, 3 N.W.3d at 676. This simplistic objection ignores the possibility that a church might purposefully engage in an activity that generates "unrelated business taxable income," subject to IRS filing requirements (Form 990-T) and taxation. It also ignores the common Catholic practice of engaging in services broadly offered beyond its own religious community. *See, e.g., Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (Catholic Social Services, a foster care agency in Philadelphia, qualified for religious exemption from the city's nondiscrimination requirements).

C. Church autonomy protects a church's characterization of its own activities as religious.

"Determining that certain activities are in furtherance of an organization's religious mission . . . is . . . a means by which a religious community defines itself." *United States v. Lee*, 455 U.S. 252, 257 (1982); *see Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment). Wisconsin is suspicious of the church's characterization of the activities it conducts to accomplish its self-defined religious mission, noting a form where CCB "self-reported the nature of its operations as charitable, educational, and rehabilitative, not religious." *CCB*, 3 N.W.3d at 673 (internal quotation marks omitted). The state discounts the potential overlap among these terms—an activity may be both charitable *and* religious, or both educational *and* religious.

Religious discrimination. The Wisconsin Supreme Court majority admits—as it should—that "inherently religious" activities "may be different for different faiths." *CCB*, 3 N.W.3d at 681. This "oblique" admission "ultimately . . . demolishes" the majority's own test. *Id.* at 707 (Bradley, J., dissenting). But the court offers no explanation as to why CCB's religiously motivated activities should not qualify. Instead, its "primarily-religious-in-nature-activities test" leaves courts and officials "second-guessing the religious significance and character of a nonprofit's actions." *Id.* at 723 (Bradley, J., dissenting).

In an Illinois case litigating a comparable exemption, the Department of Employment Security ("IDES") erroneously recharacterized an organization's pervasively religious afterschool care program. An administrative law judge found its activities "more in the nature of being secular and charitable than they are religious." *By the Hand Club for Kids, NFP, Inc. v. Dep't of Empl. Sec.*, 188 N.E.3d 1196, 1201 (Ill. Ct. App. 2020). But "because By The Hand characterized its provision of meals, homework help, and literacy improvement as religious exercises, IDES erred by recharacterizing them as secular activities for purposes of the exemption from the unemployment compensation system." *Id.* at 1214. State officials cannot discriminate among religions by regarding one faith's religious practices as "religious in nature" and another's as "secular in nature." *CCB*, 3 N.W.3d at 718 (Bradley, J., dissenting).

CCB's case has bounced like a ping pong ball from one court to another—three proceedings in Wisconsin, each court reversing the prior decision. These courts thread the theological needle by separating terms like "religious purpose," "religious motivation," and "religious reasons," ignoring the correspondence of these virtually synonymous terms. Through this mind-bending word play, "[t]he majority opinion strikes at the heart of religious autonomy." *CCB*, 3 N.W.3d at 72 (Bradley, J., dissenting). The First Amendment does not allow a civil court "to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion." *Presbyterian Church in United States v. Mary*

Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969).

II. THE WISCONSIN SUPREME COURT RULING COMPELS EXCESSIVE ENTANGLEMENT WITH RELIGION.

A failure to honor church autonomy inevitably leads to excessive entanglement with religion. "The majority's interpretation of Wis. Stat. § 108.02(15)(h)2. not only *encourages* excessive entanglement with religion, it *compels* such entanglement." *CCB*, 3 N.W.3d at 722 (Bradley, J., dissenting) (emphasis added). That is because the court's "religious in nature" requirement "forces courts to answer debatable theological questions courts have no authority to answer" about whether an activity is sufficiently religious to qualify. *Ibid*. The First Amendment forbids this exercise. "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task" that must not be based on "judicial perception of the particular belief or practice in question . . . ." *Thomas*, 450 U.S. at 714.

Although the Wisconsin Supreme Court majority "does not deny its inquiry entangles church and state," it justifies its intrusive inquiries as "inherent in any statutory scheme that offers tax exemption to religious entities." *CCB*, 3 N.W.3d at 724 (Bradley, J., dissenting). But that is "preposterous" in view of the statute's straightforward requirement that the organization's motivations be religious. *Ibid*. This simple inquiry is not a springboard to delve further

into religious doctrine. The Constitution precludes such invasion of theological territory.

Entanglement is a long thread that runs through a variety of contexts. It emerges not only in cases of religious exemption, but also where religion is employed to justify an exclusion. The courts in this case have become hopelessly entangled in evaluating CCB's religious mission, motivation, and activities. In the process, the Wisconsin Supreme Court penalizes CCB's decision to hire and provide services regardless of religious affiliation.

A. The danger of entanglement exists in numerous other contexts.

Entanglement stretches across an abundance of judicial contexts—public prayer, employment, conscientious objections, tax exemptions, public benefits, education—to name only a few.[2]

Free Exercise claims begin with the requirement for a "sincerely held" belief. "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove." *United States v. Ballard*, 322 U.S. 78, 86 (1944). Courts must be cautious in litigating what constitutes a "substantial burden" on that belief. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) ("substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Thomas*, 450 U.S. at 718 (1981) (same); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("cho[ice]

---

[2] *See* Carl Esbeck, *An Extended Essay on Church Autonomy*, 22 Federalist Soc'y Rev. 244, 254-258 (2021), Part II-B (discussion of religious questions doctrine).

between following the precepts of her religion and forfeiting benefits, . . . [or] abandoning one of the precepts of her religion").

Employment is a fertile field for entanglement. Recent landmark cases implicate the judicially recognized "ministerial exception" protecting religious employers from employment discrimination claims. *See Hosanna-Tabor*, 565 U.S. at 188-189 (state lacks "power to determine which individuals will minister to the faithful"); *Our Lady of Guadalupe*, 591 U.S. at 746 ("a component of this autonomy [internal management decisions] is the selection of the individuals who play certain key roles"). *Our Lady* also notes that it would "would risk judicial entanglement in religious issues" for a court to decide who is a co-religionist. *Id.* at 761.

Court battles over legislative invocations, culminating in *Town of Greece v. Galloway*, 572 U.S. 565 (2014), spawned entanglement concerns throughout the lower courts. "The process of policing the prayers offered . . . to exclude proselytization or disparagement will inevitably call for official and continuing surveillance leading to an impermissible degree of entanglement." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1238-1239 (10th Cir. 1998) (cleaned up).

Where questions arise concerning conscientious objectors, courts must guard against judicial entanglement with religious doctrine. In *Gillette v. United States*, this Court upheld exempting conscientious objectors to "all war" but found too much church-state entanglement would result from

allowing "judicial expansion of the exemption to cover objectors to particular wars." 401 U.S. 437, 450 (1971). Contemporary cases implicate individuals or entities who hold religious objections to participation in practices believed to be sinful. See, e.g., *Burwell v. Hobby Lobby*, 573 U.S. 682, 691, 725 (2014) (contraception mandate); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 693 (2022) ("As in *Hobby Lobby*, it is not for us to say that their religious beliefs are mistaken or insubstantial.")

B. Religious *exemptions* and religious *exclusions* both generate the potential for impermissible judicial entanglement.

Preventing unconstitutional entanglement has been described as "a compelling state interest." *Hartmann v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995); *see Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("the interest of the University in complying with its constitutional obligations may be characterized as compelling"). As the Tenth Circuit concluded, statutes that involve certain "Establishment Clause issues, such as excessive entanglement, are unconstitutional without further inquiry." *Colorado Christian University v. Weaver ("CCU")*, 534 F.3d 1245, 1266 (10th Cir. 2008).

Entanglement may arise in the context of religious exemptions, as in this case, examining whether an organization is sufficiently religious to qualify. On the flip side, in cases of exclusion, courts scrutinize whether an organization is disqualified for a benefit because it is "too" religious. Courts may err

in either context. "Properly understood," the non-entanglement doctrine "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits," like the exemption CCB seeks, "or as a basis for regulation or exclusion from benefits . . . ." *CCU*, 534 F.3d at 1261. Whether an exemption or exclusion is at stake, "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Amos*, 483 U.S. at 336.

Here, the Wisconsin Supreme Court engages in "a profound overreach" of judicial power when it "radically transforms" a broad statutory exemption into a narrow, discriminatory exemption that prefers some religious traditions while excluding others. *CCB*, 3 N.W.3d at 724 (Bradley, J., dissenting). The court had to entangle itself in religious doctrine to accomplish this transformation.

1. Exemptions entangle the government in determining whether an organization is sufficiently religious to qualify.

The Petition cites cases in Arkansas, Colorado, and Maryland where courts have allowed agencies wide discretion, thus facilitating the sort of impermissible entanglement that threatens church autonomy. Pet. 21-23. Arkansas explained that if "religion *pervades* the operation of the institution," then it is "operated primarily for a religious purpose." *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804

S.W.2d 696, 699 (Ark. 1991) (emphasis added). But the court denied exemption to a Catholic hospital after considering budget percentages, hiring requirements, and lack of proselytizing. Colorado evaluated the activities of an Institute that provided administrative support for pastoral counseling centers, ignoring the underlying religious motivation and stressing that no religious affiliation was required for those who received counseling. *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 7 (Colo. 1994). One Maryland case could be the "poster child" for entanglement, creating a lengthy laundry list of factors to determine whether a church-affiliated school was "operated primarily for religious purposes." *Employment Sec. Admin. v. Baltimore Lutheran High Sch. Ass'n*, 436 A.2d 481, 487 (Md. 1981). The court required evidence of "the substantive content of both theological and nontheological courses" and considered whether courses were "taught in an atmosphere of intellectual freedom . . . without religious pressures." *Id.* at 489 (internal citations and quotation marks omitted). This is forbidden territory for a civil court.

2. Exclusions entangle the government in determining whether an organization is "too" religious to qualify.

Religious organizations are sometimes excluded from certain benefits to avoid entanglement and comply with the Establishment Clause. Ironically, however, the process of enforcing the exclusion may generate the very entanglement it was intended to prevent. Much of this entanglement could be avoided

with the simple recognition that the government may not discriminate against religion in the distributions of exemptions and other benefits.

Entanglement is one of the three prongs set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (the statute must not foster "an excessive government entanglement with religion," quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970)). The *Lemon* court expressed concerns about the "comprehensive, discriminating, and continuing state surveillance . . .inevitably . . . required" to ensure compliance with restrictions, noting that such surveillance would "involve excessive and enduring entanglement between state and church." *Id.* at 619. This Court has finally buried the "late-night horror movie" *Lemon* "ghoul" that "stalk[ed] our Establishment Clause jurisprudence" for decades. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment); *see Bremerton*, 142 S.Ct. at 2428. Nevertheless, "the modern understanding of the Establishment Clause is a brooding omnipresence . . . ever ready to be used to justify the government's infringement on religious freedom." *Espinoza*, 591 U.S. at 389 (Thomas, J., concurring) (internal citations and quotation marks omitted).

Lemon led to a half-century of litigation, much of it exemplifying the dangers of entanglement. Minnesota state officials once had to examine textbooks and disqualify tax deductions taken for "instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines

or worship. Minn. Stat. § 290.09, subd. 22 (1982)." *Mueller v. Allen*, 463 U.S. 388, 403 (1983). Similarly, this Court concluded that "trolling through a person's or institution's religious beliefs" to determine whether a school is "pervasively sectarian" is "not only unnecessary but also offensive." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). These are only two examples among many.

Irony. Abundant examples demonstrate the irony of entanglement in religious exclusion cases. In *New York v. Cathedral Acad.,* this Court struck down a state statute that conditioned reimbursement for the cost of state-mandated examinations and teaching activities on a determination that the materials were devoid of religious content, explaining that "this sort of detailed inquiry . . . would itself constitute a significant encroachment" on the First Amendment. 434 U.S. at 132. A public university that offered facilities for student groups to meet "risk[ed] greater entanglement" by enforcing the exclusion of groups engaged in religious practices, because enforcement required the "continuing need to monitor group meetings to ensure compliance with the rule." *Widmar*, 454 U.S. at 272 n. 11. The Colorado provisions in *CCU*, requiring officials to determine whether a required course "tend[ed] to indoctrinate or proselytize," were "fraught with entanglement problems." *CCU*, 534 F.3d at 1261. Properly applied, the entanglement doctrine is a shield that "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices," whether to qualify for benefits or as a basis for exclusion. *Ibid.*

Another circuit case involved a child day-care program for military families that "prohibit[ed] Providers from having any religious practices, such as saying grace or reading Bible stories, during their day-care program," regardless of the wishes of the families themselves. *Hartmann*, 68 F.3d at 975. Such burdensome regulation does not "require (*or even allow*) a *ban* on religious activity to prevent entanglement." *Id*. at 981 (first emphasis added). The Sixth Circuit concluded that this "extensive array of regulations," "ironically . . . put the Army at great risk of unconstitutionally entangling itself with religion," requiring a determination as to "exactly how much religion is too much, what is substantive . . . and what is educational." *Id*. at 981.

In *NLRB v. Catholic Bishop of Chicago*, this Court found that the National Labor Relations Board lacked jurisdiction over lay teachers employed by church-operated schools. There was no "workable guide" to distinguish between "completely religious" and "merely religiously associated." 440 U.S. 490, 495 (1979). This Court was concerned not only that the Board's conclusions might infringe religious rights, "but also *the very process of inquiry* leading to [its] findings and conclusions." *Id*. at 502 (emphasis added).

The Maine tuition reimbursement program litigated in *Carson* is a quintessential example of impermissible entanglement—government officials rummaging through the curriculum of private religious schools. The State Department of Education examined curriculum and would disqualify a religious school if it "promote[d] the faith or belief system with

which it [wa]s associated and/or present[ed] the material taught through the lens of this faith." *Carson v. Makin*, 979 F.3d 21, 38 (1st Cir. 2020). "*The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented*." *Id*. (emphasis in original). The state's procedure to identify and disqualify "sectarian" schools created the very entanglement the Establishment Clause was designed to prevent and simultaneously infringed Free Exercise rights.

Nondiscrimination. Several recent landmark decisions of this Court confirm that even though the state is not obligated to provide tax exemptions, "[w]hat benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct." *Espinoza*, 591 U.S. at 512 (Gorsuch, J., concurring). This Court has made it unmistakably clear that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017), quoting *Sherbert*, 374 U.S. at 404. In *Trinity Lutheran*, a church could not be excluded from a state's grant program to repair playground surfaces, based solely on its religious character. Several years later, this Court reinforced the principle in *Carson v. Makin*. "A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." 596 U.S. 767, 781 (2022).

As these and other cases consistently emphasize, "withholding an otherwise available benefit based on religious status creates constitutionally intolerable indirect coercion over, and a penalty on, religious exercise." *CCB*, 3 N.W.3d at 714 (Bradley, J., dissenting) (discussing *Trinity*, *Espinoza*, and *Carson*). CCB's case is the flip side of the entanglement coin. A charitable activity operated and controlled by a church, for the express purpose of accomplishing its religious mission, cannot constitutionally be excluded from an otherwise available benefit because the government recharacterizes it as "secular." This is comparable to the error in *CCU*, where "the exclusion expressly discriminate[d] *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions . . . on the basis of criteria that entail[ed] intrusive governmental judgments regarding matters of religious belief and practice." *CCU*, 534 F.3d at 1256.

C. The Wisconsin Supreme Court became improperly entangled in evaluating CCB's religious mission, motivation, and activities.

The Wisconsin Supreme Court fails to respect the church's own characterization of its activities, based on its religious doctrine. This failure to follow the church autonomy doctrine leads inevitably to forbidden judicial entanglement—"the majority astonishingly declares Catholic Charities are not 'operated primarily for *religious purposes*' because their activities are not '*religious in nature*.'" *CCB*, 3 N.W.3d at 693 (Bradley, J., dissenting) (emphasis added). This approach exceeds the statutory

language, which merely requires an entity to be "operated primarily for a *religious reason*." *Ibid.* (emphasis added). The court divorces motivation from activities, asserting that it "must examine *both* the *motivations* and the *activities* of the organization." *Id.* at 676 (emphasis added). Although activities may be relevant as "evidence of motive," e.g., "in cases interpreting and applying 26 U.S.C. § 501(c)(3)" (*id.* at 703 (Bradley, J., dissenting)) religious motivations and religious activities are generally inseparable. "It is the underlying religious motivation that makes an activity religious." *See Thomas*, 450 U.S. at 715-716; *id.* at 705 (Bradley, J., dissenting). The statute does not demand an intrusive examination of "activities" to determine whether they are sufficiently, inherently, or "stereotypically" religious, and "more importantly the constitution bars such an inquiry." *Ibid.*

Wisconsin seemingly recognizes only two categories—"secular" or "inherently religious," ignoring even the possibility of overlap. LIRC overlooked CCB's motivations and examined its "actual activities," which it described as "secular." *Id.* at 672. "LIRC determined the provision of help to the poor and disabled is essentially secular," characterized CCB's activities as not "religious per se," and consequently denied the exemption. *Id.* at 695 (Bradley, J., dissenting) (internal quotation marks omitted). The appellate court agreed that CCB's activities were not "inherently religious" or "*primarily* religious in nature" and thus not qualified for exemption. *CCB v. LIRC*, 987 N.W.2d at 799. The state supreme court, similarly, considered "whether a nonprofit engages in worship services, religious ceremonies, serves only co-religionists, or imbues

program participants with the nonprofit's faith." *CCB*, 3 N.W.3d at 717 (Bradley, J., dissenting). While these activities are indisputably religious, they do not occupy the entire field of what churches may define as "religious" obligations within their mission.

There is no strict dichotomy between "charitable" and "religious." "The fact that an organization has a charitable purpose and does charitable work does not require the conclusion that its purposes are not primarily religious. . . ." *Schwartz v. Unemployment Ins. Comm'n*, 895 A.2d 965, 970 (Me. 2006) (Christian ministry retained its religious roots while expanding to serve the community in other ways). "[A]cts of charity as an essential part of religious worship is a central tenet of all major religions." *CCB*, 3 N.W.3d at 707 (Bradley, J., dissenting), quoting *W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F. Supp. 538, 544 (D.D.C. 1994). The majority contends that "services provided by a religiously run orphanage and a secular one do not differ in any meaningful sense." *CCB*, 3 N.W.3d at 684. But contrary to that assertion, "the overlap between secular and religious conduct does not make the religious conduct any less religious." *Id.* at 706 (Bradley, J., dissenting).

One major flaw is the Wisconsin Supreme Court's heavy reliance on *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981). *CCB*, 3 N.W.3d at 681. *Dykema* involved an inquiry into a church's "actual activities" to determine whether it was engaged in an unrelated commercial business. This type of church examination requires compliance with certain procedural protections for the church. *See* 26 U.S.C. § 7602, et seq. Although the case lists "typical activities

of an organization operated for religious purposes" (*Dykema*, 666 F.2d at 1100), the list is clearly illustrative and not exhaustive—as the Wisconsin Supreme Court admits. *CCB*, 3 N.W.3d at 81. The Seventh Circuit notes that there are "more than 20 other types of exempt organizations, besides those for religious purposes, are listed in 26 U.S.C. § 501(c)." *Dykema*, 666 F.2d at 1101. *Dykema* implicates an entirely different statutory scheme that recognizes tax exemption for a broad range of activities.

Contrary to the restrictive *Dykema* list relied on by the court majority, "[c]ourts interpreting and applying 26 U.S.C. § 501(c)(3) have acknowledged that religious purposes might be unorthodox or resemble secular purposes." *CCB*, 3 N.W.3d at 704 (Bradley, J., dissenting), *see, e.g.*, *Dep't of Emp. v. Champion Bake-N-Serve, Inc.*, 592 P.2d 1370, 1371 (Idaho 1979) (bakery operated for religious purposes, explaining that "tenets of the Seventh Day Adventists religion stress the value of labor, and work experience is . . . an integral part of the students' religious training"); *Amos*, 483 U.S. at 44 (Brennan, J., concurring in the judgment) ("nonprofits historically have been organized specifically to provide certain community services," and churches may provide such services "as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster").

D. The Wisconsin Supreme Court penalizes CCB's decision to hire and serve regardless of religious affiliation.

CCB's "open[ness] to all participants regardless of religion" leads the Wisconsin Supreme Court to conclude that its "activities are primarily charitable and secular." *CCB*, 3 N.W.3d at 687. As CCB contends in opposition, the government's interpretation "flies in the face of Catholic beliefs about care for the poor" and "favors religious groups that require those they serve to adhere to the faith of that group or be subject to proselytization." *CCB*, 3 N.W.3d at 691. Other courts have rejected such "rigid criteria in defining religious pursuits." *Kendall v. Director of Div. of Emp. Sec.*, 473 N.E.2d 196, 199 (Mass. 1985) (exemption allowed to school for disabled children operated by nuns, although school was not devoted solely to religious instruction and was open to all regardless of religious affiliation).

Ironically, the Wisconsin Supreme Court considers religious outreach and evangelism "religious in nature" (*CCB*, 3 N.W.3d at 682), yet holds that CCB's offering service to those outside their faith makes the activity less "religious in nature." *Id.* at 705-706 (Bradley, J., dissenting). CCB and its sub-entities do not require either employees or program participants to be affiliated with their Catholic faith and they do not attempt indoctrination. *CCB*, 3 N.W.3d at 673. The court of appeal found CCB's activities were not "inherently religious" based on what they do *not* do with social service participants or require of employees—teaching, evangelizing, religious rituals, worship services. *Id.* at 695

(Bradley, J., dissenting), citing *CCB v. LIRC*, 987 N.W.2d at 799.

The majority denies conducting an "examination of whether CCB's or the sub-entities' activities are consistent or inconsistent with Catholic doctrine." *CCB*, 3 N.W.3d at 687. But as dissenting Judge Bradley explains, the majority "excessively entangles the government in spiritual affairs" and errs as to Catholic beliefs about the "religious duty to provide charitable services" – "For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being." Pope Benedict XVI, *Deus Caritas Est*, ¶25 (2005). *CCB*, 3 N.W.3d at 693 (Bradley, J., dissenting). The court majority inverts the church's interpretation of its own doctrine, allowing exemption "only if accompanied by proselytizing—a combination *forbidden* by . . . many religions." *Id*. at 693-694 (Bradley, J., dissenting) (emphasis added).

The court's entanglement is pervasive, "overtly discriminat[ing] against Catholic Charities because they follow Catholic doctrine" and conduct activities that "resemble secular social services too much." *CCB*, 3 N.W.3d at 717 (Bradley, J., dissenting). CCB not only serves but also employs those of other religions. But "[c]ourts are not allowed to determine who is and is not a co-religionist." *Id*. at 723 (Bradley, J., dissenting); *see CCU,* 534 F.3d at 1264-65 (this question "requires [the state] to wade into issues of religious contention"). Additional entanglement occurs where a court purports to decide "what constitutes religious education and evangelism"—

inherently "religious questions whose answers will vary from faith to faith." *CCB*, 3 N.W.3d at 723-724 (Bradley, J., dissenting). What about "conducting charity as an illustration of the love of one's deity" or "engaging in a commercial enterprise to illustrate one's faith applied to daily life"? *Ibid*. This is forbidden theological territory for civil courts.

CONCLUSION

This Court should reverse the ruling of the Wisconsin Supreme Court. Wisconsin has egregiously violated the doctrine of church autonomy by improperly entangling itself in religious questions about the nature of Catholic Charities Bureau's activities.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Dr.
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539

Counsel for Amici Curiae
World Faith Foundation